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Harmonization of International Bankruptcy Law and Practice: Is It Necessary - Is It Possible

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I. Everyone Is for Harmonization—Whatever It Is

"Harmonization of international insolvency and bankruptcy law and practice"—the words alone conjure up images of international cooperation that have an immediate appeal in the post-Cold War period.[1] In fact, there long has been a consensus among commentators that increased cooperation in international

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1. This article employs the phrase "international insolvency and bankruptcy law and practice" to refer to both out-of-court workouts and judicial proceedings in which more than one state's municipal laws affect the debtor and its assets. This phrase emphasizes the dynamic interaction of national legal systems that Judge Jessup defined as "transnational" law in which "[b]oth public and private international law are included, as are other rules which do not wholly fit into standard categories." PHILIP C. JESSUP, STORRS LECTURES, TRANSNATIONAL LAW 2 (1956), *quoted in* HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS II (1968). Commentators in this area also refer to "international insolvency" problems, "multinational bankruptcies," "cross-border insolvencies," or "transnational bankrupties." *See, e.g.*, Richard A. Gitlin & Ronald J. Silverman, *International Insolvency and the Maxwell Communication Corporation Case: One Example of Progress in the 1990's, in* INTERNATIONAL INSOLVENCIES: DEVELOPING PRACTICAL STRATEGIES (PLI No. 628, 1992); Alan L. Gropper, *The Bankruptcy Code's Approach To Multinational Bankruptcies: Basic Legal Framework, in* INTERNATIONAL INSOLVENCIES: DEVELOPING PRACTICAL STRATEGIES (PLI No. 628, 1992); Selinda A. Melnick, *Cross-Border Insolvencies: The United States Perspective—A Primer, in* INTERNATIONAL INSOLVENCIES: DEVELOPING PRACTICAL STRATEGIES (PLI No. 628, 1992); Harvey R. Miller & Larren M. Nashelsky, *Transnational Bankruptcy and Reorganization Cases: Historical Antecedents and Looming Problems, in* INTERNATIONAL INSOLVENCY: RESTRUCTURING AND WORKOUTS IN MULTINATIONAL CORPORATE FAILURES (Miller & Prior eds., 1993).

insolvency and bankruptcy matters is essential to promoting international commerce and trade.[2]

In contrast, there is no consensus about what is meant by "harmonization." Should, for example, the goal of harmonization be the creation of a supranational bankruptcy system that accords jurisdiction in international bankruptcy cases to a supranational bankruptcy court, which then displaces the bankruptcy courts of the states affected?[3] Likewise, should municipal bankruptcy laws be displaced by a supranational bankruptcy law applicable in such cases? Is there any interest in this approach among the consumers of any such system—that is, would this system be considered advantageous by the international business community? Would states have any reason to concede their economic, legal, and political jurisdiction in this area to a supranational court?

Should the goal of harmonization be less exalted? Should instead harmonization seek to allocate jurisdiction in such cases among the bankruptcy courts of the states affected and to rationalize the selection of the applicable law in such cases? Should developments in this area continue on a case-by-case basis, the so-called ad hoc approach through which an "international common law of bankruptcy" is evolving? Or should governments undertake to negotiate bilateral or multilateral bankruptcy treaties that allocate jurisdiction among states, identify applicable procedural and substantive laws, and accommodate the public policies of each state's municipal bankruptcy laws? In practical terms, can this level of harmonization satisfy the practical needs of the participants in such cases for predictability

2. *See, e.g.*, Gitlin & Silverman, *supra* note 1; Stefan A. Riesenfeld, *Transnational Bankruptcies in the Late Eighties: A Tale of Evolution and Atavism, in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 409 (David S. Clark ed., 1990); Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307 (1987); John Honsberger, *The Negotiation of a Bankruptcy Treaty, reprinted in* 1985 MEREDITH MEMORIAL LECTURES 288 (1986); J.H. DALHUISEN, DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY § 2.04[5], at 3-260 (1986); Kurt H. Nadelmann, *Creditor Equality in Inter-State Bankruptcies: A Requisite of Uniformity in the Regulation of Bankruptcy*, 98 U. PA. L. REV. 41 (1949-50) [hereinafter cited as Nadelmann, *Creditor Equality*]; and Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 58, 68-70 (1944) [hereinafter Nadelmann, *Treaties*].

3. This article adopts the term "states" to refer to sovereign political entities, including the United States of America. *See* Gitlin & Flaschen, *International Void*, 42 BUS. LAW. at 307 n.3. The term "international" in this article should be understood to refer to all states and not only to European and other states generally considered to be Western countries. Despite the conviction that efforts in this area should include other major and emerging trading countries and areas, the literature in this area largely, if not entirely, still focuses on cooperation among European states, states comprising the British Commonwealth, the United States, and South American states. Whether this paucity of information concerning other states reflects a lack of concern for bankruptcy cooperation in such states and their legal traditions, an absence of significant international insolvency problems involving these states, or merely a culturally insular perspective, is beyond the scope of this article. Nonetheless, the author believes that further inquiry into these issues would be productive given the scope of trade between European states and states in the Western Hemisphere, on the one hand, and states in Asia, and the prospective trade with states in Oceania, the Middle East, the Indian subcontinent, and the states that are emerging from the remnants of the Soviet Union or the other.

of results, efficient administration and equitable distribution of estate assets, and finality of results? In essence, can this harmonization increase the likelihood that bankruptcy judgments will be recognized and enforced by foreign states?

In conjunction with either of these approaches, should the international legal community draft model bankruptcy codes for enactment by states in the process of abandoning command economies and embracing market economies, and thereby introduce uniformity in municipal bankruptcy laws? If so, who should participate in these efforts and what organizations should sponsor them? Would such uniformity necessarily harmonize international bankruptcy law and practice at least for the states enacting these model bankruptcy codes?

Despite a lack of consensus concerning the most effective means to promote harmonization, the history of international commercial insolvencies indicates that creditors long have recognized that failure to cooperate in resolving an immediate financial crisis will adversely affect any recovery on their claims.[4] In response to international economic crises caused by the inability of debtors in one state to satisfy obligations owed to creditors in another state, European states over the last several hundred years have attempted to assist their citizens by promoting cooperation in insolvency and bankruptcy matters. Since at least 1204 European states have attempted to ameliorate international insolvency problems by entering into bankruptcy treaties that address problems such as jurisdiction over debtors, the efficient administration of bankruptcy estates, and the transfer of assets to one state for distribution to creditors.[5] Although bankruptcy treaty solutions to international bankruptcy and insolvency problems have been attempted on many occasions, only a limited number of treaties are now in force.[6]

In addition, when the economic failure of a debtor in one state portends disaster on an international scale, states have recognized that failure to cooperate with one another also will have serious adverse effects on their major financial institutions and risk significant disruption to international commercial and political relations.[7] Today, the failure of the United States and its major trading partners to create a system that promotes resolution of international bankruptcy and insolvency problems efficiently, equitably, and predictably could have significant economic

4. As discussed in more detail in the following sections of this article, the intervention of Pope Boniface in the resolving the collapse of the Ammanati bank in 1302 represents an early attempt by creditors in several states to cooperate and thereby maximize recovery on their claims. *See* Nadelmann, *Treaties, supra* note 2, at 58-59.

5. *See, e.g., id.* at 61 nn.14-15 (references to the treaty between Verona and Trent in 1204 dealing with the transfer of assets, and a treaty between Verona and Venice in 1306); *see also* Honsberger, *supra* note 2, at 288.

6. The most prominent treaties currently in force are the Scandinavian Convention between Denmark, Finland, Iceland, Norway, and Sweden, and the Bustamonte Code, which has been ratified by 15 Latin American states. *See* Nadelmann, *Treaties, supra* note 2, at 68 n.76, 70 n.93. The European Economic Community (the EEC) failed to draft a Bankruptcy Convention despite attempts throughout the 1970s and 1980s. Recently it has revived these efforts and a second draft convention is being worked on currently.

7. Nadelmann, *Creditor Equality, supra* note 2, at 42.

consequences.[8] The observation of one leading commentator made almost fifty years ago remains a clarion call: "The problems yet unsolved in international bankruptcy cases are considered a continual threat to and a source of disturbance in the development of international commercial relations."[9]

Today, as proponents of cooperation in international bankruptcy law and practice consider the situation, the observations of one scholar involved in efforts to harmonize international law merit consideration:

> Our times are characterized by a multiplicity of initiatives directed towards the unification or at least the harmonization of national laws. . . . Sometimes the individual conventions and uniform laws aim at a universal application, while others apply only to defined groups of states or regions. In some instances they seek to replace the corresponding domestic law completely, while in others their aim is simply to regulate international relations, the parallel domestic law continuing to regulate purely internal relations. . . . Finally, there may be model rules which have no binding force, the introduction of which into the various national systems is left entirely to the discretion of states.[10]

But first, before determining whether to pursue an ad hoc approach to harmonization (that is, a case-by-case approach), to negotiate bankruptcy treaties, or to draft model bankruptcy codes, it is necessary to examine the fundamental substantive legal issues and practical barriers to harmonization. Therefore, the remainder of this article discusses the issues that should be considered, the barriers that must be surmounted, and the approaches that might be followed, in harmonizing international bankruptcy law and practice.

Nonetheless, in the end, harmonization, like beauty, may be in the eye of the beholder.

II. The Goals: Predictability, Efficiency, Equity, and Finality

Given the consensus that international insolvency and bankruptcy cooperation is a laudable and necessary goal, it remains necessary to determine what is meant by harmonization and what is the most effective means of achieving it. Answering these questions requires recognition that municipal laws governing debtor and

8. The failure to create an effective mechanism to resolve trade and other commercial disputes can have significant political consequences, too. For example, one of the criticisms that might be made of the North American Free Trade Agreement (NAFTA) with Canada and Mexico is that its dispute settlement provisions pertain only to disputes regarding interpretation and application of the NAFTA and to certain disputes involving NAFTA investors. *See* Description of the Proposed North American Free Trade Agreement prepared by the Governments of Canada, The United Mexican States, and the United States of America, Aug. 12, 1992, at 31, 39-40 (pamphlet available from the office of the United States Trade Representative, Washington, D.C.). Because the NAFTA does not address commercial disputes not based upon specific provisions of the Agreement itself, it fails to provide the results that this article asserts are essential to promoting transnational commercial activity—namely, predictable results in the recognition and enforceability of bankruptcy judgments, efficient administration and equitable distribution of bankruptcy estates, and finality in results.

9. Nadelmann, *Treaties, supra* note 2, at 60-61.

10. Michael J. Bonell, *International Uniform Law in Practice—or Where the Real Trouble Begins*, 38 AM. J. COMP. L. 865.

creditor relationships, in particular bankruptcy laws, embody fundamental social and economic policies. As discussed in more detail in the remainder of this article, any effort to harmonize international bankruptcy law and practice is doomed if the advocates of such harmonization fail to understand the fundamental social and economic policies fulfilled by the municipal bankruptcy laws of the various states that will be affected.

Municipal bankruptcy law is based upon a simple truth—some businesses and commercial transactions will fail, and consequently, some obligations will not be satisfied in full. The response to this truth—that is whether the municipal law emphasizes creditors' rights or encourages rehabilitation of businesses and accords a debtor a fresh start, or seeks a balance between these policies—depends upon the social values and economic policies of that society. For example, because economic risk-taking is believed to benefit a market economy, the bankruptcy laws of the United States represent a clear policy to avoid liquidation, to retain the going-concern value of businesses, to protect employees' jobs, and to afford debtors a fresh start by granting a discharge of prebankruptcy debts.[11]

Regardless of the particular social and economic policies embodied in the municipal bankruptcy laws of the participants in an international bankruptcy case, these creditors and debtors desire the same outcomes as they would seek in a purely domestic bankruptcy case—that is, predictability of results (enforcement of bankruptcy court judgments by foreign courts), efficient administration of the estate and its equitable distribution, and finality of result. Likewise, although they may desire different substantive results in any particular instance, both creditors and debtors benefit from the equitable treatment of claims and the general benefits of the national bankruptcy laws and policies with which they are familiar.

The success of efforts to harmonize international bankruptcy law and practice, by whatever means, must be measured by the extent to which such efforts increase the likelihood that these shared goals will be realized. Realization of these goals, in turn, requires identification of the issues that must be resolved and the barriers that must be overcome in this process.

III. Fundamental Issues and Barriers to Harmonization of International Bankruptcy Law and Practice

The success of any effort to harmonize international bankruptcy law and practice will turn on the handling of issues such as the recognition and enforcement of bankruptcy adjudications, the accommodation of fundamental economic and social policies underpinning different municipal bankruptcy laws, and the consideration of economic issues that may encourage or discourage interest in harmoni-

11. *See* NLBR v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984). *See also* Gitlin & Flaschen, *supra* note 2; Nadelmann, *Rehabilitation International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. (1976) [hereinafter Nadelmann, *Herstatt*]; Nadelmann, *Creditor Equality*, *supra* note 2.

zation. Likewise, unless certain practical barriers are overcome, any effort to harmonize the law in this area will be frustrated.

A. Recognition and Enforcement of Bankruptcy Judgments

In a fundamental and very practical sense, creditors in any bankruptcy or insolvency case seek to maximize recovery on their claims at the lowest transactional cost. Similarly, debtors seek to maximize the benefits available to them under the bankruptcy laws (such as obtaining a discharge of prebankruptcy obligations and restructuring their obligations) at the lowest transactional cost to them. Although these fundamental objectives of creditors and debtors remain unchanged in an international bankruptcy case, their realization may be adversely affected if bankruptcy judgments entered by one state's courts are not recognized and enforced in jurisdictions other than the adjudicating jurisdiction. Unfortunately, as one leading commentator has observed, "in general the complexity of bankruptcy proceedings and their far-reaching consequences for debtors and creditors alike often appear to undermine any attempt at developing generally satisfactory rules concerning recognition and execution of foreign bankruptcies."[12] Nonetheless, unless a means is found to increase the likelihood that bankruptcy adjudications will be recognized and enforced, harmonization has limited, if any, significance.

Therefore, the paramount concern for any effort to harmonize international bankruptcy law and practice is whether bankruptcy adjudications by one state's courts will be recognized and enforced by foreign courts. Generally, a court's decision to recognize and to enforce a foreign bankruptcy judgment is based upon its determination that the adjudicating court had jurisdiction over the parties and subject matter that is the subject of the judgment, that it applied the proper law (including choice of law rules) to the matter before it, and that fundamental public policies of the enforcing state will not be compromised by enforcement of the judgment.[13]

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12. Dalhuisen, *supra* note 2, § 2.01[4][b], at 3-124. For a review of the problems associated with recognition and enforcement of U.S. judgments in other states, see Matthew Adler, Should the United States Negotiate a Treaty on the Recognition and Enforcement of Judgments, Draft Report of the American Bar Association, Section of International Law and Practice 4 (unpublished manuscript). This Draft Report should be published in Summer 1993. Prior to the Draft Report's publication, Matthew Adler, Esq., made it available to this author. The conclusions and opinions expressed in the Draft Report are Mr. Adler's alone. Conversation with Matthew Adler (May 5, 1993).

13. *See generally* Dalhuisen, *supra* note 2, §§ 2.01 *et seq.* For example, a U.S. court may deny recognition and enforcement of a foreign bankruptcy court judgment if it concludes that the foreign proceeding does not accord U.S. creditors certain due process protections, even though the foreign judgment was made in compliance with applicable foreign bankruptcy law. *See* 11 U.S.C. § 304(c) (1988); Interpool, Ltd. v. Certain Freights of M/V Venture Star, 102 B.R. 373 (Bankr. D.N.J. 1988), *aff'd*, 878 F.2d 111 (3d Cir. 1989). Similarly, an English court may consider the effect of a judgment on its local creditors in determining whether to recognize and enforce a bankruptcy judgment issued by an American court. *See* Felixstowe Dock & Railway Co. v. U.S. Lines, Inc., [1989] 1 Q.B. 360; *see also* Dalhuisen, *supra* note 2, § 1.01, at 3-1 to -8; Gerhard Kegel, *Fundamental Approaches*, *in* International Encyclopedia of Comparative Law, Vol. III, Private International Law

1. *The Exercise of Jurisdiction*

The first barrier to recognition and enforcement of a bankruptcy judgment is the exercise of "excess" jurisdiction on the part of the adjudicating court. Essentially, municipal bankruptcy laws permit courts either to exercise territorial jurisdiction over debtors and their assets or to assert extraterritorial (worldwide) jurisdiction over the assets of any debtor eligible for relief under its bankruptcy laws. The United States Bankruptcy Code, for example, grants U.S. bankruptcy courts worldwide jurisdiction over the debtor and all of the bankruptcy estate's property. This expansive grant of extraterritorial jurisdiction may be utilized by a foreign debtor to assert the automatic stay granted under United States bankruptcy law to protect its assets outside the territory of the United States, even though the law of the situs of the property would offer no such protection.[14]

Despite the utility of this universal jurisdiction from the perspective of a debtor involved in an international bankruptcy case, it nearly guarantees that jurisdictional disputes will arise in many international bankruptcy cases. At least one commentator believes that international insolvency and bankruptcy problems are "exacerbated by the affirmative declaration by many nations in their insolvency laws that their laws apply extraterritorially."[15] As a matter of policy, most states assert that "local bankruptcy laws should be applied universally but that foreign laws should be given only limited (if any) extraterritorial recognition, [and that] lies at the very heart of the difficulty in attaining international bankruptcy cooperation."[16] As a practical matter, the complex and contradictory orders that might ensue if the debtor is the subject of two primary bankruptcy cases in which both courts assert such universal jurisdiction are not difficult to imagine. If, for example, two courts assert worldwide jurisdiction over the debtor's assets and its estate, the debtor could be subject to contradictory substantive bankruptcy laws that subject certain property to differential treatment.

The complex issues posed by such assertions of extraterritorial jurisdiction

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ch. 3 (Kurt Lipstein ed., 1986) [hereinafter ENCYCLOPEDIA VOL. III] (issued under the auspices of the International Association of Legal Science) (emphasizing that the adjudicating court must have had jurisdiction if its judgment is to be enforced by a foreign court).

14. *See* 28 U.S.C. § 1334(d) (1988) (the district court, in a case commenced under title 11 of the United States Code, has "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate"). For an application of this extraterritorial jurisdiction, see *In re* Maruko, Inc., Case No. SD—and the capability of the automatic stay to prevent foreclosure of a Japanese debtor's property in Australia, 91-12303-LM11 (Bankr. S.D. Cal.) (pending). *Maruko* is discussed in Arnold M. Quittner, *Cross-Border Insolvencies: Concurrent Japanese and United States Procedure, in* INTERNATIONAL INSOLVENCIES: DEVELOPING PRACTICAL STRATEGIES 33 (PLI No. 628, 1992).

15. *See* also Gitlin & Silverman, *supra* note 1, at 11 (citing 11 U.S.C. § 541 (1988) (the debtor's estate includes property "wherever located and by whomever held") and English Insolvency Act 1986, § 436 (the debtor's estate includes property "wherever situated")); DALHUISEN, *supra* note 2, § 2.03[1], at 3-172.3.

16. Gitlin & Flaschen, *supra* note 2, at 309 (citing DALHUISEN, *supra* note 2, § 2.03[3], at 3-190.2).

often are resolved on an ad hoc basis.[17] Although these issues may be resolved satisfactorily on an ad hoc basis for the parties in a particular case, any such solution will have limited, if any, precedential effect on future cases. At best, such solutions now may be advanced only as part of an evolving "international common law of bankruptcy" that has become customary international law through usage and convention. Consequently, any court is free to ignore such solutions and determine the issues on any basis permitted under its municipal laws.

It is precisely these jurisdictional issues, which occupy significant time and effort in large international bankruptcy cases, that may be more efficiently resolved in bilateral and multilateral bankruptcy treaties.[18] Additionally, resolving these jurisdictional issues through the treaty process has the benefit of reducing the transactional costs and risks associated with failed international commercial transactions and increasing the predictability of results in terms of the recognition and enforcement of bankruptcy adjudications.

2. *Application of Private International Law*

The second factor generally considered by a court in determining whether to recognize and enforce a bankruptcy judgment is whether the adjudicating court applied the proper law to the issues decided.[19] Selection of the proper law is the province of private international law, which always includes the rules that determine when the private law of the lex fori, as opposed to the foreign private law, is applicable.[20] Under traditional conflicts of laws rules, if foreign substantive law of a private law nature is the proper law, its application flows from the command of the private international law of the lex fori. Or, as Lord Mansfield said: "[E]very action tried here must be tried by the law of England, but the law of England says that in a variety of circumstances . . . the laws of the country where the cause of action arose shall govern."[21]

In contrast, contemporary notions of private international law consider it to be a series of rules that seek to do justice between conflicting interests. This pragmatic approach employs an inductive process that relies on the facts and the existing law that render its rules more subtle.[22] It seeks to regulate international situations in accordance with justice, and in theory domestic and foreign private law are to be applied according to the same rules—that is, they are entitled to equal treatment. This view has been labeled "Practical Internationalism."[23]

Unfortunately, this contemporary approach may lead to an inability to assure

17. *See generally* Gitlin & Silverman, *supra* note 1.
18. Nadelmann, *Treaties*, *supra* note 2, at 71.
19. DALHUISEN, *supra* note 2, §§ 1.01, 2.01.
20. Kegel, *supra* note 13, at 3.
21. *Id.* at 10 (quoting Holman v. Johnson, 1 Cowp. 341, 343 (1775), 98 Eng. Rep. 1120, 1121 (1775)).
22. *Id.* at 12.
23. *Id.* at 13 n.117.

that the adjudicating court applied the proper law to the issues before it. In essence, this legal relativism may provide a ready reason to deny recognition and enforcement of a bankruptcy adjudication by an enforcing court. As one commentator notes, "[p]rivate international law . . . in the field of bankruptcy and insolvency is undoubtedly defective and inadequate."[24] This perceived inadequacy of private international law is one of the fundamental reasons that some commentators assert that bankruptcy treaties between trading partners are the only means to assure recognition and enforcement of bankruptcy judgments.[25]

As a result of this uncertainty, the cause of harmonizing international bankruptcy laws and practice may be advanced by negotiating a treaty that deals directly with selection of the proper law to apply in a given circumstance. Private international law, then, disappears as a possible bar to recognition and enforcement of bankruptcy adjudications. Likewise, to the extent that uniform bankruptcy laws are enacted by the states involved in an international case, this issue becomes moot. As a result, private international law only survives in relation to countries that do not take part in unification by ratifying a treaty or enacting the pertinent model laws.[26]

3. *Protection of Fundamental Public Policy*

Finally, a court may decline to recognize and enforce a foreign bankruptcy judgment if it determines that a public policy of the forum would be violated by enforcement of the judgment. Predicting whether enforcement of a particular judgment would violate a public policy of the enforcing state requires an understanding of the conceptual basis of that state's bankruptcy laws. Three distinct conceptual approaches to bankruptcy laws have evolved: the judgment approach, the creditor's rights approach, and the general assignment for the benefit of creditors approach. Each approach embodies fundamental public policies concerning the nature of debtor/creditor relations and the proper role of the bankruptcy process, and these policies are interwoven in the fabric of a state's legal system.

The judgment theory conceptualizes bankruptcy as a process that essentially confirms or creates specific legal relationships of a private nature. This concept of bankruptcy is difficult to reconcile with modern reorganization approaches, such as chapter 11 in the United States Bankruptcy Code, because of the emphasis in reorganization laws on limiting creditors' rights and personal liability of directors and managers of the debtor. These modern reorganization laws represent a public policy concern that negates, to some degree, the private law character of insolvency under the judgment approach.[27]

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24. Honsberger, *supra* note 2, at 289 (quoting Muir Hunter, *The Draft Bankruptcy Convention of the European Economic Communities*, 21 INT'L & COMP. L.Q. 682, 685-86 (1972)).

25. *Id.* at 289 n.8 (quoting Hunter, *supra* note 24).

26. Kegel, *supra* note 13, at 26, 31.

27. DALHUISEN, *supra* note 2, § 2.01[1], at 3-100 to -101.

In contrast, the creditors' rights approach is intended to satisfy accumulated debts rather than determine the rights and obligations of the parties under private law. Fundamental to this approach is the notion that bankruptcy is a provisional remedy intended to preserve the estate until the rights of the creditors are ascertained, the estate's assets determined, and decisions made whether to liquidate or reorganize the debtor. The essence of this approach is the simultaneous maturity of all prebankruptcy claims and their satisfaction under nonbankruptcy law (subject to any limits imposed by the bankruptcy laws).[28]

The creditors' rights approach also has been modified in varying degrees by many modern bankruptcy laws to promote rehabilitation of the debtor rather than emphasizing its straight liquidation.[29] The reorganization provisions of Chapter 11 of the United States Bankruptcy Code, for example, articulate an unambiguous policy "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."[30] In light of the popular belief held by many non-U.S. lawyers and businessmen (and, perhaps, by their counterparts in the United States) that chapter 11 cases are inefficient and unfairly favor a debtor's equity ownership and management over its creditors,[31] non-U.S. courts may be reluctant to enforce bankruptcy orders entered by U.S. bankruptcy courts if the rights of non-U.S. creditors (under non-U.S. law) have been compromised by the adjudication under the United States Bankruptcy Code.[32]

Finally, a general assignment of property conceptual approach to bankruptcy laws tends to prevail in common law states. Although the essential simplicity of this approach appears to be an advantage, it also has been modified by modern notions of reorganization of debtors.

The importance of understanding the distinct social and economic policies vindicated by each conceptual approach cannot be underestimated because they determine whether a state is predisposed to recognize and enforce foreign bankruptcy adjudications.[33] For example, one leading commentator has observed that bankruptcy laws based upon either the judgment theory or the assignment for the benefit of creditors theory are more likely to permit recognition and enforcement of foreign bankruptcies, while the public policy aspect of the creditors' rights

28. *Id.* § 2.01[2], at 3-104 to -112.

29. *Id.* § 2.01[3], at 3-112 to -116.

30. *See* NLBR v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984); *see also* Gitlin & Flaschen, *supra* note 2; Nadelmann, *Herstatt*, *supra* note 11, at 1; Nadelmann, *Creditor Equality*, *supra* note 2. The variation in permitting rehabilitations rather than liquidations of debtors as a solution to insolvency may be attributed to distinct historical, cultural, and legal traditions, and attitudes of financial institutions in different countries. Likewise, the actual incidence in utilization of rehabilitation provisions also may vary depending upon such factors. What effect, if any, the NAFTA negotiated between Canada, the United States, and Mexico will have on this disparity in rehabilitation prospects under Mexican law, Canadian law, and U.S. law is unknown.

31. *See Bankruptcy: When Firms Go Bust*, ECONOMIST, Aug. 1, 1992, at 63.

32. DALHUISEN, *supra* note 2, at 3-116 n.10a.

33. *Id.* § 2.01, at 3-100 to -129.

approach to bankruptcy raises a significant barrier against recognition and enforcement of foreign bankruptcies.[34] As a general rule, if the conceptual basis of the bankruptcy laws of an adjudicating state and an enforcing state differ significantly and are in conflict, one may expect that the enforcing court may be more inclined to refuse to recognize and enforce a foreign bankruptcy judgment.[35]

4. *Recognition and Enforcement of Bankruptcy Adjudications Under U.S. Law*

The general consensus of American commentators is that proponents of foreign judgments traditionally have received favorable treatment in American courts concerning recognition and enforcement of their foreign judgments.[36] Additionally, the United States Bankruptcy Code affords foreign representatives of bankruptcy estates the right to commence an ancillary proceeding to assist in administration of a foreign bankruptcy estate (for example, where it has assets in the United States) or to commence a full bankruptcy case under U.S. bankruptcy law. Despite this relatively open access to the U.S. bankruptcy court system, disputes between bankruptcy courts in the United States and other countries remain a serious barrier to effective harmonization. This situation simply highlights the complexity of achieving harmonization in this field.

Although the U.S. law concerning recognition and enforcement of foreign judgments adheres to the general rules described above, courts in the United States also consider whether notions of international comity require recognition and enforcement of a judgment at issue.[37] A foreign judgment will be recognized and enforced by a U.S. court if the proponent of the judgment is able to show that the adjudicating court had proper subject matter jurisdiction and jurisdiction over the parties, timely and proper notice of the proceedings was given, and the judgment debtor had an opportunity to present a defense to an unbiased tribunal.[38]

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34. *Id.* § 2.01[4][a]. As Dalhuisen notes, although the creditors' rights approach is being modified by modern notions of rehabilitation and reorganization of debtors, it retains its public policy nexus that, itself, may present a barrier to recognition and enforcement of foreign bankruptcies.

35. *Id.* § 2.01[4], at 3-124.

36. *See generally* Adler, *supra* note 12; Arthur T. Von Mehren & Donald T. Trautman, *Recognition and Enforcement of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601, 1602 (1968). In contrast is the perception that U.S. litigants have more difficulty in obtaining enforcement and recognition of their American judgments outside the United States. *See* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE (Charles Platto ed., 1989).

37. Comity is defined as:

> 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 laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1985); *accord* Cunard S.S. Co. v. Salem Reefer Servs., 773 F.2d 452, 456-60 (2d Cir. 1985).

38. *See* Hilton v. Guyot, 159 U.S. at 204-05; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-482 (1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. d (West Supp. 1988). Due to the federal system in the United States, some commentators point out that American courts have extensive experience in granting recognition and enforcement

Nonetheless, the perception remains among some non-U.S. parties that courts in the United States remain hostile to recognition of foreign bankruptcies. For example, U.S. courts have been accused of ignoring principles of equity in the treatment of similarly situated creditors and notions of judicial economy that would be realized by having a single administration of an international bankruptcy estate.[39]

As indicated above, section 304 of the United States Bankruptcy Code (section 304) permits the representative of a foreign proceeding to commence an ancillary case in a U.S. bankruptcy court, to obtain orders from that court to protect assets of a foreign debtor in the United States, to facilitate the orderly administration of the debtor's assets, and to prevent dismemberment of the estate.[40] Despite the fact that section 304 reflects a significant change in the law that permits, under appropriate circumstances, the de facto single administration of a worldwide bankruptcy estate, some commentators nonetheless criticize it because they believe it provides too much discretion to the bankruptcy judge to refuse a petition seeking relief in an ancillary proceeding.[41] However, this criticism may be misplaced because it fails to acknowledge that it is unusual for a state's bankruptcy courts to refuse to enforce the orders of a foreign bankruptcy court based upon considerations similar to those embodied in section 304.[42]

In addition to lending judicial assistance under section 304, the United States

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to "foreign"—that is sister state—judgments and thus it is natural for them to extend that experience to judgments from foreign countries. *See* Kurt H. Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About It*, 42 IOWA L. REV. 236, 240 (1957); *cf.* Robert B. Von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L L. 401 (1977) (the development of American law on foreign judgment recognition and enforcement is routed in the full faith and credit clause of the U.S. Constitution).

39. Gitlin & Flaschen, *supra* note 2; *In re* Toga Mfg., 28 B.R. 165, 167 (Bankr. E.D. Mich. 1983). Other commentators maintain the U.S. courts have been the most tolerant in recognizing foreign bankruptcy adjudications due to the existence of section 304 of the U.S. Bankruptcy Code. Professor Reisenfeld, comment at the panel discussion of the Private International Law Committee of the ABA Section on International Law and Practice, San Francisco, Cal. (Aug. 9, 1992). Although judicial decisions in U.S. bankruptcy courts have, upon occasion, demonstrated favoritism towards local creditors, often such bias has been explicitly implemented in the municipal law of many states. *See generally* Nadelmann, *Treaties*, *supra* note 2 (reviews municipal laws of various Latin American countries that have explicitly favored local creditors in the distribution of local assets).

40. 11 U.S.C. § 303(b)(4) (1988) (involuntary petition by foreign representative); 11 U.S.C. § 304 (1988) (ancillary proceeding); Koreag, Controle et Revision, S.A. v. Refco F/X Associates, Inc. (*In re* Koreag, Controle et Revision, S.A.), 961 F.2d 341, 348 (2d Cir. 1992). Section 304 has been the subject of numerous commentaries. *See, e.g.*, Gropper, *supra* note 1, at 49; Melnik, *supra* note 1, at 225.

41. *See, e.g.*, Model International Insolvency Cooperation Act (MIICA) § 2 (drafted by Committee J of the International Bar Association) (published in the materials presented at the American Bar Association program on Multinational Commercial Insolvency, Toronto, Canada, May 1993). The comment to section 2 of MIICA emphasizes that some practitioners involved with Committee J believe that enumeration of the factors to be considered in granting relief under section 304 accords too much discretion to the bankruptcy judge. *See also* Melnik, *supra* note 1, at 239.

42. *See, e.g.*, Felixstowe Dock & Ry. Co. v. United States Lines, [1989] 1 Q.B. 360.

Code also permits a foreign representative to file an original proceeding in the United States. A foreign representative may commence an original case if he seeks to utilize substantive and procedural U.S. bankruptcy law such as the automatic stay against any actions against the debtor or its property, the worldwide jurisdiction asserted by the bankruptcy court, and the trustee's avoidance powers.[43]

Although the United States Bankruptcy Code does not confer automatic recognition and enforcement of all foreign bankruptcy adjudications, it does permit the most extensive functional harmonization of bankruptcy laws available today. In that regard it represents a functional paradigm for other states to consider in any effort to reform their municipal bankruptcy laws and thereby enhance the opportunity for harmonization of international bankruptcy cases and practices.

B. Bankruptcy Laws Represent Fundamental Social Policies

As mentioned above, an advocate of harmonization must recognize that bankruptcy laws address fundamental economic and social issues, and the treatment of these issues under one state's laws may be fundamentally different from the treatment under another state's laws.[44] Consequently, any effort to harmonize bankruptcy laws and practice is unlikely to be successful unless these fundamental economic, legal, and political policies (for example, preferential treatment of local creditors) are identified by all parties. Moreover, reaching a consensus on how to accommodate these policy differences, alone, will not eliminate all barriers to harmonization. Instead, basic structural differences between states' legal systems also will have to be eliminated or otherwise accommodated to avoid disharmony in practice.[45] Elimination of these barriers will be especially difficult where the legal regimes of the states are fundamentally different. Differences, for example, arising from the civil law tradition of one state and the common law tradition

43. 11 U.S.C. § 303(b)(4) (involuntary petition under either ch. 7 or ch. 11 authorized) and § 301 (voluntary petition under either ch. 7 or ch. 11).

44. Cuming, *National and International Harmonization: Personal Property Law, in* Commercial and Consumer Law from an International Perspective 471 (King ed., 1986). Although this article addresses specific issues implicated in harmonizing personal property security law, particularly between Canadian provinces, its observations are relevant to a discussion of the harmonization of international bankruptcy laws. Like personal property security laws, one of the purposes of municipal bankruptcy laws is the promotion of commercial activities by protecting creditors' expectations for the business transaction particularly from a creditors' rights theory of bankruptcy, thereby assuring a degree of predictability. Moreover, the Canadian experience in attempting to harmonize personal property security law is instructive because it involved an effort to accommodate the fundamental differences between the common law tradition of its English-speaking provinces and the French civil law tradition of Quebec.

45. *Id.*

of another is a recurring problem that admits no easy solution.[46] Resolution of a seemingly irretractable conflict between the civil law and common law traditions may require adoption by a state of a new legal principle or mechanism that is compatible with a fundamental legal principle held by the other state.[47]

Ultimately, a proponent of harmonization must accept that the differences in the substantive bankruptcy laws of the states involved in any effort to harmonize bankruptcy laws and practices impose real limits on the degree of harmonization that can reasonably be expected. Therefore a working knowledge of the bankruptcy laws of the other states involved is necessary before an advocate can understand the possible and the probable outcomes of any harmonization effort.

1. *Protection of Local Creditors*

Although many municipal laws and policies provide that all creditors, including foreign creditors, should receive equal treatment under local law, practice may stray from policy in this area.[48] Distribution of a debtor's assets has too often meant that local creditors have been favored over foreign creditors either as a matter of municipal law or judicial policy.[49] Discriminatory treatment of foreign creditors imposes a fundamental barrier to the recognition and enforcement of a foreign judgment when the enforcing court determines that discriminatory treatment has been accorded local creditors by the adjudicating court, especially if such conduct disadvantaged citizens of the enforcing court.[50]

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46. For a thorough discussion of the differences between the bankruptcy laws of England, the United States, and various European states, *see* DALHUISEN, *supra* note 2, §§ 2.05 *et seq.* The chances of unifying these laws, except between states sharing close historical, cultural, economic, and political ties, seems doubtful. Even the efforts of the European Community in the area of bankruptcy cooperation have been directed at allocating jurisdiction among various national courts, which then would apply municipal law according to certain rules of private international law as modified by treaty.

47. Cuming, *supra* note 44, at 486-87. The conclusions of the Quebec Civil Code Revision Commission concerning the proposed Canadian Personal Property Security Act are indicative of the flexibility required for successful harmonization of laws between states with different legal traditions. After reviewing this proposed revision of personal property security laws, the Commission concluded that its basic concept—"security interests"—did not represent a mere embodiment of common law mortgages or equitable charges. Instead, the Commission concluded that the concept of "security interest" corresponded closely with the civil law concept of "hypothec," and that this "security interest" evidenced an adoption by Canadian common law jurisdictions of the concept of hypothecs. Consequently, the Commission concluded that Quebec could move toward a greater degree of harmonization of its laws with the laws of other jurisdictions in this area.

48. *See, e.g.*, Gitlin & Flaschen, *supra* note 2, at 307; Nadelmann, *Herstatt, supra* note 11, at 1; Nadelmann, *Creditor Equality, supra* note 2.

49. *See, e.g.*, Felixstowe Dock & Ry. Co. v. United States Lines [1989] 1 Q.B. 360 (Hirst, J., declined to set aside the *Mareva* injunction and thereby permit English assets to be removed from the jurisdiction of the English court and to be subject to a U.S. bankruptcy court restraining order staying all claims against the debtor. The court noted that, in light of the fact that several states had already seized assets, the detriment to local creditors that would occur as a result of setting aside the *Mareva* injunction outweighed any benefit to the debtor and its estate), *cited in* Gropper, *supra* note 2, at 60.

50. *Cf.* Interpool, Ltd. v. Certain Freights of M/V Venture Star, 102 B.R. 373 (Bankr. D.N.J. 1988), *aff'd*, 878 F.2d 111 (3d Cir. 1989) (motion by foreign representative to dismiss involuntary ch. 7 case denied, and section 304 petition not granted; the court noted that, because the Australian

Likewise, an express policy favoring local creditors will pose a significant problem where two primary cases are pending, and the different local laws applicable to the debtor represent fundamentally different bankruptcy principles.[51] For instance, if the debtor's compliance with one court's orders compels it to discriminate against nonlocal creditors, such compliance may have planted the seeds for eventual nonrecognition of a critical judgment by a court in the forum in which the disadvantaged creditors reside or do business. Yet failure to comply with the order or judgment of the first court unquestionably would result in some sort of sanction against the debtor.

Finally, harmonizing a municipal law that mandates discriminatory treatment of foreign creditors with other states' laws will be exceedingly difficult in the context of any treaty negotiations. Only abandonment or limitation on such discriminatory treatment would appear acceptable to states whose municipal laws are de jure blind to distinctions between creditors or claims based upon nationality or citizenship.

2. *Similarity of Municipal Laws*

A fundamentally different barrier to harmonization exists where states have superficially similar substantive bankruptcy laws. For example, the fact that most municipal bankruptcy laws address common issues (such as the opening formalities of bankruptcy cases, the amenability of certain persons and entities to the bankruptcy laws, the filing of claims and distribution of assets in connection therewith, the powers of trustees, receivers, or liquidators, and avoidable transfers) may lull one into perceiving a false harmony between the bankruptcy laws and practices of several states.[52] This superficial harmonization between particular municipal bankruptcy laws and policies is deceptive and actually masks the complex procedural and substantive problems in an international insolvency case that practitioners must resolve.[53] Conversely, the more similar two states' bankruptcy policies are, the more likely their laws can be harmonized through the treaty process.[54]

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bankruptcy law failed to accord equal treatment to that which the U.S. creditors would receive under U.S. bankruptcy law, a full case would be commenced in the United States and all U.S. assets would be administered by the court in that case).

51. Gitlin & Silverman, *supra* note 1, at 10.

52. *See generally* DALHUISEN, *supra* note 2, § 2.05 (discussing the differences between bankruptcy laws on these and other matters, and the choice of law issues related to harmonizing them). These fundamental differences between bankruptcy laws are not confined to obvious differences between the civil law and the common law. For a brief discussion of the differences between bankruptcy laws in the United States and England concerning priorities and calculation of claims, see Gitlin & Silverman, *supra* note 1, at 10.

53. *See generally* Gitlin & Silverman, *supra* note 1, at 9-19.

54. Honsberger, *supra* note 2 (although the U.S.-Canadian treaty was not ratified, recognition of the different bankruptcy policies reportedly was not the barrier).

C. Economic and Other Practical Factors Affecting Harmonization

The success of any effort to harmonize international bankruptcy laws and practice requires an advocate to pay special attention to certain economic and practical factors that comprise real barriers to this process.

First, given the amount of time and effort necessary to achieve de jure harmonization in the area of international bankruptcy laws and practice, an advocate must ascertain whether harmonization is a matter of importance to relevant business and professional groups.[55] If it is not, either the effort must be abandoned or these groups must be persuaded that they will benefit from harmonization of laws affecting their businesses.

Second, the history of efforts to promote cooperation in international insolvency and bankruptcy matters demonstrates that success generally occurs only between states with significant commercial relations with each other.[56] Although similarity in legal principles and legal systems can enhance efforts to harmonize bankruptcy laws and practices, commercial necessity is essential and may help counterbalance legal parochialism.[57] Nonetheless, as the barren efforts of the European Economic Community in this area demonstrate, economic integration and commercial ties alone do not assure success in harmonizing bankruptcy laws.

Third, any effort to harmonize bankruptcy laws of different states must focus on what is achievable. This pragmatic approach means that one should be concerned not only with reaching a resolution of issues that will be accepted by states involved (and enacted into domestic law if necessary), but also a resolution that actually will be implemented by the relevant business communities of the states involved.[58]

Fourth, if the states involved do not share the same legal systems, the success of their efforts will be enhanced by taking a "functional" approach in efforts to harmonize their laws. That is, rules should be determined by the nature of the transactions at issue and the economic and social policies deemed desirable by the parties involved.[59] One advantage of this "functional" approach is that it permits the parties to examine the major legal issues without being constrained by prior legal concepts and allows commercial and practical factors to exert an increased influence.

Fifth, success in drafting treaties or uniform laws increases when the parties use neutral or a-national language that does not contain concepts or terms peculiar to a particular municipal law.[60]

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55. Cuming, *supra* note 44, at 471.

56. *See generally* Nadelmann, *Treaties*, *supra* note 2; *cf.* Cuming, *supra* note 44, at 480.

57. Cuming, *supra* note 44, at 480.

58. Bonell, *supra* note 10, at 866.

59. Cuming, *supra* note 44, at 487 (quoting the Secretary General in his 1980 Report to UNCITRAL discussing the merits of the approach taken towards security interests in art. 9 of the Uniform Commercial Code).

60. Bonell, *supra* note 10, at 873; *see also* Honsberger, *supra* note 2, at 299-300.

Sixth, experience suggests that the degree of harmonization of laws achieved in the international arena varies inversely with the scope of the goal selected.[61] In essence, a more narrow goal may be expected to result in a higher degree of unity. Consequently, focusing efforts on either rationalizing the allocation of jurisdiction between national courts or obtaining uniformity in private international law provisions between states may be more likely to result in actual agreements among states. These practical goals may be more realistic than attempting to unify substantive bankruptcy laws by demanding that states with long legal traditions substantially amend their laws.[62]

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. These states' bankruptcy laws may require substantial revision to function effectively in international commerce. Therefore, enactment of comprehensive model bankruptcy laws may achieve significant harmonization of international bankruptcy laws and practices among these states.[63]

Seventh, a fundamental barrier to the harmonization of international bankruptcy laws and practice is the assumption by many policy-makers in government that bankruptcy is an aspect of private law and, consequently, the state has only a peripheral interest in it.[64] Typically, except when a state holds a priority claim (for example, a revenue claim) in a particular case, it too often believes that its involvement in bankruptcy matters should be limited to supervision of judicial proceedings and establishment of the rules of procedure. Consequently, negotiation of bankruptcy treaties traditionally has not enjoyed a high priority for governments, and they often do not have any policy dealing with such negotiations.[65] Moreover, the dearth of bankruptcy treaties and the failure of recent efforts in this area are not encouraging. Nonetheless, in light of the increased importance of international trade and the resulting increase in international insolvency problems, negotiations among the Member States of the European Community suggest an increased awareness of the importance of cooperation in international insolvency matters.[66]

61. Cuming, *supra* note 44, at 485.

62. But see *id.*, wherein the author asserts a widespread agreement that harmonization of conflict of laws rules is not sufficient and that structural changes in each state's substantive laws is necessary, especially in the area of personal property security laws.

63. For example, as part of the Central and East Europe Law Initiative (CEELI) project of the American Bar Association, this author has reviewed the proposed bankruptcy laws for Bulgaria and Russia. In each instance, the laws contain provisions that may be cumbersome in efficiently and equitably distributing assets to creditors while also permitting reorganization of viable enterprises. Consequently, these states might benefit from access to model bankruptcy codes that account for the progression of civil law in the field over the last fifty years.

64. Honsberger, *supra* note 2, at 291.

65. *See, e.g.*, Gitlin & Flaschen, *supra* note 2; Honsberger, *supra* note 2, at 291.

66. Letter from Michael Prior (Aug. 3, 1992) (on file with the author) (concerning the status of the second draft EC Convention on Bankruptcy).

Eighth, the treatment of revenue claims of foreign governments also represent a fundamental barrier to cooperation in international bankruptcy cases. As a general proposition, courts will not enforce foreign revenue claims. Therefore, improving cooperation in international bankruptcy cases requires finding a means to deal with governmental revenue claims. These claims, for example, could be dealt with either by adjusting their priority for purposes of receiving a distribution or by limiting distributions to no more than a certain percentage of the total value of an estate. If some compromise cannot be negotiated, courts can be expected to continue their refusal to enforce such revenue claims entirely.[67] In that event, expecting governments to cooperate in efforts to harmonize international bankruptcy laws and practices may be unrealistic.

IV. The Alternative Approaches to Achieve Harmonization

There are three alternative approaches to promote harmonization in international insolvency and bankruptcy law and practice: First, ad hoc cooperation in particular insolvency and bankruptcy cases; second, negotiation of bankruptcy treaties to harmonize international law and practice and allocate jurisdiction among states having a significant relationship to a particular debtor and its assets; and third, enactment of model bankruptcy codes as municipal law by numerous and commercially significant states. The observation of one leading commentator remains apt:

> International bankruptcy law is a catchphrase for the rules that are supposed to govern the case of the insolvent debtor who has assets in more than one country. Absent a treaty—and there are few in this area of the law—each legal system acts as it sees fit. Ideally, all creditors are supposed to share equally in the assets of a debtor's estate. But for reasons which are sometimes clear and sometimes obscure, local creditors often obtain more than an equal share from the local assets.[68]

Regardless of which of these approaches is employed, an advocate must address the particular issues and overcome the barriers to harmonization discussed in the preceding parts of this article. The remainder of this article examines each approach in more detail.

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67. *Cf.* Honsberger, *supra* note 2, at 291 (noting that priority rules for distribution of assets do not generally apply to claims of the government); Overseas Inns S.A.P.A. v. United States, 685 F. Supp. 968 (N.D. Tex. 1988) (although the U.S. Government had prior notice of a plan in Luxembourg that would pay only 23.49% of the U.S. revenue claim and it did not object, the district court refused to extend comity to the Luxembourg court's decree and thereby did not recognize and enforce the judgment). The necessity to deal with revenue claims also has been stressed by Professor Reisenfeld, of Boalt Hall School of Law, University of California-Berkeley, and former Counselor to the U.S. State Department in connection with the Canadian-U.S. negotiations concerning a draft bankruptcy treaty. Conversation with Stefan Reisenfeld (Aug. 11, 1992).

68. Nadelmann, *Herstatt*, *supra* note 11, at 1.

A. The Ad Hoc Approach: The Emerging Common Law of International Bankruptcy Law and Practice

Although most commentators decry the paucity of bankruptcy treaties among major trading states,[69] the necessity for cooperation in contemporary international insolvency and bankruptcy cases is so overwhelming that cooperation on a case-by-case basis has emerged as the de facto norm. As one participant in recent international insolvencies has observed:

> In the absence of formal treaties to address the problems arising from international insolvencies, the task falls to the shoulders of insolvency practitioners to develop on a case by case basis strategies and techniques for resolving the conflicts that arise when different nations attempt to apply different laws and enforce different requirements upon the same set of parties.[70]

The fact that the United States is not a party to any bankruptcy treaties means that resolution of the complex procedural and substantive problems characterizing international insolvency and bankruptcy cases continues to be an ad hoc affair for U.S. creditors and debtors.[71] Typically, this ad hoc approach involves negotiating an agreement, which is approved by the courts having jurisdiction over the debtor and its assets, to coordinate concurrent cases commenced in different national courts and allocating some, but not all, authority over issues between these courts.[72] This approach is a primary source of an evolving "international common law of bankruptcy," which, arguably, constitutes an embryonic customary international bankruptcy law.

In recent years, the filing of concurrent bankruptcy cases in the United States by Axona International Credit & Commerce Limited, Maxwell Communications Corporation plc, Olympia & York, L.J. Hooker, and the Bank of Credit and Commerce International (BCCI) demonstrates that these debtors have relied upon the bankruptcy law of the United States as the means to impose ad hoc harmonization on their affairs. In essence, they have utilized the U.S. bankruptcy laws either to shield their assets from creditors' demands in other states or to impose a practical harmony (albeit limited) on the conflicting demands of the bankruptcy laws of several states.[73]

This ad hoc approach is not new. The first prominent manifestation of this approach to international financial disasters may have been the vigorous interven-

69. *See supra* note 2 and accompanying text.

70. Gitlin & Silverman, *supra* note 1, at 11-12.

71. *See id.* at 9.

72. *See generally* International Insolvencies: Developing Practical Strategies (PLI No. 628, 1992); Riesenfeld, *supra* note 2.

73. These cases all reflect a trend towards concurrent, primary cases in more than one jurisdiction, with the courts in these cases creating ad hoc procedural orders directed towards preserving the going concern value of the worldwide estate and assuring equitable distribution of the assets of this estate. *See, e.g.*, Gitlin & Silverman, *supra* note 1; Quittner, *supra* note 14.

tion of Pope Boniface VIII in 1302 to the collapse of the Ammanati Bank of Pistoja.[74] In the Ammanati affair Papal intervention was compelled by the necessity of a coordinating authority to assure (to the degree possible) that all assets were administered for the benefit of all creditors, regardless of the state in which they resided, and to avoid piecemeal dismemberment of the bankrupt's estate.[75] As the only sovereign capable of exercising influence outside its territory, the Papacy was in a unique position to impose order and to promote international cooperation. A pragmatic solution was devised in response whereby, in exchange for the cooperation of the owners of the bank in collecting its debts, the Papal Court assured the safe passage of the bank's owners back to Rome.[76] Additionally, letters rogatory were issued to clergy in various states concerning the collection of debts owed to the bank. Thus, the far-flung financial system of the Papacy was used to collect and transfer monies to Rome for eventual distribution among all creditors.

The immediate and critical threats to the financial system of Europe posed by the Ammanati affair and the Papal response appear strikingly contemporary. The Papal response was, essentially, the same solution devised by the regulatory and judicial authorities in the various states affected by the recent BCCI collapse. The coordinated and worldwide response by various national bank regulators to the BCCI situation stemmed from their realization that if BCCI were permitted to continue its operations without restraint or if the various national regulators and judicial authorities failed to take coordinated international action, both individual creditors and national economic systems faced a financial disaster of staggering proportion and consequences. In order to prevent further damage to their national economies and the worldwide financial system, and to afford the time necessary to determine the validity and amount of claims held by over a million creditors, the bank regulators entered into agreements and the judiciary of various states entered orders that prevented individual creditors from seizing assets or otherwise taking actions that threatened a global solution.[77]

74. Nadelmann, *Treaties, supra* note 2, at 59. This article's description of the Ammanati bank failure and the response of the Papacy is derived from Nadelmann's treatment of it in his seminal article.

75. *Id.* at 58-59. The necessity for a coordinated international response to the collapse of the Ammanati Bank was premised on several circumstances: the bank had branches in several countries of Europe; many members of the Papal Court were important clients of the bank, and thus its failure would significantly affect the Papacy; and assets of the bank were being transferred from Rome to Pistoja and thus would be out of reach of local creditors.

76. *Id.* at 59. The Papacy issued an order that forbade the owners of the bank from disposing of their property and, at the same time, enjoined debtors of the bank from making payments without authorization of the Holy See. Yet, because the legal authority of the Holy See did not extend to all countries in which creditors were trying to seize assets and in which the principal debtors of the bank resided, this papal order was not, alone, sufficient to resolve this problem.

77. Ronald DeKoven, *The BCCI Case—Opinion and Order, in* INTERNATIONAL INSOLVENCIES: DEVELOPING PRACTICAL STRATEGIES 305, 310 (PLI No. 628, 1992). In this case the court stated that the BCCI collapse affected over 1,000,000 depositors worldwide and that BCCI was characterized by mismanagement, self-dealing, and fraud. Recognizing the severity of the problems, and in light

Even in cases lacking the apparent massive fraud characterizing BCCI, practitioners with recent experience in international insolvency and bankruptcy cases are confronted with the same basic jurisdictional and enforcement issues. Even if an ad hoc approach effectively coordinates administration of a debtor's worldwide estate, the risk remains that jurisdictional conflicts, private international law problems, or the public policy of the enforcing state may ultimately preclude recognition and enforcement of an adjudicating court's judgments if such enforcement would be detrimental to the responding state's local creditors. This risk of nonrecognition and nonenforcement of bankruptcy adjudications in foreign courts represents a fundamental problem that must be resolved if bankruptcy law and practice are to be truly harmonized. These problems have been addressed, with limited success, in most bankruptcy treaties.[78]

Although the ad hoc approach often yields innovative solutions to the jurisdictional problems that are the basis of decisions by courts not to recognize and enforce foreign bankruptcy adjudications, the capability of this approach to achieve widespread harmonization of international bankruptcy law and practice is limited. First, because these ad hoc solutions constitute only the "law of the case" their application in subsequent cases is uncertain at best. Because these cases have no precedential value (except, perhaps, in the jurisdiction in which a decision is rendered), there is no assurance that the solutions created will be applied in subsequent cases. Nor, even if they are applied, is there any assurance that the judgments implementing these solutions in a subsequent case will be recognized and enforced by a foreign court. Such solutions, no matter how well reasoned or practical, will have no impact on the unbridled judicial discretion in the recognition and enforcement of bankruptcy judgments which often is considered a major problem.[79]

Second, due to the absence of an effective means to compile and disseminate information concerning the practical solutions developed, application of these solutions in subsequent cases, and in planning commercial transactions, may be limited.[80] Nonetheless, this limitation should not be permitted to depreciate the

of the intervention of public authorities in England, Luxembourg, the Cayman Islands, the United States, and the State of New York, Judge Keenan held that "[t]his Court will not sanction any interference in this global resolution of all the controversies involving BCCI in the United States." *Id.* at 325.

78. *See, e.g.*, Gitlin & Silverman, *supra* note 1, at 10-12; Quittner, *supra* note 14, at 329-42.

79. MIICA is intended to preclude such judicial discretion as a barrier to recognition and enforcement of bankruptcy judgments. Article 1 of MIICA provides that once a bankruptcy case has been commenced in a competent court, the national courts of other states enacting MIICA would be required to recognize the jurisdiction of the competent court in the first state. *See, e.g.*, Melnik, *supra* note 1; *cf.* Adler, *supra* note 12, at 4.

80. As one commentator has observed in connection with the unification of international law, the absence of any central repository for national interpretations of an international agreement will decrease the opportunity for uniform interpretations of that agreement. As a consequence, neither unification nor harmonization of the law is enhanced. *See* Bonell, *supra* note 10, at 865. In the absence of any such central repository for information, dissemination of any lessons learned will be limited to practitioners and scholars who may be aware of professional programs dealing with such cases.

real conceptual and practical contributions being made by practitioners in these international cases. Instead, the educational efforts of the bankruptcy and insolvency bar and related professions in this area should be expanded to educate all interested parties about these solutions to real problems. In that way governments may address harmonization in a more systematic manner by negotiating and ratifying bilateral and multilateral bankruptcy treaties among major trading partners and by promoting the drafting of model laws and their enactment into the municipal law of states that are now converting to more free market economies.

Third, because ad hoc solutions cannot be relied upon in future cases, one might argue that they are unlikey to have any significant effect on structuring commercial transactions. Because the parties to a transaction cannot reasonably predict whether these solutions will be implemented in the event of a bankruptcy or insolvency proceeding in the future, they will not consider them in structuring a transaction. However, it may be as valid to question whether any significant bankruptcy planning occurs in structuring commercial transactions. Nonetheless, introducing even limited predictability of outcomes remains a valid goal for any harmonization effort and has been one of the prime goals for all bankruptcy treaties that have been negotiated to date. Unfortunately, because these practical problems have not been institutionalized by treaties or uniform municipal laws, the effectiveness of the emerging "international common law of bankruptcy" remains limited.

Moreover, even if one believes that an ad hoc approach is inevitable and, perhaps, the only effective approach to handle the mega-cases that are occurring with increasing frequency in the international arena, its utility in other cases may be questioned. One may surmise that in international cases that have lesser potential to harm national economic systems or that have smaller bankruptcy estates to distribute, the transactional costs of negotiating complex agreements allocating jurisdiction among courts or handling specific claims or assets will render this ad hoc approach inefficient and unavailable as a practical matter.

These criticisms represent too narrow a view of the evolution of the law in this area and ignore actual practice. The "international common law of bankruptcy" that is evolving on an ad hoc basis in the large international bankruptcy cases does exert a real influence on harmonization of international bankruptcy law and practice.[81] This "international common law of bankruptcy" provides practical solutions to fundamental jurisdictional and other problems that are being employed by practitioners in subsequent cases. Not only are these practical solutions being employed by practitioners, they may well represent an evolving customary

81. Practitioners in the field increasingly rely on this "international common law of bankruptcy" in developing practical solutions in handling multinational bankruptcy cases. Thomas C. Given, Comment at the panel discussion on Harmonization of International Bankruptcy Law and Practice sponsored by the International Creditors' Rights and Bankruptcy Committee, ABA Section of International Law and Practice, Washington, D.C. (Apr. 29, 1993).

international law in this area that could be embodied in international treaties on bankruptcy cooperation and thereafter be codified in municipal law.[82] Thus, despite the unlikelihood that these solutions will be accorded any stare decisis effect, they are helping to define the customary international law in this area.

Despite its inherent limitations, this approach constitutes a laboratory for developing practical solutions that may be employed in future cases. It also permits identification of other problems and solutions that should be addressed by the international business community, the bankruptcy and insolvency bar, and associated professions. The source of empirical information concerning the frequency and economic dimensions of international bankruptcy problems could be useful in convincing governments of necessity to rectify the lack of harmonization of law in this area.[83]

B. The Treaty Approach: Predictability, Efficiency, Equity, and Finality

Arguably, incorporating many of the solutions developed in the de facto approach into bankruptcy treaties between major trading partners offers the most efficient and widespread means to harmonize international bankruptcy laws and practice. Once ratified by major commercial states and trading partners, it would permit reduction of the injustice, inconvenience, frustration, and unpredictability associated with international insolvencies.[84]

1. *Jurisdictional Issues*

The jurisdictional and other issues that must be considered in achieving harmonization through a treaty are complex: Given that denial to recognize and to enforce foreign judgments often is affected by jurisdictional issues, how should a treaty resolve these fundamental issues?

Should, for example, the goal of harmonization focus on efficient administration of the estate and thus establish a unified administration of a debtor and its assets worldwide? If so, will this so-called *compétence directe* approach eliminate all jurisdictional conflicts? Or will it actually precipitate forum shopping or a rush

82. For example, in *In re* Maxwell Communications Corp., plc, Case No. 91-B-15741 (TLB), Judge Brozman of the United States District Court, Southern District of New York, entered an order that allocates authority between the examiner appointed by the court, and the joint administrators appointed by the English High Court of Justice, Chancery Division, Companies Court. Presumably, this order will reduce the likelihood that either court's judgments or orders will not be recognized and enforced. This particular solution could stimulate ideas concerning procedural rules that might be incorporated into international bankruptcy treaties. For a copy of this order, see Gitlin & Silverman, *supra* note 1.

83. The absence of current empirical data concerning the frequency and magnitude of international bankruptcy cases, and the states whose courts are most often involved, leaves one to speculate on these issues. This void in information is similar to the situation in connection with recognition and enforcement of foreign judgments in the United States. *See* Adler, *supra* note 12.

84. Honsberger, *supra* note 2, at 290.

to commence a case so as to deprive a particular jurisdiction from exercising jurisdiction over a debtor or certain assets? How will important bankruptcy policy issues of the nonforum states be accommodated if the lex fori governs all substantive issues? Should, as a result, some rights be determined by foreign law, and if so, what rights should be accorded such treatment?[85]

Alternatively, should these jurisdictional issues be resolved by according two or more states' courts concurrent jurisdiction, and by such identification define which bankruptcy adjudications will qualify for recognition in the other state's courts?[86] Should the efficiency of a single court administration be tempered by this so-called *compétence indirecte* approach, which permits concurrent jurisdiction in several states as a means to protect the public policy interests of all states affected by an insolvency such as particular treatment of local assets or protection of local creditors?

In considering these alternative jurisdictional approaches, the effectiveness of any bankruptcy treaty will turn on its capability to increase the predictability that bankruptcy adjudications rendered by a "competent court" will be recognized and enforced by other states' courts. A court's decision whether to recognize and enforce a foreign bankruptcy judgment is based upon its determination that the adjudicating court had jurisdiction to adjudicate the issue that is the subject of a judgment, that it applied the proper choice of law rules, and that enforcement will not compromise fundamental public policies of the enforcing state.

Simply put, a primary measure of the effectiveness of a bankruptcy treaty will be its ability to assure the extraterritorial effect of certain bankruptcy adjudications so as to promote predictability of result, efficient administration and equitable distribution of the estate, and finality of results.[87] This extraterritorial effect can be accomplished in one of two ways. First, a treaty could establish its own special rules of jurisdiction regarding bankruptcy matters that permit a bankruptcy case to be commenced (or a debtor to be adjudicated bankrupt) in a signatory state only by the tribunal accorded bankruptcy jurisdiction by the treaty.[88] In this *compétence directe* approach only one court has jurisdiction in a case and that designated court supersedes all of the usual rules of jurisdiction. This approach would create exclusive jurisdiction at the domicile or principal place of business of the debtor and confer exclusive jurisdiction over all estate assets, wherever situated. It has

85. Such an approach, the so-called *compétence directe* approach, is found in several European bankruptcy treaties and was at the heart of the abandoned 1980 Draft Bankruptcy Convention of the European Economic Community (the EEC Draft Bankruptcy Treaty). *See* DALHUISEN, *supra* note 2, § 2.04[5], at 3-262. Reportedly, this newest version of an EEC treaty has abandoned this approach in favor of the *compétence indirecte* approach.

86. This *compétence indirecte* approach is used in the Scandinavian Treaty (art. 13) and the Model Hague Conference Treaty of 1925 (art. 1 & 2). *See* DALHUISEN, *supra* note 2, § 2.04[5], at 3-266.

87. For a detailed discussion of the recognition and enforcement of bankruptcy judgments, see notes 12-43 *supra* and accompanying text.

88. *See* Nadelmann, *Treaties*, *supra* note 2, at 72; DALHUISEN, *supra* note 2, at 3-262; Honsberger, *supra* note 2, at 295.

the advantage of avoiding the inefficiency and waste associated with concurrent bankruptcy cases and could reduce forum shopping, at least among the debtors subject to the jurisdiction of the contracting states. However, from a creditor's point of view, this approach may be disadvantageous because it may require that a creditor file claims (or, for example, an involuntary bankruptcy petition against a debtor) in a foreign court. Not only would this requirement be inconvenient, but its expense may discourage creditors from utilizing the bankruptcy system. Further, this approach may not be flexible enough to accommodate important policy differences inherent in the particular substantive bankruptcy laws of the signatory states because it may be difficult to bifurcate the lex fori under this approach.[89]

Alternatively, a treaty may provide extraterritorial effect only for the bankruptcy adjudications declared by a court specified in the treaty, and adjudications declared by any court would have no extraterritorial effects.[90] This *compétence indirecte* approach allocates jurisdiction in bankruptcy matters between specified courts while permitting concurrent bankruptcy cases to be commenced in two or more contracting states.[91] A treaty employing this approach would define which local bankruptcy courts have jurisdiction, and consequently, a judgment rendered by a competent court would be more likely to be accorded recognition and enforcement by other contracting states. This approach has the advantage of permitting important policy differences between contracting states' bankruptcy laws to be taken into account in any particular case by permitting a second case to be commenced. Nevertheless, the duplication of efforts may impose delays and increases costs for a debtor and its estate.[92] This approach has been employed in the Model 1925 Hague Convention, the Scandinavian Treaty (article 13), and the French-Italian Treaty (article 20), and, reportedly, is also now part of the draft EC Convention on Bankruptcy being negotiated at this time.[93]

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89. DALHUISEN, *supra* note 2, at 3-262. The French-Swiss Treaty (art. 6), the French-Belgian Treaty (art. 8), the Belgian-Netherlands Treaty (art. 20), the French-Monaco Treaty (art. 2), the Belgian-Austrian Bankruptcy Treaty (art. 2(1)), and the abandoned 1980 EEC Draft Bankruptcy Convention all employ this approach.

90. Nadelmann, *Treaties*, *supra* note 2, at 72; DALHUISEN, *supra* note 2, at 3-262.

91. Reportedly, the new bankruptcy laws proposed for the Federal Republic of Germany permit a local creditor to open a concurrent, primary case if it concludes that it will be better treated by application of local assets to its claim. Conversation with Stefan Reisenfeld (Aug. 11, 1992).

92. DALHUISEN, *supra* note 2, at 3-262. The underlying policy of this approach is reflected in section 304 of the Bankruptcy Code. The United States has been described as

> the leader in open attitudes towards foreign insolvencies with Section 304 of its Bankruptcy Code offering, on terms, recognition of all proper foreign insolvency practitioners and their right to call for assets in the U.S.A. to be dealt with under the laws of the foreign insolvency and, above all, to create one state.

Letter from Michael Prior, *supra* note 66; *see also* Michael Prior, Paper presented at the First Biannual International Seminar on Insolvency and Creditors Rights, Transport Industry Finance and Insolvency Issues, Recognition of Foreign Insolvency Proceedings, London, England (June 2, 1992).

93. Letter from Michael Prior, *supra* note 66. The Second Draft EC Convention on Bankruptcy has been circulated to a restricted number of persons, but reportedly would not change this fundamental vision. In contrast, the U.S. bankruptcy law offers more than merely an ancillary proceeding to assist foreign trustees or receivers in collecting assets and administering their estate. A debtor may file a

2. *Choice of Law Issues and Private International Law Issues*

In addition to these jurisdictional issues, a bankruptcy treaty could specify the applicable law to particular categories of issues in international bankruptcy cases. For example, it could specify when the private bankruptcy law of the lex fori and when foreign private bankruptcy law apply, and whether the lex fori governs all issues or whether certain issues will be determined by the lex loci or lex fori concursus.[94] In instances where a debtor's assets are being administered by two or more courts that share concurrent jurisdiction, specification of the law to be applied by the adjudicating court may enhance the recognition and enforcement of the adjudicating court's bankruptcy judgments by a foreign enforcing court. Given the complex nature of many international insolvency and bankruptcy cases, harmonization might be enhanced by permitting parties to contracts to select procedural rules other than those applicable under the lex fori to govern administration of a unified estate. However, bankruptcy treaties generally have not dealt with attempts to harmonize procedural issues that may have a significant effect on the substantive rights of the participants in a bankruptcy case.[95]

C. Model Laws: Harmonization Through Uniform Municipal Laws

1. *Fundamental Issues*

In light of the fundamental economic, political, and legal changes that have taken place in the last several years in Eastern Europe and the former Soviet Union, proponents of harmonization of international bankruptcy law and practice must consider whether a more radical approach should be employed.[96] Assuming

full proceeding under the U.S. Bankruptcy Code and thereby be accorded all rights provided by the Code, including the protection of the automatic stay and the application of various avoidance rules, and the definition of the estate as including all property located worldwide. *See* Quittner, *supra* note 14, at 331-33.

94. A discussion of the history of private international law, and the varying formulations of what properly is encompassed by this concept, is beyond the scope of this article. This area of the law has been the subject of intense scholarly discussion since the 19th century, and such discussion continues unabated to this day. *See, e.g.*, Gerhard Kegel, *Introduction, in* Encyclopedia Vol. III, *supra* note 13, ch. 1.

95. *See* Dalhuisen, *supra* note 2, §§ 2.05 *et seq*. The appointment of the trustee, the formalities connected therewith, and the trustees' liability generally are not the subject of treaty law and therefore are left to the lex fori concursus. *Id.* § 2.05[1], at 3-273 n.8. Likewise, a division of different roles and powers between the courts, registrars (in common law countries), the delegated judge (in several civil law countries), and the trustee, liquidators, receivers, or administrators is not customarily the subject of existing treaty law and bankruptcy matters, and the lex fori concursus is normally applicable. *Id.* at 3-291 n.9. Treaty law is not normally concerned with creditors' meetings or creditors' influence in such meetings through committees or otherwise, and voting procedure is determined by the lex fori. Treaty law tends not to deal with the subject of filing, and the procedural aspects of verifying claims, and generally refers to the lex fori as applicable in matters of procedure. *Id.* at 3-308 n.15. The execution and sale of foreign assets, especially on the European continent in respect to real property, is dependent on local formalities and cooperation of local authorities and is traditionally thought to be the very essence of the problem of foreign bankruptcy recognition. *Id.* at 3-310. Treaty law generally accepts the lex loci for execution sales in this regard.

96. Cuming, *supra* note 44, at 483.

a consensus could be reached on these jurisdictional and private international law issues, should the international community abandon (or supplement) its efforts to negotiate treaties embodying this consensus? Should it, instead, refocus its energies and seek to achieve a functional harmonization by drafting model substantive bankruptcy laws that would be enacted as municipal law by these countries? If so, would this new approach render current conflicts concerning private international law and national jurisdiction essentially irrelevant?

A model laws approach utilized by UNCITRAL in many contexts, which is designed to provide moral suasion and intellectual insight, could achieve significant de facto harmonization because municipal laws would be substantially identical. Achieving harmonization of international bankruptcy law and practice through drafting model laws would have to address the same issues, and overcome the same barriers, as efforts to negotiate bankruptcy treaties. In the area of international insolvency and bankruptcy cooperation this approach has been employed by the International Bar Association in connection with its Model International Insolvency Cooperation Act (MIICA). Nevertheless, to date, no states have amended their municipal bankruptcy laws to incorporate the fundamental concepts of the MIICA, such as single case administration, exclusive jurisdiction in the adjudicating state, and limits on discretion in denying recognition and enforcement of judgments by any state that enacts this model law.[97] Although proposed changes in the United States Bankruptcy Code to incorporate the MIICA's provisions have been drafted, no serious effort to enact these changes appears to have been undertaken.[98]

2. *Barriers to Overcome*

To be effective in harmonizing international bankruptcy law and practice, model bankruptcy laws must overcome several barriers. Assuming unification is the proper goal for international efforts, several fundamental issues must be resolved.

First, how would such unification come about? Should, for example, an international body (such as the UNCITRAL or the Hague Convention on Private International Law) draft model bankruptcy codes, or should this task be the province of professional and business groups?

Second, regardless of who the drafters may be, can any model code successfully blend fundamentally different common law and civil law bankruptcy law principles?[99] More problematically, can a model code derived from common law and

97. According to the chairman of Committee J of the IBA, its efforts now are shifting towards drafting more comprehensive model bankruptcy codes. Conversation with Michael Prior (July 1992).

98. The proposed changes in title 11 and title 28 of the United States Code that would be necessary if MIICA's provisions were enacted as part of U.S. bankruptcy law may be found at Melnick, *supra* note 1, at 242-62.

99. For a detailed discussion of the differences in national bankruptcy laws, and differences between common law jurisdictions and civil law jurisdictions generally, see DALHUISEN, *supra* note 2, §§ 2.05 *et seq.*

civil law traditions be reconciled, for example, with modern Islamic legal principles? Likewise, can a model code reconcile fundamentally different notions concerning the nature of the bankruptcy process? Can a model bankruptcy code unify a judgment approach, a creditors' rights approach, and a general assignment approach to bankruptcy that may underlay various states' laws?[100]

Third, even assuming drafting model bankruptcy codes is an appropriate activity to undertake, what states do the drafters expect to adopt such codes: The emerging capitalistic states in Eastern Europe and Africa? The states that formerly were part of the Soviet Union? Should the goal be more ambitious, anticipating the revision of municipal bankruptcy laws in Europe, Canada, the United States, Australia, and Latin America such that conflicts in international bankruptcy cases will be reduced? Nonetheless, model laws may be very useful in the emerging states of Eastern and Middle Europe, and the former Soviet Union, which are embracing more open market economies and reforming their legal systems to accommodate these economic changes.

Fourth, if the several states enacting a set of model laws have fundamentally different legal traditions and principles, these model laws may be interpreted differently despite being substantially identical. The resulting confusion and uncertainty in the application of a model law would reduce the very qualities that model laws are intended to promote: predictability and uniformity. In that event, disharmony, rather than harmony, could prevail.

Fifth, delays in enacting enabling legislation in the states involved may render the proposed laws ineffective. Although the problem of delay also exists where a treaty is signed but not ratified by a sufficient number of states or enabling legislation is not enacted, it might be expected that states that have invested time and energy in negotiating a treaty are more motivated to ratify that treaty. In contrast, model bankruptcy laws created by international agencies or bar associations may not be enacted promptly because the target states may have no interest in adopting a set of model laws developed without their active involvement. Consequently, the likelihood of enactment of a set of model laws would increase in direct proportion to the active involvement of the target states in framing such model laws. Therefore, the selection of participants in this process should be as inclusive as possible, while still permitting the task to be accomplished.

Sixth, unless care is taken to assure that a model law is accurately translated into the official language of each state, its effectiveness may be materially reduced.[101] Similarly, use of technical legal terms that have no precise definition in the official language of an enacting state, or have no corresponding meaning under its legal principles, pose a significant problem to the effectiveness of any model law.

Finally the degree of worldwide harmonization of bankruptcy law and practice

100. For a detailed discussion of these distinct conceptualizations of the nature of bankruptcy and their bearing on international cooperation, see *id.* § 2.01.

101. Bonell, *supra* note 10, at 866-88.

that will be achieved through model laws will depend upon the number of states enacting a model law and the economic value of their commercial transactions and trade with other states. Given the long established history of bankruptcy laws in the major trading states of Europe, England and the Commonwealth states, Latin American states, and the United States, model laws in this area will probably not be enacted in the municipal laws of these states. As a result, the scope of any harmonization through enactment of model laws may be expected to be more regional than worldwide.

V. Conclusion

The current growth of international trade compels all major trading states to be concerned with harmonization of international bankruptcy laws and practice. Not only do major international insolvencies affect the private business community; they may threaten the economic and political stability of many states. Codifying in bankruptcy treaties the "international common law of bankruptcy" being generated on an ad hoc basis represents the most efficient means to satisfy the common concerns of all participants in any insolvency or bankruptcy matter: predictability in results, efficiency and equity in distribution of the estate's assets, and finality.