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## Some Gloomy Thoughts Concerning Cross-Border Insolvencies

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# SOME GLOOMY THOUGHTS CONCERNING CROSS-BORDER INSOLVENCIES

DOUGLASS G. BSHKOFF\*

*There once was a man from Lahore  
With abodes in Bombay and Bangor.  
When some creditors clawed  
At the homestead abroad,  
His receiver invoked 304.*

A cross-border insolvency implicates, at least temporarily, the legal systems of two or more nations. In the most common fact pattern, an insolvency proceeding is commenced in Nation A. The insolvency representative then attempts to repatriate assets located in Nation B. Other common interactions include a request for protection or discovery of assets, avoidance of transfers, dismissal of pending legal proceedings, and recognition in Nation B of a discharge granted by a court in Nation A.

In a perfect world, administration of the insolvency estate would be centered in one jurisdiction. That country's law would also govern the resolution of most of the disputes arising in, or related to, the insolvency proceeding. In reality, current practice is far from perfect. The universalist vision prevails only in the most ordinary situations. Territorial resolution of insolvency issues is far more common whenever there is a significant difference between the legal rules prevailing in the concerned countries.

In this essay, I: (1) briefly discuss the avenues of cooperation available when Nation B is the United States; (2) assess the current level of cooperation with Nation A; and (3) speculate whether the situation is likely to change in the foreseeable future.

## I. THE CURRENT SITUATION

The foreign insolvency representative appointed in Nation A has three basic options. She may request assistance from a state or federal court,<sup>1</sup> commence a normal involuntary bankruptcy in the United States,<sup>2</sup> or seek

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1. See Douglass G. Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729, 730-33 (1987).

2. 11 U.S.C. § 303(b)(4) (1988).

an ancillary administration as permitted by § 304.<sup>3</sup> Section 304(b) authorizes injunctions against various legal proceedings, repatriation of assets located in the United States, and “other appropriate relief.” Other provisions in the Bankruptcy Code also help resolve problems arising in cross-border insolvencies,<sup>4</sup> but § 304 has received the most attention from academic and practitioner commentators. This interest is understandable; § 304 is novel. It attracts attention because of its direct application to cross-border insolvency problems and its suggestion that a cooperative attitude is appropriate even when § 304 is not invoked. American statutory law goes further than the law of any other industrialized nation in authorizing cooperation with foreign insolvency regimes.<sup>5</sup> Nonetheless, the current level of cooperation is modest and unlikely to change in the foreseeable future.<sup>6</sup>

Historically, bankruptcy in the United States has existed to promote an equal distribution of assets among creditors and, in some instances, to discharge obligations.<sup>7</sup> The most important measure of cooperation is the extent of our willingness to turn over American assets for distribution in accordance with a foreign order of priority. How we honor discharges granted elsewhere is also a significant measure of whether we are inclined to cooperate. We usually allow repatriation of assets only when the foreign distribution scheme resembles our own.<sup>8</sup> As for discharge, there has been only one significant court decision, and it refuses to recognize the effect of a foreign reorganization plan.<sup>9</sup>

Other indications of cooperation are positive. Foreign insolvency representatives, for example, now have no difficulty in establishing standing

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3. 11 U.S.C. § 304 (1988).

4. See 11 U.S.C. § 109(b)(3) (1988) (foreign bank eligible for bankruptcy); 11 U.S.C. § 305(a)(2), (b) (1988) (foreign proceeding as basis for abstention); 11 U.S.C. § 306 (1988) (limited appearance by foreign representative); 28 U.S.C. § 1410 (1988) (venue of foreign proceeding).

5. Section 426 of the Insolvency Act 1986 (applicable in England and Wales) authorizes an ancillary administration. This authorization does not extend to situations in which the primary proceeding has been commenced in the United States or other important commercial jurisdictions. See Gabriel Moss, *Administration Orders for Foreign Companies*, *INSOLVENCY INTELLIGENCE*, Mar. 1993, at 19.

6. Boshkoff, *supra* note 1, at 745-47.

7. Bankruptcy policy analysis is becoming much more complicated. See, e.g., Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 *MICH. L. REV.* 336 (1993).

8. Opinions permitting repatriation of assets or granting other relief often note a similarity between the American and foreign insolvency regimes. See, e.g., *In re Rubin and Halevy*, 24 *Bankr. Ct. Dec. (CRR)* 1365 (*Bankr. S.D.N.Y.* 1993) (concerning the liquidation of an Israeli reinsurance company).

9. *Overseas Inns S.A.P.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990).

to obtain judicial assistance from American courts.<sup>10</sup> And ineligible debtors can still be the subject of ancillary proceedings.<sup>11</sup> But no amount of low-level cooperation can make up for the fact that we are a long way from conforming to the utopian vision of a universal international insolvency regime. A moment's reflection will suggest why this is so and why we should not expect to see any changes soon.

Cross-border insolvency problems have been around for a long time,<sup>12</sup> but they have become prominent and noticeable only during the last two decades. Section 2a(22) of the Bankruptcy Act of 1898 conferred ancillary jurisdiction on courts of bankruptcy "where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction outside the United States."<sup>13</sup> There was little reported litigation involving this section and it merited only a single page of discussion in the 14th edition of *Collier*.<sup>14</sup> While this subdivision contained a grant of jurisdiction, it offered no suggestions as to when the exercise of jurisdiction was appropriate. Section 4-103 in the Bankruptcy Commission's proposal, derived from section 2(a)(22), was more ambitious.<sup>15</sup> While not explicitly authorizing an ancillary proceeding, it did permit the foreign representative to request judicial assistance even when there was no pending domestic bankruptcy. This section also contained a list of factors that were to be considered by the American judge in fashioning relief. With the addition of "comity," this list now appears in § 304(c) as follows:

In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

10. See, e.g., *Metropolitan Inv. Corp. v. Buchler*, 575 So.2d 262 (Fla. Dist. Ct. App. 1991) (extending comity to English administrators of jetliner lessor's parent corporation, who brought action ancillary to English insolvency proceeding seeking injunctive relief against lessee's wrongful withholding of funds received from sublessee).

11. *Goerg v. Parungao*, 844 F.2d 1562 (11th Cir. 1988) (regarding the ancillary administration of the estate of deceased German debtor); *In re Rubin and Halevy*, 24 Bankr. Ct. Dec. (CRR) 1365 (Bankr. S.D.N.Y. 1993) (holding that the McCarran-Ferguson Act is not a barrier to recognition of bankruptcy of foreign insurer).

12. For a good discussion of the pre-1979 case law, see Charles D. Booth, *A History of the Transnational Aspects of United States Bankruptcy Law Prior to the Bankruptcy Reform Act of 1978*, 9 B.U. INT'L L.J. 1, 6 (1991).

13. 76 Stat. 570 (1962) (repealed 1979).

14. 1 COLLIER ON BANKRUPTCY ¶ 2.79(a) (14th ed. 1974).

15. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 137, 93d Cong., 1st Sess., pt. 2, at 69-71 (1973).

- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.<sup>16</sup>

This recitation of factors is so comprehensive that it is almost meaningless as an indication of our desire to cooperate, or not cooperate, when an insolvency proceeding is commenced elsewhere. It is somewhat like a budget resolution in favor of deficit reduction that lists every federal program as a possible source of savings but makes no hard choices. Procedurally innovative and substantively vacuous, § 304 is more important for its symbolism than for its substance.<sup>17</sup> Congress' explicit authorization of ancillary proceedings is at most a restrained endorsement of cooperation, persuasive only so long as domestic interests are not severely prejudiced.<sup>18</sup> How soon can we expect the situation to change? The American experience with bankruptcy suggests that patience is in order. Title 11 of the United States Code is so firmly a part of the contemporary legal landscape that we often forget that there was a significant period of time when we had no federal bankruptcy statute. The short-lived acts of 1800, 1841, and 1867 were all the product of acute domestic financial distress.<sup>19</sup> It took approximately 100 years to develop a consensus in the United States that one national insolvency regime was preferable to local proceedings. Today, many bankruptcy practitioners would find it convenient to move more aggressively toward a universal system of insolvency administration.

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16. 11 U.S.C. § 304(c) (1988).

17. Section 304 has much in common with § 2-302 of the Uniform Commercial Code. *See* U.C.C. § 2-302 (1994). Both sections provide new procedural frameworks for the resolution of important substantive matters (achieving international insolvency cooperation and regulating unconscionable bargains, respectively). Both are mainly important because of their general message (cooperation is good, bargains can be policed). Both fail to provide guidance for changes in substantive law. (UCC § 2-302 provides no statutory definition of unconscionability while § 304(c) contains so many factors that it is meaningless.) And both provisions have attracted an inordinate amount of academic attention. Interest in UCC § 2-302 peaked some years ago, and it no longer is a popular topic with law review writers. Perhaps a similar decline in interest awaits § 304.

18. Occasionally, American courts do not favor American creditors. *See, e.g.,* *Brittain v. United States Lines*, 884 F.2d 1566, 1568-69 (2d Cir. 1989) (refusing to grant relief to creditors seriously prejudiced by order of foreign court).

19. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 9 (1935).

Unfortunately, there is no indication of any broad-based public support for significant change through statute or treaty. It may take one or more international financial failures far greater than the collapse of the Maxwell empire, BCCI, or Olympia and York to convince all interested parties that something beyond modest unilateral accommodation efforts is in order.<sup>20</sup>

Even when the time for further integration of insolvency regimes through statute or treaty arrives, it will require a formidable effort to achieve change. Bankruptcy is no longer an arcane corner of the law, ignored by all but a few. Ever since the battle over bankruptcy court jurisdiction in the early 1980s, political forces have been evident that make significant reform very difficult to achieve.<sup>21</sup> I suspect that these political impediments to change will become more powerful in the years ahead. Bankruptcy law has become so important to the national economy that reform no longer can be left to a few academics and insolvency practitioners. To be sure, adverse political forces can be overcome. Contemporary disputes over bankruptcy policy are probably no more substantial than those which divided agrarian and banking interests in 1898. Even so, it will take a long time to build the consensus necessary for effective legislative action.

Disputes arising under nonbankruptcy regulatory laws complicate the process of increasing cooperation between insolvency regimes, particularly when an American or foreign regulatory statute is given extraterritorial effect by one jurisdiction. For example, several courts have recently dismissed pending securities fraud litigation against foreign debtors on the grounds of comity.<sup>22</sup> Some of these decisions have already been criticized on the ground "that a public policy approach to choice of law questions is more appropriate than an international comity approach," even when the

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20. A messy international bank failure was one of the factors contributing to the adoption of § 304. See Chin Kim & Jimmy C. Smith, *International Insolvencies: An English-American Comparison with an Analysis of Proposed Solutions*, 26 GEO. WASH. J. INT'L L. & ECON. 1, 14 (1992) (recounting the liquidation of Bankhaus I.D. Herstatt K.G.a.A., a West German bank, in which international creditors flooded the New York state courts seeking to attach the assets held by Chase Manhattan Bank, Herstatt's principal New York clearing bank).

21. There is no definitive history of the 1978-1984 battle over bankruptcy court jurisdiction. Two helpful sources are BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *POLITICS AND TEMPORALITY: AGENDA-SETTING IN UNITED STATES AND ENGLISH BANKRUPTCY LAW* (American Bar Foundation Working Paper No. 9213), and Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1 (1985).

22. See *Allstate Life Ins. Co. v. Lintner Group*, 994 F.2d 996 (2d Cir. 1993); *Zeidenberg v. Polly Peck Int'l*, [1991-1992 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 74,779 (S.D.N.Y. 1992); *Lindner Fund v. Polly Peck Int'l*, 143 B.R. 807 (S.D.N.Y. 1992).

request for comity comes from a foreign insolvency representative.<sup>23</sup> Any attempt to achieve greater cooperation between insolvency systems will certainly have to consider the effect of that cooperation upon related regulatory statutes,<sup>24</sup> particularly when a statute is ordinarily applied to activity occurring outside the enacting nation. Indeed, cooperation between insolvency systems would logically seem to be one of the last steps, rather than one of the first steps, in the integration and harmonization of commercial laws. As one observer of events in Europe has commented:

The fundamental problem is that different countries have different social ambitions for their insolvency laws. The French put great emphasis on protecting the rights of the workforce, and trying to save their jobs. German attempts to reform their antiquated laws have foundered, not least because of a refusal by the government to accept a weakening of deeply entrenched preferential rights which make almost all cases completely academic for the ordinary trade creditor. They are trying again. Almost every EC version of bankruptcy law excludes any concept of discharge, automatic or not, and the resulting 'clean slate' for the debtor: essentially, you remain bankrupt for life unless you pay your debts in full. One consequence is that these countries have far fewer personal insolvencies than the UK.

Any attempt at harmonizing insolvency law strikes at the heart of deep-seated cultural differences and legal codes founded on quite different principles. After company and commercial law, property law, contract law and family law have all been harmonized it might just be possible to get some broad agreement on what a common European insolvency law might look like. Pigs might also learn to fly.<sup>25</sup>

Elsewhere in this issue, Professor Karen Gross suggests that community issues should be taken into account when bankruptcy occurs.<sup>26</sup> Her position has substantial appeal. However, widespread acceptance of this view would further increase the possibility of intersystem conflict and decrease the possibility of significant international cooperation, at least in

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23. Lauren D. Rosenthal, *Rule 10b-5 and Transnational Bankruptcies: Whose Law Should Apply?*, 61 *FORDHAM L. REV.* S321, S347 (1993).

24. Public policy considerations have been relevant in other bankruptcy comity decisions. See *In re Banco Nacional de Obras y Servicios Publicos*, 91 B.R. 661 (Bankr. S.D.N.Y. 1988) (interpreting the effect of a collective bargaining agreement in a cross-border insolvency proceeding); *Interpool Ltd. v. Certain Freights of M/V Venture Star*, 102 B.R. 373, 377 (D.N.J. 1988), *appeal dismissed*, 878 F.2d 111 (3d Cir. 1989) (holding that Australian insolvency law did not provide sufficient due process protection to American creditors).

25. *Harmonizing European Insolvency Laws - A British Perspective*, reprinted in *WKLY. NEWS AND COMMENT, BANKR. CT. DEC.*, Dec. 10, 1992, at A3.

26. See Karen Gross, *The Need to Take Community Interests into Account in Bankruptcy: An Essay*, 72 *WASH. U. L.Q.* 1031 (1994).

the near term.

Finally, up to now, all of the commentary on § 304 has focused on the collapse of multinational business enterprises. This is understandable since there is only one significant recent case involving an individual debtor.<sup>27</sup> It is unlikely, however, that meaningful integration of insolvency systems, either by statute or treaty, can be accomplished without resolving the impact of integration on individual debtors. Overcoming this obstacle is likely to be difficult since nations differ substantially in their treatment of natural persons, both with regard to exemption entitlement and to discharge of obligation. When the first significant personal cross-border insolvency receives publicity, we will discover that requests for recognition of foreign proceedings relating to individuals raise entirely different issues than those relating to corporations.<sup>28</sup>

## II. A TEST CASE

The grant of a request for asset repatriation in circumstances potentially detrimental to American creditors would be a very significant expression of our willingness to cooperate in the administration of a foreign insolvency proceeding. In 1992, the Second Circuit had the opportunity to respond favorably to such a request. The outcome in *In re Koreag, Controle et Revision S.A.*<sup>29</sup> demonstrates that this influential Court of Appeals is presently unsympathetic to the universalist position.

The debtor in *Koreag*, Mebco, was engaged in currency exchange transactions with Refco. As part of a planned exchange, Refco deposited funds in Mebco's New York bank account. These deposits were made after a Swiss liquidation proceeding had been commenced. Refco was unaware of this fact. Mebco's liquidator sought a turnover of these postbankruptcy deposits through a § 304 proceeding. Refco opposed the request, arguing that it had a prior claim to the deposits as the beneficiary of a constructive trust. The Second Circuit refused to order an unconditional turnover, an action which would have permitted the Swiss court to resolve the

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27. *Goerg v. Parungao*, 930 F.2d 1563 (11th Cir. 1991) (concerning the ancillary administration of the estate of deceased German debtor).

28. The status of the marital home (England's version of the homestead) has caused "enormous problems" in the E.E.C.'s negotiations concerning a bankruptcy treaty. John D. Honsberger, *The Negotiation of a Bankruptcy Treaty*, in MERIDETH MEMORIAL LECTURES 303 (Faculty of Law, McGill University 1985). See also Roy Goode, *Reflections on the Harmonization of Commercial Law*, in COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS 16 (Ross Cranston & Roy Goode eds., 1993).

29. 961 F.2d 341 (2d Cir. 1992).



constructive trust dispute by applying either Swiss or New York law.<sup>30</sup> It also refused to apply Swiss law itself.<sup>31</sup> Instead, it remanded the case with instructions that the trial court determine whether Refco had a valid claim to the deposits under New York law as the beneficiary of a constructive trust. There is very strong language in the opinion favoring application of American law to resolve creditor claims before any repatriation of assets occurs.

Property interests have an independent legal source, antecedent to the distributive rules of bankruptcy administration, that determines in the first instance the interests of claimant parties in particular property. It logically follows that before a particular property may be turned over pursuant to § 304(b)(2), a bankruptcy court should apply local law to determine whether the debtor has a valid ownership interest in that property when the issue is properly posed by an adverse claimant.<sup>32</sup>

The use of equitable concepts such as the constructive trust to reorder distribution priorities is problematic even in ordinary domestic proceedings. Equity's devotion to bilateral fairness undercuts the egalitarianism of bankruptcy.<sup>33</sup> The conflict between these competing concepts of fairness becomes even more intense in international insolvencies when chauvinism increases the temptation to employ equitable principles in the protection of domestic interests.

There is, of course, no way to avoid this conflict. And no one can guarantee that a foreign tribunal will be any less chauvinistic than an American court. One must simply decide whether the gains to be achieved through a unitary administration abroad are greater than the risk of a possibly biased decision adverse to American interests.<sup>34</sup> The answer in *Koreag* is clear. Cooperation is not valued as highly as the protection of American creditors.

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30. *Id.* at 349.

31. *Id.* at 351.

32. *Id.* at 348.

33. The conflict between the constructive trust and bankruptcy distribution rules is well documented in Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297. Recently, the Sixth Circuit, in a very important opinion, criticized equitable constructive trust principles and refused to apply them to resolve a bankruptcy dispute. See *XL/Datacomp. v. Wilson (In re Omega Group, Inc.)*, 16 F.3d 1443 (6th Cir. 1994).

34. The best statement of arguments in favor of universalism is found in Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 464-71 (1991).

### III. WHAT NEXT?

The current modest level of cooperation is likely to continue for a long time unless there is a revival of interest in reciprocity as a condition for cooperation with a foreign insolvency regime. In recent years, courts have ignored *Hilton v. Guyot*,<sup>35</sup> the Supreme Court decision that first announced the reciprocity requirement, or have assumed compliance absent proof that reciprocity does not exist.<sup>36</sup> Now, the Third Circuit appears ready to revive this requirement in litigation related to a Dutch insolvency proceeding.<sup>37</sup> Reintroduction of a strictly enforced reciprocity requirement will sharply diminish cooperation with other insolvency regimes, particularly the United Kingdom.<sup>38</sup> This diminished cooperation in turn, may precipitate the type of business crisis needed to muster support for a fundamental change in the way we deal with cross-border insolvency problems. Absent such a crisis, the current fragmented, ad hoc approach will continue even though we can agree with the following observation by John Lowell:

It is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.

These remarks appeared in Volume 1 of the Harvard Law Review.<sup>39</sup> Not much has changed in the last 106 years!

### IV. A SOMEWHAT LESS PESSIMISTIC POSTSCRIPT

The conference draft of my paper ended at this point. I now would like to add a few less gloomy observations.

There are several possible models for the harmonization of our

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35. 159 U.S. 113 (1895).

36. See, e.g., *Cunard Steamship v. Salen Reefer Services AB*, 773 F.2d 452 (2d Cir. 1985).

37. See *Kilbarr Corp. v. Business Sys., Inc.*, 990 F.2d 83 (3d Cir. 1993).

38. The United Kingdom has the misfortune to be firmly on the record as opposed to cooperation in an important American bankruptcy proceeding. See *Felixstowe Dock and Ry. Co. v. U.S. Lines, Inc.* [1989], Q.B. 360. For an optimistic view that the situation is now improving, see Ian F. Fletcher, *The Ascendence of Comity from the Ashes of Felixstowe Dock*, *INSOLVENCY INTELLIGENCE*, Feb. 1993, at 10.

39. John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888).

insolvency laws.<sup>40</sup> We are currently pursuing an ad hoc approach with regard to the negotiation of bilateral and multilateral treaties. This method is probably the best that we can hope for in the foreseeable future. Indeed, this process may continue for many decades before it produces the universalist regime espoused by so many experts. Such a lengthy time frame is daunting. Is there anything the academic community can do to speed progress? I think there is.

Lack of trust is a serious barrier to meaningful international cooperation in any area, including insolvency. Trust in a foreign legal regime requires knowledge of how it functions.<sup>41</sup> It is not realistic to expect significant integration of national insolvency regimes until we have a firm understanding of, and sympathy for, what happens abroad—in England, in Japan, in Mexico, and elsewhere. Reading translations of foreign laws will not produce that understanding. More than a mastery of text is required. We need to know how foreign insolvency regimes actually function. What is the balance of power between creditors with secured and unsecured claims? To what extent does the system rely on adjudication for the resolution of disputes? Does the initial decisionmaker have more or less discretion than a bankruptcy judge? Are any administrators (public or private) well-trained, capable, and conscientious. Is the foreign procedure compatible with our notions of due process? Are creditors offered reasonable opportunities for oversight of the bankruptcy process? These and many other questions must be answered before we can make material progress toward international cooperation.

Expositions by foreign experts, no matter how skillful, are not likely to be completely satisfactory. Unless the writer is conversant with our bankruptcy process, she is not likely to concentrate on the aspects of the foreign system that will be of the most interest to us.<sup>42</sup>

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40. For an excellent discussion of various approaches to harmonization, see Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?*, 27 INT'L LAWYER 881 (1993).

41. Treaties appear to be most effective when the signatories share other relationships and are located fairly close to each other. The Nordic Bankruptcy Convention is a good example. See Michael Bogdar, *Report for Sweden*, in CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS 109, 117 (Ian F. Fletcher ed., 1990). For a description of three insolvency treaties, see Michael Prior & Nabarro Nathanson, *Bankruptcy Treaties Past, Present and Future, Their Failures and Successes*, in INSOLVENCY LAW THEORY AND PRACTICE 226 (Harry Rajak ed., 1993).

42. Ian Fletcher's observation concerning the structural and cultural differences between Chapter 11 and Administration Orders, see Ian F. Fletcher, *Commentary on Aghion, Hart, and Moore*, *Improving Bankruptcy Procedure*, 72 WASH. U. L.Q. 879 (1994), is an example of the type of insights we need. Professor Fletcher, of course, is very familiar with our bankruptcy system. His expertise concerning

At present, there is hardly any comparative bankruptcy scholarship by American academics, and practitioner authors tend to concentrate on the interface of national insolvency systems. Their work is often interesting and of high quality, but it fails to provide enough information on how foreign systems handle purely domestic financial failures. American academics could make a valuable contribution if they were willing to spend substantial amounts of time, six months or more, living abroad and studying the actual workings of foreign insolvency systems. The understanding that results from publication of the insights gained through this type of field investigation is essential if we hope to achieve greater harmonization of our bankruptcy laws. And this is the type of project that academics, free of the need to serve clients each day, are especially qualified to pursue.

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American procedures should not surprise us. He has both studied and taught law in the United States.

