American Bankruptcy Institute Law Review

Volume 10 Number 1 Spring 2002

Book Review

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reviewing

Samuel L. Bufford, Louise DeCarl Adler, Sidney B. Brooks, & Marcia S. Krieger, International Insolvency (Federal Judicial Center 2001)

International insolvency is still a mysterious and esoteric practice area, populated by a relatively small number of insiders all of whom are intimately familiar with the unique concepts and rules, and all of whom seem to know one another very well. For the rest of the universe of bankruptcy professionals and judges, the lingo is odd and unfamiliar, the special practices truly foreign. What, after all, is the average bankruptcy judge to make of notions like recognition, hotchpot, and protocol in the bankruptcy context?

Those as yet not already initiated into the special rites of transnational insolvency will thus welcome *International Insolvency*, [2] a publication written by members of the International Law Relations Committee on behalf of the Federal Judicial Center. This little monograph (it runs a mere 97 pages of text, not counting the appendices) attempts to part the curtain and admit the rest of the judiciary to the inner sanctum of international insolvency practice. The preface candidly explains that "... the sources of law on this subject [international insolvency] are undergoing rapid change ...." Thus, in one sense, the publication faces the real danger of being out of date within a year or two of its publication. Still, its authors have endeavored to be as current as possible, including discussions of, for example, the European Union Regulation on Insolvency Proceedings, set to become binding in May 2002. Indeed it might even be said that the greatest value of the publication lies in its collecting, in one short, relatively easily digestible volume, virtually the entire panoply of issues, principle authorities, and major source materials in the field. For any judge who has ever faced cross−border insolvency issues, that alone will prove to be the publication's principle value, because one of the greatest challenges for judges − especially judges who have not been actively involved in the area − is knowing what is out there already, and knowing how to find it. On this last point, the volume is especially valuable for its appendix, which includes a copy of the UNCITRAL Model Law on Cross−Border Insolvency, a copy of the EU Regulation on Transnational Insolvencies, and the Cross−Border Insolvency Concordat published by Committee J of the International Bar Association. None of these documents are readily available to most federal bankruptcy judges − either in their own law libraries or via online research facilities.

The volume is organized sensibly, beginning with an overview of the essential features of international insolvency cases, and an explanation of the fundamental competing theoretical constructs that generate the difficulties in this area of the law. The authors [3] correctly note at the outset the daunting challenge that they faced in preparing this monograph: "One of the most noteworthy features of international bankruptcy law is the lack of legal structures, either formal or informal, to deal with an insolvency that crosses national borders." [4] That reality, more than any other, shapes the rest of what the authors have to say, for there are indeed far too few legal structures to guide practice in this area, and virtually no current global agreements that one could call binding. [5]

There is a reason, of course, for why the rules for transnational insolvency proceedings are so very amorphous and, in some respects, *ad hoc*. Though we may indeed live in a global village in some respects, in many others, we still inhabit a world as fractured and internecine today as it was a thousand years ago. Current events remind us again and

again that, in the dialectic that Thomas Friedman described in his book, *The Lexus and the Olive Tree*, [6] the "progress" of history is hardly linear and inexorable. If we are approaching global harmonization in any area of discourse of commerce, be it law or business, we seem capable of achieving little more than fits and starts. Countries and peoples still too often emphasize national and cultural identity over international cooperation and the idea of the family of man, erecting political and economic walls against one another (all too often with disastrous consequences that hardly need detailing here, given the events of the last year).

The relatively dry and arcane world of international insolvency in fact mirrors a story that is being played out in newspapers and television news programs worldwide. Some nations, judges, practitioners, and commentators see a world made better by principles of globalization, with unitary principles driving outcomes, irrespective of local law, a kind of super−legal regimen. Others fear the kinds of exploitation that have, for centuries, disguised themselves as "the march of progress." They scurry to erect local barriers against foreign incursions. Or (the obverse side of the same coin) there are those who see their own storied history and legal culture as worthy of protection against dilution and the mediocrity that they see flowing inexorably from all efforts to harmonize laws, and so resist globalization on anything other than their own terms. These are impulses not unique to our little legal corner of the globe. It should be no surprise to anyone that, when these impulses clash, they generate the same kinds of seemingly intractable difficulties.

The monograph appreciates these difficulties, though its writing style makes the conflict seem far more sanguine: "Multinational insolvency proceedings frequently result in competing interests among the jurisdictions involved." [7] Perhaps that tone is the better one to take, though, for the uninitiated reader, it also masks the intensity that can sometimes mark a given nation's sense of protectionism about its local rules and practices in the insolvency arena. The monograph more moderately explains that

Under the universality approach ... an international insolvency case is treated, insofar as possible, as a single case and the creditors treated equally wherever they may be located. Under the territoriality approach, each country looks out for its own creditors before contributing assets to pay creditors in other countries.

... Territoriality takes the pessimistic view that local claimants ultimately will not receive their fair share of the assets in a foreign insolvency. Consequently, under this approach a local court must provide for these creditors as well as possible, given the assets within the court's jurisdiction.

... Universality is based on the assumption that, without coordination of laws and courts of different jurisdictions in transnational cases, the optimal use and distribution of assets cannot be accomplished, and asset waste and turmoil are certain to result. [8]

Those who have been actively involved in this area of the law, especially with the efforts at coming up with binding international principles to govern cross−border insolvency proceedings, appreciate that, in actual practice, the territorial barriers can in fact be daunting. [9] The judges who will be using this publication, however, probably have little need for much more than a superficial understanding of the basic driving principles. The authors of the monograph elected to prepare a work that would likely be used in practice, and so opted for brevity. Those looking for a more nuanced treatment of the basic principles that have driven this debate and the development of the law thus far should look elsewhere. That is not the articulated purpose of this publication.

The meat of the monograph is organized around three major themes. First, the authors discuss issues that are expected to arise either when the judge has a domestic case with assets or claims (or perhaps even foreign subsidiaries) in other countries, or when the judge is asked to deal with an aspect of a foreign insolvency proceeding − most commonly arising when a foreign representative seeks assistance by way of an ancillary proceeding under section 304 of the U.S. Bankruptcy Code. Next, the authors survey the recent efforts at developing principles and rules for handling cross−border insolvencies, summarizing the UNCITRAL Model Law on Cross−Border Insolvency, the European Union Regulation on Insolvency Proceedings, the American Law Institute's Transnational Insolvency Project, proposing principles to be used among the member NAFTA nations, and the seminal work of Committee J of the International Bar Association (which developed the Concordat that has served as the template for protocols actually employed in a number of transnational insolvency cases).

In the third and final section, occupying a scant six pages, the monograph finally gets to the issues most likely to have driven the average judge to pick up the book in the first place. Here, the authors survey − in all too brief and cursory a fashion to be truly useful, it seems − the procedural challenges that face any judge handling a transnational insolvency case. In this section, the command to the contributing authors to be brief seems to have been taken too seriously, and has resulted in a treatment that is, as a practical matter, far too cursory to be truly useful to sitting judges. The issues selected for review [10] are indeed the issues that do in fact arise (not surprising given the authors' hands−on familiarity with these kinds of cases). However, the discussion offered lacks sufficient detail to be of any real use. For example, the appropriateness of the venue selected for initiating a main case occupies but a few brief paragraphs, though the implications for the judge in practice are highly complex. How, for example, is this issue likely to arise? Will it arise before the U.S. bankruptcy judge? What choices does the U.S. judge have if the court decides that the United States is not the proper forum? What choices (and implications) are presented if the judge decides that the United States *is* the true center of main interests? Would not a judge turning to this part of the monograph expect to find a discussion of section 305, which authorizes a judge to dismiss a local proceeding in favor of the administration of a foreign proceeding? [11] Though there is an excellent discussion earlier in the book about section 305, the lack of a cross−reference within this section to that discussion is startling, especially as this is the section to which savvy judges are most likely first to turn to.

A similar criticism applies to this section's treatment of the remaining procedural topics − all important but all both too brief and too lacking in cross−referencing to the earlier, more detailed discussion to be of real use to a sitting judge.

Of all the procedural topics that are covered in this section, the one that most deserved a fuller discussion was communication between judges. Most U.S. judges are unlikely to appreciate the intensity of feeling that many judges in other nations have about the impropriety of such communications. [12] Yet the brief discussion of the topic invites just such communications, without discussing the numerous alternatives that might be available − directing the preparation and delivery of transcripts of proceedings, for example, or detailing findings in a court order, with directives to counsel that it be served on the court administering the companion foreign proceeding − all alternatives that might prove less aggressive and more palatable to our colleagues who serve in civil law jurisdictions. These intensely practical tips are, it seems, what most judges will be hoping to find when they pick up this volume, but which are missing in this first edition. Perhaps another edition − likely to be published anyway, given the need to update in order to keep up with current developments in this fast moving area − could explore in greater detail the alternative approaches that have already been successfully employed in transnational cases to date.

A later edition might also want to add to this section a discussion of the process by which a protocol could (or should) be encouraged and developed by the court. [13] While they are not a panacea, protocols have proven to be a useful tool in a variety of transnational insolvency cases. A small but growing body of practitioners is familiar with their essential features and function, and are likely to be able to negotiate their essential terms with the principal players in the case. For the judge new to such cases, however, [14] the entire process is likely to appear mysterious. What is more, the request to adopt a protocol, if urged first by the lawyers without the prior involvement of the judge, may look to the uninitiated judicial officer rather like coloring outside the lines. The monograph could significantly improve the sophistication and skill of the bench in such cases by exploring in greater detail not only what protocols are, but also how they might be adopted, how they can be made to work effectively, and what their limitations might be.

This review has worked in reverse order, discussing this third major area of the monograph's concentration first because this is the section to which judges are most likely to turn if they use this monograph as an aid in handling a transnational insolvency case that has landed on their desk. The second major area of the monograph's concentration, by contrast, provides excellent insight into recent advances in furnishing effective rules for handling cross−border insolvencies, surveying the work of the United Nations, the European Union, the American Law Institute, and the International Bar Association (Committee J). A judge looking for practical guidance in handling a case may actually best be served by reviewing this portion of the monograph, because here, distilled, is the best thinking and work product of some of the most skilled and experienced minds in this area of the law. In addition, the EU Regulation, the UNCITRAL Model Law, and the Committee J Concordat are included as appendices, giving judges ready access to the actual language of these otherwise difficult to procure documents. Users of this text may find the greatest value in being able to cite to these appendices when writing opinions and deciding issues before them. Closer study of these

documents may also help to influence the way judges actually shape transnational cases, a process that, in many ways, in turn lends greater credence and acceptance to what are otherwise simply prescriptive or aspirational statements of principle.

The first section of the monograph provides the most substance of all to judges, giving to them (and their law clerks) a ready source of law, collected in a single easily accessible document, for handling many of the legal issues presented to judges in transnational cases. There are two parts to this section (though the organization of the book does not, in fact, describe this as a single section with two parts). The second section is the part most likely to be of practical use to judges handling transnational cases, as this how such cases are most likely to show up before the court. However, the first section offers some insight into matters that a judge handling a domestic case with international aspects is likely to face, an equally useful discussion.

Strong as is much of the content in these first two sections, however, it suffers from what must be poor editing. For example, the text uses occasionally misleading lead−ins that are likely to confuse a judge not already familiar with this area of law. The section denominated "Domestic Cases and Proceedings with Transnational Aspects" one would think covers U.S. case filings with transnational aspects. Yet the lead paragraph refers to "two kinds of proceedings" available "for transnational insolvency cases," one of which it identifies as an ancillary proceedings opened under section 304. This is misleading because this second kind of case really has nothing to do with "domestic cases with transnational aspects." It belongs instead in the next major section (the one entitled "Foreign Cases with Domestic Aspects"). [15] This sort of misdirection is unfortunate, because it creates unwarranted confusion in the mind of the reader. A better lead−in might have alerted the reader to the "point of view" issue in all transnational insolvency cases (*e.g.*, what is local to the U.S. judge is foreign to the representative of a proceeding pending in another country), then signaled the monograph's intent to focus on issues from the point of view of the U.S. judge, starting with local cases with foreign implications, then later discussing foreign cases with local implications. That approach would have avoided confusion. Perhaps the next edition can address these lead−in and transition problems. [16]

Sometimes, too, the text seems to forget its primary target audience − U.S. judges who may be called upon to handle cases with transnational aspects. The discussion of jurisdiction sharing between district and bankruptcy judges must surely be aimed at foreign judges and practitioners, for it is difficult to belief that any U.S. bankruptcy judge today (especially one who is getting ready to handle an international insolvency) is unaware of this most basic of issues regarding what bankruptcy judges can and cannot do as judges. Too, the discussion of assets abroad starts with the unnecessarily simplistic statement that "[t]he filing of a bankruptcy case in the United States creates an estate ..." − unless the target audience is foreign judges. Confusion over the target audience makes it more difficult to know when the text is saying something important for the U.S. judge to know and when it is instead talking to foreign judges. That, in turn, makes the text less useful for U.S. judges who are trying to get up to speed on these issues with respect to cases actually pending before them. Again, a later edition could easily remedy this problem.

Reading past these problems, however, one finds a nicely compact rendition of the essential issues likely to be of concern to a judge handling a domestic case with transnational aspects. The very size of the monograph prevented greater detail, but the discussion of the various issues is compact, with excellent references for further research contained in the footnotes. The authors discuss the extraterritorial reach (if any) of U.S. jurisdiction, the automatic stay and the discharge injunction, give a highlight of how avoidance powers might play out in a foreign proceeding, and explain the difficulties that foreign jurisdictions are likely to have in recognizing our debtor−in−possession. In an all−too−brief subsection, the authors talk about initiating ancillary proceedings in a foreign jurisdiction to extend the reach of the estate to administer assets. This section makes up for its brevity with helpful reference to the UNCITRAL Model Law, though it would have been good if the authors had noted the adoption of the Model Law in Mexico and Japan. [17]

The subsection that discusses issues arising when a foreign insolvency proceeding seeks assistance in the United States is the strongest and most straightforward piece of the book, due in no small part to the relatively coherent body of law that has built up in the United States around the application of sections 304 and 305 of the U.S. Bankruptcy Code. If there is a quibble, it is with the authors' failing to exploit the opportunity to explain in a clear and cogent fashion the practical operation of section 304. The case law is inconsistent on the question whether, for example, the recognition of a foreign representative ought to be governed by the six factors set out in section 304(c), or whether

instead those factors apply only to deciding whether the relief the representative seeks should be granted. [18] The procedure section follows *Collier*, which elides the recognition step, governed by section 304(a), with the relief step, governed by section 304(b). [19] A few courts recognize that, in fact, the section 304(c) factors apply only to the relief step, so that denial of relief does not necessarily mandate dismissal of the petition. [20] Thus, it is not necessary that a foreign representative initiate a new section 304 petition for every new form of relief it might need. [21]

Yet this is a small quibble indeed. The monograph's discussion of section 304 and its operation is thorough, succinct, and well−organized, and will be warmly welcomed by sitting judges. They will also be grateful for the survey of worldwide efforts at developing uniform rules for handling transnational insolvencies. They will be glad to have this little volume, just so they have quick and ready access to the UNCITRAL Model Law on Cross−Border Insolvency, to Committee J's Concordat, and perhaps even to the European Union's Regulation on Insolvency Proceedings. Hopefully, the authors of this little volume will, in the not too distant future, publish a second edition, adding new developments, smoothing out the writing in places, and fleshing out the Procedural Issues section. Meantime, this monograph fills an important role. There is literally nothing else quite like it out there, and lawyers will be wanting their own "little blue book" just like the one the FJC sent out to all the bankruptcy judges in the United States.

Footnotes:

[1] Hon Leif M. Clark, U.S. Bankruptcy Court, San Antonio, Texas. Back To Text

[2] Samuel L. Bufford et al., International Insolvency (Federal Judicial Center) (2001). Back To Text

[3] The principle draftsperson of the monograph was Judge Samuel L. Bufford, a U.S. Bankruptcy Judge sitting in Los Angeles, who has been an active participant in the multinational efforts to harmonize some of the working principles that ought to govern in the area. He has a thorough working knowledge of the issues, making him perhaps the most credible choice for draftsperson that the Federal Judicial Center could have hoped for. The other members of the International Judicial Relations Committee who contributed were Bankruptcy Judges Louise DeCarl Adler (S.D.Cal.), Sidney B. Brooks (D.Colo), and former bankruptcy judge and now U.S. District Judge Marcia S. Krieger (D.Colo.). Back To Text

[4] International Insolvency, at 1. Back To Text

[5] See Lucian Arye Bebchuk & Andrew T. Guzman, An Economic Analysis of Transnational Bankruptcies, 42 J.L. & Econ. 775, 775 (1999). Back To Text

[6] Thomas L. Friedman, The Lexus and the Olive Tree (Farrar, Straus & Giroux) (2000). Back To Text

[7] Id. at 3. Back To Text

[8] Id. at 3−4. Back To Text

[9] See Jay L. Westbrook, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum, 65 Am. Bankr. L.J. 457, 460−61 (1991). Back To Text

[10] The issues covered are (1) appropriate venue for the case, (2) notice to creditors, (3) communications between judges, (4) conflict of laws, and (5) distribution to creditors. Id. at 91−96. Back To Text

[11] See 1 U.S.C. § 305 (1994) (permitting judge to dismiss local case when there is another foreign proceeding already pending, involving same entity). Back To Text

[12] See INSOL International, Judicial Colloquium, (1994); see also The American Law Institute, Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement, at 79−81 (Tent. Draft, April 14, 2000). Back To Text

[13] The previous section of the monograph briefly describes what a protocol is at the conclusion of the discussion of the work of Committee J of the International Bar Association. Telling a judge what a protocol is is a good start, but it hardly begins to deal with the myriad justifiable questions any judge is likely to have about protocols once they know what they are. Back To Text

[14] The intended target for this monograph is, according to the preface, federal judges (especially bankruptcy judges) who may be faced with cases with international insolvency implications, and who need both some guidance and some access to the available materials in the area. See International Insolvency, supra, at v. Back To Text

[15] Id. at 7. Back To Text

[16] The introductory paragraphs to the second section, involving foreign cases with domestic aspects, by contrast, are quite a bit clearer, though a heading to the third introductory paragraph, indicating that it referred to the first of two major choices to be made by a foreign representative (file a full−blown case in the United States, or simply seek more limited ancillary relief from the U.S. court), would have been even more clear. See id. at 25−26. Back To Text

[17] It may have been that the printing schedule for the monograph prevented reference to these relatively recent events. Back To Text

[18] Compare In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982), with In re Fracmaster, Ltd., 237 B.R. 627 (Bankr. E.D.Tex. 1999). Back To Text

[19] See International Insolvency, at 44 (citing to 9 Collier on Bankruptcy, &1010.03 (15th ed. 2000)). Back To Text

[20] See, e.g., In re Len Blackwell, Liquidator for I.G. Services, Ltd., 270 B.R. 814 (Bankr. W.D.Tex. 2001). Back To Text

[21] Thus, for example, a foreign representative's efforts to remove an asset governed by a security interest to the jurisdiction of a foreign court might be rejected, though the same representative's subsequent efforts to enjoin the creditor's efforts to sell the asset might be granted. Both requests for relief ought to be brought under the aegis of the single ancillary petition, even if they are asserted at different times. See In re Len Blackwell, Liquidator for I.G. Services, Ltd., 270 B.R. 814 (Bankr. W.D.Tex. 2001). Back To Text