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The Second Decade

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## Introduction to the Symposium

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## INTRODUCTION

*Neil B. Cohen,\* Michael A. Gerber,\*\* & Edward J. Janger\*\*\**

This Symposium is a tribute to the late Professor Barry L. Zaretsky (1950-1997). Barry was a member of the Brooklyn Law School faculty for nineteen years. He was a teacher and mentor to countless Brooklyn Law School students, as well as a distinguished bankruptcy and commercial law scholar. He was also a good friend to many of the authors who have contributed to this volume.

In 1996, Barry and Ian Fletcher, then of Queen Mary and Westfield College, University of London, organized the first symposium entitled *Bankruptcy in the Global Village*. Professor Fletcher describes the context of that symposium in his contribution to this volume. That conference occurred at a time when there was much lawmaking activity in the area of international insolvency. However, none of the ongoing projects had yet borne fruit. The American Law Institute's *NAFTA Insolvency Project* was in full swing, but was years away from producing the influential *Principles of Cooperation Among NAFTA Countries*. The European Union's *Insolvency Convention* had stalled, and was consigned to a limbo from which it emerged only in 2002. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvencies was still over a year away from endorsement by the General Assembly.

Since 1996, much has changed. The initiatives of the first wave, in process in 1996, are now operational. The *NAFTA Principles* were published in 2003. The UNCITRAL Model Law has been adopted by nine countries, including—with the enactment of Chapter 15 in 2005—the United States. In 2000, the European Union promulgated a regulation based on the *Insolvency Convention* that went into force in 2002 and now governs insolvencies in EU member states. The first-wave initiatives had a common theme. Each of the various harmonization efforts was procedural in nature—designed to create rules and mechanisms that would allow courts to coordinate their efforts in cross-border insolvency cases. Substance, of course, was lurking just around the corner, and the second wave of international bankruptcy law reform efforts has focused in that direction. UNCITRAL has completed a Legislative Guide on insolvency law, and is preparing one on the law of secured credit, to name just two of the ongoing initiatives. UNIDROIT, the World Bank, and others have reform efforts underway in the areas of both bankruptcy and secured

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credit. Meanwhile, practice has continued to develop with cross-border cases becoming increasingly common.

The Articles in this volume are wide ranging, but we have organized them into four conceptual clusters. The first cluster consists of the Key-note by Professor Paulus, and Articles by Professors Fletcher, Pottow, and Janger. Professor Paulus explores and evaluates efforts by multilateral institutions to harmonize substantive bankruptcy law during the last decade. Fletcher, Pottow, and Janger also take stock of the developments of the last decade, and consider how best and how far to push multilateral harmonization efforts forward. The second set of papers focuses attention on the current efforts to harmonize substantive law. Professors Block-Lieb and Halliday explore the novel approach to harmonization used by UNCITRAL in the Legislative Guide on Insolvency. Professor Harris and Nick Segal each examine the interaction between bankruptcy law and the law of secured credit, with attention to the effect of substantive legal differences on bankruptcy cases. Finally, Professor Rasmussen suggests that market convergence may make legal harmonization unnecessary. The third cluster looks at the role of choice of law in cross-border cases. Gabriel Moss explores recent cases under the EU Insolvency Regulation that have struggled with the problem of defining a debtor's center of main interest, while Professor Westbrook explores both how the center of main interest should be determined and what questions should be determined by a debtor's forum choice. Finally, the last cluster of papers is in the nature of two epilogues: one focused on practice and the other on lawmaking. Professor Ziegel explores the evolution of Canada-U.S. cross-border cases under the NAFTA principles and the newly adopted Chapter 15, while Professor Halliday explores the determinants for a successful international insolvency lawmaking initiative and makes some predictions and suggestions for the various ongoing lawmaking efforts.

The Articles build on the work of the first symposium, and we hope that they are as helpful to the ongoing development of global bankruptcy law and practice. Those of us who participated in the symposium this past October were continually aware of Barry Zaretsky's absence, and of his presence. He would have enjoyed himself. We missed him, and we thank him for providing, yet again, an opportunity to explore a topic that he found (and made) interesting.