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Barry L. Zaretsky

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SYMPOSIUM

TRANSNATIONAL INSOLVENCY: A MULTINATIONAL VIEW OF BANKRUPTCY

INTRODUCTION

*Barry L. Zaretsky**

Commercial enterprises take risks as a means of generating profit. Although an enterprise may limit itself to prudent risks, the nature of risk is such that some ventures will fail. Bankruptcy law provides the means by which the assets of a commercial enterprise can be equitably distributed among creditors when a venture has failed and the enterprise is unable to satisfy fully the claims of all its creditors. Because most countries have comprehensive bankruptcy rules and procedures, there is reasonable assurance that a domestic enterprise's assets will be equitably distributed in a bankruptcy proceeding. However, the equitable distribution concept tends to vary among jurisdictions. Some jurisdictions accord priority to certain claims that would not receive priority in other jurisdictions. Consequently, when an enterprise's business implicates more than one nation, significant conflict of laws issues arise with respect to which nation's bankruptcy provisions will govern the gathering and distribution of available assets.

As international business transactions have become larger and more frequent, international enterprises have become more common. This has resulted in increased interest in, and concern with, resolution of the various issues that arise when more than one nation's bankruptcy laws are implicated in the failure of an enterprise.

In this symposium sponsored by the *Brooklyn Journal of International Law*, four prominent authors address some of the issues involved in international bankruptcies. In general, these issues involve general conflict of laws issues in the international business arena and the degree to which nations will cooperate in

* Professor of Law, Brooklyn Law School.

transnational bankruptcies. Two of the articles focus in different ways on what is probably the most difficult issue in international bankruptcy — the treatment of claims and their priorities. When a debtor has assets and liabilities in one jurisdiction but is principally located in another jurisdiction, it must be determined whether the law of the principal jurisdiction or the law of the other jurisdiction will govern the distribution of assets in the nonprincipal jurisdiction. A jurisdiction may adopt a territorial approach, retaining local assets for the benefit of local creditors under a local priority structure, or a universality approach, in which the various local jurisdictions yield to the rules and structure of the debtor's principal location. A third possibility is a modified universality approach, in which local jurisdictions yield to the rules and structure of the principal location as long as those rules do not seriously conflict with the local approach.

Daniel M. Glosband and Christopher T. Katucki describe the issues involved in determining which jurisdiction's claims and priority structure will govern the distribution of available assets. They then analyze the United States approach to the recognition of foreign bankruptcy law and trace the evolution from territoriality theory to at least a modified universality approach.

Professor Jay Lawrence Westbrook focuses on conflicts with respect to a bankruptcy trustee's power to avoid payments made and transactions entered into prior to the commencement of a bankruptcy proceeding. He suggests that resolution of the avoidance power conflict is directly related to resolution of the claims and priority issues because avoidance of a transfer restores the property to the bankruptcy estate, presumably for distribution under the applicable claims and priority structure. Consequently, only if we know how property will ultimately be distributed can we determine whether the use of local law or principal jurisdiction law is applicable.

Finally, Professor Jacob S. Ziegel offers a comparative perspective by describing the Canadian approach to bankruptcy. This article provides the analysis that would be necessary in order to determine, particularly under the modified universality approach that seems to have been adopted by United States bankruptcy law is section 304 of the Bankruptcy Code, whether the Canadian and United States bankruptcy systems are sufficiently consistent to permit one to yield to the other in transnational bankruptcies. It also describes the Canadian approach to transnational bankruptcy and, in that regard, provides an inter-

esting contrast between the common-law provinces and Quebec with respect to the domestic recognition of foreign bankruptcy orders.

