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Foreword (The Sixth Annual Ernst C. Stiefel Symposium)

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FOREWORD

*Aleta G. Estreicher & Karen Gross**

There are many things to consider when planning a symposium, including its content, focus, approach, audience, format, and style. Although often unarticulated, such variables give events their personalities, and we wanted “ours”¹ to reflect what we consider important. First and foremost, we tried to design an innovative and thoughtful foray into comparative law analysis.² We hope that those who attended as well as the readers of this symposium issue will agree that we succeeded.

With regard to content, we chose to concentrate on emerging nations. The particular nations represented at this symposium (with the exception of the United States) are in various stages of transformation into fully developed market economies.³ Such nations, rightly or wrongly, often look to more developed nations—ours, for example—for guidance. Corporate and bankruptcy law (not coincidentally our respective areas of interest and expertise) are particularly novel and useful vehicles for engaging in comparative analyses. Moreover, we felt that such analyses are long overdue, since although there is scholarship about each nation separately,⁴

* Professors Estreicher and Gross teach at New York Law School and coordinated this conference together.

1. Although we use the term “ours,” the symposium was made possible by the generosity of Dr. Ernst C. Stiefel and the dedicated efforts of the members of the *New York Law School Journal of International and Comparative Law*, which organized and ran it.

2. Indeed, there has been remarkably little written on how to think from a comparative law perspective. See, e.g., George G. Triantis, *The Careful Use of Comparative Law Data: The Case of Corporate Insolvency Systems*, 17 N.Y.L.SCH. J. INT’L & COMP. LAW 193 (1997) [hereinafter Triantis, *The Careful Use*]; George G. Triantis & Lynn LoPucki, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT’L L.J. 267 (1994).

3. The emerging nations studied included: Argentina, China, Hungary, Romania, Korea, Mexico and South Africa.

4. This observation stands in sharp contrast to the comparative constitutional law field, which has generated a rich, ever-increasing body of scholarship. See, e.g., GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, &*

until recent years, there has been remarkably little cross-border dialogue, debate, or writing in the corporate and bankruptcy areas.⁵

Any comparative legal analysis can be directed at a micro and/or macro level. While corporate and bankruptcy law raise myriad important “micro” issues, this symposium focused on basic structural concerns of general applicability. For example, the panelists addressed whether a business in financial difficulty can liquidate or reorganize or both, and who makes that choice;⁶ they did not attempt to consider the details—either substantive or procedural—of confirming a plan of reorganization.⁷ Similarly, in the corporate context, the program addressed the available options for organizing or restructuring a business⁸ rather than detailing the minutiae of business agreements or the process of securities registration.⁹ This focus enabled the participants to identify values, cultural norms, and business and/or legal practices endemic to the countries they represented; moreover, it prompted us to reexamine the soundness of basing our law models on U.S. principles (or, indeed, on the laws of any other developed nation).

OUTCOMES (1996); POLITICAL CULTURE & CONSTITUTIONALISM: A COMPARATIVE APPROACH (Daniel P. Franklin & Michael J. Baun eds., 1994); MARIAN C. MCKENNA, THE CANADIAN & AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE (1993); COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE & AMERICA (Mark V. Tushnet ed., 1990); MAHENDRA P. SINGH, COMPARATIVE CONSTITUTIONAL LAW (1990); MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW (1980); B.B. GUPTA, COMPARATIVE STUDY OF SIX LIVING CONSTITUTIONS: BRITAIN, FRANCE, INDIA, SWITZERLAND, RUSSIA & U.S.A. (1976).

5. See Triantis, *The Careful Use*, *supra* note 2, at 195.

6. Among the articles included in this issue are: Samuel L. Bufford, *Romanian Bankruptcy Law: A Central European Example*; Jerome S. Cohen, *The Chinese Legal System: A Primer for Investors*; James L. Garrity, Jr. & Karen P. Ramdhanie, *Korean Bankruptcy Law: Heavy Duty Hypothetical Applied*; Richard A. Gitlin & Timothy B. DeSieno, *Bankruptcy Laws of South Africa*; Karen Gross & Matthew S. Barr, *Bankruptcy Solutions in the United States: An Overview*; Eduardo R. Martinez, *Mexican Bankruptcy Law: The Legal Effects of Bankruptcy and Suspension of Payments*; Triantis, *The Careful Use*, *supra* note 2.

7. Some of these details have been addressed by the panelists in their written responses in this issue. See articles cited *supra* note 6.

8. See in this issue Katherine Ashton & Dr. Zsuzsa Kovács, *Corporate Development in Emerging Nations: Hungary*; Juan M. Dobson, *Reflections on Heavy Duty Argentina II*; Aleta G. Estreicher & Warren S. Green, *Heavy Duty II: Forming a Business Entity in the United States*; Ann F. Thomas, *Square Wheels: U.S. Pass-Through Taxation of Privately Held Enterprises in a Comparative Law Context*; Bruce Wolfson & Warren S. Green, *Financing Heavy Duty II: Accessing the U.S. Capital Markets*.

9. Again, some of the details have been addressed in the articles in this issue. See sources cited *supra* note 8.

Our approach to the material was dialogic: the panelists interacted with one another on an issue-by-issue basis. While the “talking heads” approach may have merit in certain situations (and is regrettably quite common when there are speakers from different parts of the world¹⁰), comparative analysis calls out for continuous exchanges of ideas. Dialogue also exposes the disjuncture between theory and practice both within individual nations and among the various nations represented.¹¹

As to anticipated audience, all too frequently programs speak to a narrow professional group. This symposium was directed at scholars and practitioners of corporate and bankruptcy law¹² as well as international and comparative law.¹³ It was also of interest to bankruptcy judges,¹⁴ particularly in light of the ever growing number of cross-border insolvencies.¹⁵ But, perhaps most importantly, we wanted to engage the business community in the dialogue, given the number of American businesses that are seeking to invest in the emerging nations.¹⁶

In keeping with our desire to avoid a series of discrete speeches, we decided to build our symposium around a “Master Hypothetical”¹⁷ that presented the panelists with a family-owned and managed manufacturing firm, Heavy Duty, suffering serious financial difficulties. The first panel—our bankruptcy experts—discussed Heavy Duty’s options in bankruptcy. The second panel—our corporate law experts—presented the

10. There are several reasons for this. First, the planning and coordination of events including an international array of participants is difficult. And second, the norm for such scholarship in many nations involves the serial presentation of formal papers.

11. See Triantis, *The Careful Use*, *supra* note 2, at 205.

12. Many of our panelists fall within this category: Katherine Ashton, Jerome Cohen, Juan Dobson, Eduardo Martinez, Richard Gitlin, Ann Thomas and Bruce Wolfson.

13. In this category we include Dr. Stiefel, sponsor of the symposium and renowned international scholar. Professor Jerome Cohen, cited above, fits into both categories.

14. Judges participating on the Panels include, Hon. Samuel L. Bufford, United States Bankruptcy Court Judge, Central District of California, and Hon. James L. Garrity, United States Bankruptcy Court Judge, Southern District of New York.

15. See, e.g., *In re Maxwell*, 93 F.3d 1036 (2nd Cir. 1996); *In re Hackett*, 184 B.R. 656 (Bankr. S.D.N.Y. 1995); *Philadelphia Gear Corp. v. Philadelphia Gear De Mexico*, 44 F.3d 187 (3rd Cir. 1994); *In re G.C.K.*, 170 B.R. 838 (Bankr. S.D.N.Y. 1994). Recently, the International Bar Association has developed a “Concordat” which sets forth guidelines for the treatment of cross-border insolvencies. See Mike Sigal et al., *The Law and Practice of International Insolvencies, Including a Draft Cross-Border Insolvency Concordat*, in ANNUAL SURVEY OF BANKRUPTCY LAW 1 (William L. Norton, Jr. et al. eds., 1994).

16. Currently, U.S. private investment in the developing world is approximately \$130 billion. See U.S. DEP’T OF COM., SURVEY OF CURRENT BUSINESS, Sept. 1996, at 124-25.

17. See SYMPOSIUM HYPOTHETICAL: HEAVY DUTY.

options for restructuring Heavy Duty once it emerged from its insolvency and regained financial stability. Although the order of presentation (bankruptcy first, restructuring second) departs from the usual pattern in the United States (where one sees formation first and bankruptcy second), the reality in many emerging nations more closely resembles our hypothetical. In fact, many pre-existing (perhaps once state-owned) but financially unhealthy firms in such nations undergo some sort of insolvency proceeding and emerge in a different form.

As for style, we wanted the program to be as accessible, informal, interactive and inclusive as we could make it. To that end, we invited applicants from across the United States and abroad to apply for scholarships (funded by Dr. Ernst C. Stiefel, our sponsor and benefactor) to attend and participate in both the program and this symposium issue.¹⁸ The luncheon, which recognized Dennis J. Cougal, the President of INSOL,¹⁹ was also intended to foster dialogue among the participants. We intended it to be a “working lunch,” with tables organized by nation to provide members of the audience with an opportunity to question and talk with the panelists and scholarship recipients in a less formal atmosphere than the symposium. Candidly, this experiment was less successful than we had hoped, although the food and the company were enjoyed by all!

We believe that the symposium succeeded on all levels and hope that this special issue (containing the Master Hypothetical,²⁰ and articles from the panelists as well as the scholarship recipients) will become a useful resource for others who are engaged in comparative bankruptcy and corporate law analysis.

18. Scholarship pieces in this issue include Jean Braucher, *Harmonizing the Business Bankruptcy Systems of Developed and Developing Nations: Some Issues*; Kimberly D. Krawiec, *Corporate Debt Restructurings in Mexico: For Foreign Creditors, Insolvency Law is Only Half the Story*; Paul Kuruk, *A Survey of Bankruptcy Law in Ghana*; Robert Laurence, *The State of Hungarian Insolvency Law*; Kellye Y. Testy, *Old Questions, New Contexts: Corporate Law in Emerging Nations*; Mary Jo Newborn Wiggins, *Rethinking The Structure of Insolvency Law in South Africa*.

19. INSOL International is a world-wide federation of national associations of accountants and lawyers who specialize in insolvency. Formed in 1982, INSOL seeks to “take the leadership role in international insolvency issues and policies, and also to facilitate an exchange [of] information and ideas among members . . . and other constituencies affected by the insolvency process.” *INSOL International Goals, Strategies and Mission* (visited Mar. 31, 1997)

<<http://www.insolvency.co.uk/ipbodies/insogoal.htm>>.

20. The bibliographies were prepared by ILJ members, with the assistance of the wonderful NYLS library staff. For this and all their other valuable contributions to the symposium, we thank them.

Finally, we both want to thank Dr. Ernst C. Stiefel for his remarkable generosity to us and to New York Law School, the staffs of this and last year's *New York Law School Journal of International and Comparative Law*, and the many other individuals, inside and outside New York Law School, who worked so hard to make the symposium a success. Many thanks to you all.

