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Grenztiberschreitendes (internationales) Insolvenzrecht der Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland (Cross-Border Bankruptcy Law of the United States and Germany), by Edgar J. Habscheid

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Book Review

Grenzüberschreitendes (internationales) Insolvenzrecht der Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland

(Cross-Border Bankruptcy Law of the United States and Germany)
by Edgar J. Habscheid
Duncker & Humblot, 1998, pp. 534

REVIEWED BY HANNAH L. BUXBAUM*

Courts and commentators have long emphasized the importance of developing a functional system for resolving multinational insolvencies. Recent legislative achievements in the reform of international bankruptcy law,¹ as well as recent literature in the field, have focused on the particular importance of such a system to countries between which there is a high and consistent level of monetary flows. Edgar Habscheid’s book² provides a comparative analysis of the international bankruptcy regimes in two such countries: the United States and Germany.

Habscheid has conducted a meticulous study in one of the most time-honored comparative modes: his book provides a careful descriptive analysis of two countries’ approaches to international bankruptcy. Unlike many such studies, however, Habscheid’s keeps one eye on the horizon. Before beginning the comparative description that constitutes the bulk of his book, Habscheid lays a theoretical foundation for that analysis by examining two models of international bankruptcy regulation—one a form of universality, the other a judicial assistance framework.³ Throughout his discussion of German

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² EDGAR J. HABSCHEID, GRENZÜBERSCHREITENDES (INTERNATIONALES) INSOLVENZRECHT DER VEREINIGTEN STAATEN VON AMERIKA UND DER BUNDESREPUBLIK DEUTSCHLAND (1998).

³ Id. at 13-50.
international bankruptcy law, he also considers the recent European Union
Convention on Insolvency Proceedings\(^4\) and the interaction between that
legislation and German domestic bankruptcy law. Such devices give the
reader a useful context in which to consider the individual bankruptcy
provisions discussed at length throughout the work.

Habscheid’s book is divided into three parts. Part I briefly presents two
models for the resolution of cross-border bankruptcies: the judicial assistance
system used in Switzerland and the universalist system contemplated in
Germany’s draft international bankruptcy law of 1992. Part II, which
describes U.S. bankruptcy law, includes one section on domestic bankruptcy
practice and one on the law applicable to cross-border insolvency proceedings.
Part III then sets forth the German laws governing international bankruptcy.
As the description of the U.S. bankruptcy system is intended primarily to
acquaint German readers with practice under the U.S. Bankruptcy Code, it is
the materials on cross-border bankruptcy law—contained in the second section
of Part II and in Part III—that will be of primary interest to those concerned
with international transactions.

In the second half of Part II, Habscheid provides a careful and thorough
analysis of the Bankruptcy Code provisions addressing transnational
insolvency. He begins by discussing the process by which foreign bankruptcy
representatives are recognized in the United States. Then, before setting forth
practice under the current Bankruptcy Code, he describes the methods for
assisting foreign bankruptcies that were implemented prior to 1978 as well as
the notions of comity on which those methods were based. Most of the
discussion, however, consists of a meticulous analysis of ancillary
proceedings conducted pursuant to Section 304 of the Bankruptcy Code, and
includes a careful consideration of the case law that has developed under that
Section. Although Habscheid has chosen to maintain a descriptive method
throughout, he does conclude by noting the inclination of many domestic
courts to protect the interests of U.S. creditors.\(^5\)

After providing an overview of avoidance practice under U.S. law,
Habscheid then turns in Part III to a description of German international
bankruptcy practice. He discusses the 1985 decision of Germany’s Federal

\(^4\) See also Schollmeyer, supra note 1.

\(^5\) HABSCHEID, supra note 2, at 262 ("The decision [whether or not to defer to foreign proceedings] is left to the discretion of the bankruptcy judge, pursuant to which the interests of U.S. creditors regularly receive special protection under the statute.") (reviewer’s translation).
Supreme Court that effectuated the shift to a universality-based system, and then addresses the recognition and enforcement of foreign bankruptcy judgments in Germany. It is a strength of his book that, throughout this section, Habscheid returns to particular aspects of U.S. bankruptcy practice in examining the process by which that practice is assisted in German courts. In discussing claims based on punitive damages, for instance, Habscheid asks whether a bankruptcy triggered by a punitive damages award can be recognized in Germany, as well as whether a creditor whose claim is based on such an award can block a debtor's discharge. Rather than relying on vague assertions concerning comity and the recognition of foreign proceedings, in other words, he provides a concrete and detailed analysis that explores the operation and the limitations of ancillary proceedings.

On one level, Habscheid’s comparison of the two legal systems is useful simply as a demonstration of how far international bankruptcy cooperation has progressed in the past decade. A mere five years ago, for instance, the prevalence of reorganization in U.S. bankruptcies was a sticking point regarding their recognition in Germany, where reorganization was not a viable option. Similarly, the fact that German law did not recognize the “fresh start” policy embraced in the United States often prevented German courts from rendering assistance to U.S. bankruptcy trustees in cases involving the discharge of pre-bankruptcy debts. The German bankruptcy law that went into effect at the beginning of 1999 represents a fundamental change in orientation, recognizing both reorganization and fresh start as valid goals of the bankruptcy process. Thus, Habscheid notes that today a reorganization approved by a U.S. bankruptcy court is entitled to prima facie recognition in Germany.

The real utility of Habscheid’s work, however, might lie in its use as a window onto the specific possibilities and limitations of the approaches being

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6. BGHZ 95, 256.
7. HABSCHEID, supra note 2, at 178-79.
8. Although German law contemplated an alternative to liquidation called “debt composition proceedings” (Vergleich), virtually all corporate bankruptcies resulted in liquidation of the debtor.
9. Insolvenzordnung v. 5.10.1994 (BGBl I S.2866); Einführungsgesetz zur Insolvenzordnung v. 5.10.1994 (BGBl I S.2911).
11. See Insolvenzordnung §§ 286-303, in BALZ AND LANDFERMANN, supra note 10, at 402-26, for a commentary on the new provisions. Habscheid notes the influence of the U.S. model on the adoption of these provisions. HABSCHEID, supra note 2, at 340.
12. HABSCHEID, supra note 2, at 390.
proposed in the more normative scholarship conducted in this field. Consider, for example, analysis of the trend favoring cooperative, parallel adjudications by courts administering international bankruptcies.\textsuperscript{13} It is evident that one prerequisite for such cooperation is a certain degree of similarity in the underlying substantive laws of the different jurisdictions involved. (Indeed, in some respects the development of a cooperative bankruptcy protocol by courts in different countries necessitates a mini-"common core" study, identifying the areas in which the respective laws agree and seeking to reconcile them where they do not.) Yet generalizations about the similarities between legal systems must be avoided, and close comparative work can be of great assistance in that regard. The point discussed above regarding German and U.S. laws on reorganization provides a useful example. One might expect, on the basis of Germany's recent approval of the reorganization option, that the choice of reorganization over liquidation by a U.S. debtor would no longer impede a cooperative resolution between U.S. and German bankruptcy courts. In discussing the circumstances under which the recognition of a reorganization might violate German public policy, though, Habscheid suggests that a reorganization intended merely to secure breathing room for the debtor might not be recognized to the same extent as a "valid" reorganization.\textsuperscript{14} His careful comparative analysis thus provides a concrete foundation for considering the parameters within which individual cooperations might be successful.

Habscheid's work will be similarly valuable to studies analyzing the prospects of the harmonization of international bankruptcy law.\textsuperscript{15} Habscheid's analysis reveals a certain convergence of approaches to international insolvency, supporting arguments that the increasing harmonization of substantive bankruptcy laws will soon engender a truly unified international approach to cross-border insolvency. At the same time, though, Habscheid is

\textsuperscript{13} Bankruptcies resolved by means of cooperative protocols include those of Maxwell Communication Corporation and Everfresh Beverages. For a discussion of this process, see Evan D. Flaschen & Ronald J. Silverman, \textit{The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation Insolvency}, \textit{in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW} (Jacob S. Ziegel ed., 1994). \textit{See also} Berends, \textit{supra} note 1.

\textsuperscript{14} HABSCHEID, \textit{supra} note 2, at 389-90.

\textsuperscript{15} See Thomas M. Gaa, \textit{Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?}, \textit{27 INT'L LAW. 881} (1993), for a useful discussion of the goals of and obstacles to harmonization. Gaa writes that "[t]he success of any effort to harmonize international bankruptcy law and practice will turn on the handling of issues such as... the accommodation of fundamental economic and social policies underpinning different municipal bankruptcy laws, and the consideration of economic issues that may encourage or discourage interest in harmonization." \textit{Id.} at 885.
careful to account for the assumptions underlying this convergence. In his discussion of Germany's recently enacted reorganization provisions, for instance, he notes that one of the primary reasons that reorganization was adopted in Germany was to protect jobs—a concern in the United States, of course, but perhaps not a primary concern. His work thereby promotes a deeper awareness of the social and political choices that inform and sometimes limit the harmonization process.

Comparative work of this kind can also be integrated with the economic analysis that has contributed to the reform debates. Arguments that universality provides greater efficiency than territoriality with respect both to the costs of the bankruptcy process itself and to pre-filing investment decisions might be interestingly combined with comparative law studies. The sort of close comparative analysis Habscheid undertakes provides a particularly useful lens through which unique considerations might be identified that impose additional costs on bankruptcy processes in certain countries. In that way, studies such as this can enhance the utility of economic models in facilitating the ongoing development of more efficient solutions to cross-border insolvency.

16. HABSCHEID, supra note 2, at 2.