

PRE-PUBLICATION DRAFT

CHAPTER 10

TRANSNATIONAL BANKRUPTCIES

A. INTRODUCTION

An increase in the number of multinational companies leads inevitably to an increase in the number of multinational bankruptcies. Traditionally, bankruptcy has been one of the most parochial and nationalistic areas of the law, each nation following a “grab rule” approach: seizing local assets and distributing them to the claimants in a local proceeding, with little concern for the overall result for the company or for claimholders outside the domestic jurisdiction. However, increasing experience with global bankruptcy cases, the emergence of academic theories supporting a global perspective, and a burst of interest by international law reform organizations have combined to produce a dramatic shift in viewpoints and a number of international initiatives that seemed unlikely just a few years ago.

Traditionally, there were two theoretical approaches to international bankruptcy: territorialism and universalism. Territorialism justified the “grab rule” on the grounds that local creditors had legitimate expectations that any financial crisis would be resolved applying local policies and preferences. Its proponents argued that those expectations gave rise to vested local rights that should be respected. Universalism rests on the fact that bankruptcy is a collective proceeding that must extend to all of a debtor’s assets and all the stakeholders. In effect, universalism holds that a bankruptcy resolution must be symmetric to a debtor’s market. In liquidation, this is the only approach that will permit collection of most assets and distribution of those assets in accord with a coherent and fair set of rules. Moreover, reorganization is nearly impossible without one central, supervising court just as a national market (such as the United States) requires a national bankruptcy

regime, a globalizing world requires a globalizing bankruptcy regime.

The globalizing forces affect many areas of the law. In an era in which AOL cannot merge with Time Warner without the approval of the Commission of the EU, it is pointless to talk about territorial application of the antitrust laws. Similarly, when the great Korean car manufacturer Daewoo trembles on the brink of collapse, with huge lawsuits by creditors in numerous courts around the world and stalled negotiations with banks and bondholders from nearly every developed country, the idea of restructuring within a territorial bankruptcy system becomes nonsensical. It seems inevitable that the task of the legal architects of our economic future is to construct a global solution as soon as possible.

The great majority of experts in the field agree that universalism is the right long-term approach. However, they also agree that it will take some time to achieve, even in a globalizing world. (Experts disagree sharply as to how long.) Some urge that modified territorialism is the best interim solution, because they believe it is not possible to construct a workable universalist system in the absence of a full, undiluted universalism with one court and one law. Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 *Cornell L. Rev.* 696 (1999).

Most experts, however, are more inclined to “modified universalism,” which, as its name suggests, starts from the opposite perspective. This is the view adopted by the American Law Institute, which explains modified universalism in its recently adopted Principles for Cooperation as “universalism tempered by a sense of what is practical at the current stage of international legal development. . . .” American Law Institute, *Transnational Insolvency Project, Principles of Cooperation in Transnational Bankruptcy Cases Among Members of the North American Free Trade Agreement* at 1, n.2 (Tentative Draft, April 14, 2000) (final approval May 16, 2000; forthcoming).

The key difference between the two approaches is that modified universalism takes a worldwide perspective, seeking solutions that come as close as possible to the ideal of a single-court, single-law resolution, while territorialism is defined by a conviction that local creditors have vested rights in whatever assets can be seized by their courts when insolvency looms. Various aspects of these two approaches will be revealed in the cases and text that follow.

The problem of the management of the general default of a multinational company (called a “bankruptcy proceeding” in the United States and an “insolvency proceeding” in most of the

world) has two central aspects: choice of forum and choice of law. The two are often confused in the literature and in the cases. The main reason for this confusion is that traditionally each national court thought only to apply its local bankruptcy law to all aspects of the case before it, so there was no attention to the difference between choosing a court to manage the case and choosing a law to apply to certain issues in the case. Indeed, it will often be correct to apply the managing court's law to various issues, but it will also be necessary to apply other national laws to particular transactions or claims, so it is important to remember the distinction between "Which court should have primary management of the case?" and "Which law should be applied to this issue?"

The discussion that follows is divided along just those lines. The next section deals with choice of forum and the section after that with choice of law, which represents the more difficult and less-developed issues in the field.

B. CHOICE OF FORUM

By hypothesis, the problem of choice of forum arises only in a system of modified universalism. In a territorial system every court administers the assets it controls, while in a fully realized universalist system the administering court is chosen by some internationally agreed set of rules. However, choice of forum in a universalistic system does not mean that only one court is involved in the case, because it is necessary to obtain cooperation from every court that has control over important segments of the company's assets. Choice of forum means choice of a primary forum, the lead court in administering the case. That court is the court in the jurisdiction that is deemed to be the company's "home" country, typically the situs of its "principal place of business" or the "center of its main interests." The home-country court will have pending before it a full-fledged bankruptcy proceeding under its law. The other courts involved in the case may also have bankruptcy cases pending. Where other courts have full bankruptcy cases involving the same company, we speak of "parallel proceedings" in the home country and the cooperating country. Alternatively, the proceedings in other courts may be limited to "ancillary proceedings" that are designed solely to assist the primary court. Either approach can be used to cooperate in a system of modified universalism, although the ancillary approach is more efficient at meeting universalist objectives.

In the absence of a legal framework for cooperation, a practice of creating "Protocols" has begun to emerge (see *In re*

Maxwell, infra). Protocols are agreements among major stakeholder groups as to how a multinational bankruptcy will be managed. In regimes in which the debtor remains in possession, the debtor will be one of those major stakeholders in the negotiations, but in other legal regimes, transnational reorganizations or liquidations may take place by agreement among all the creditors. The development of these protocols has not only facilitated the resolution of the cases concerned, but is creating a database of experience highly useful to those seeking to fashion an improved international regime. The ALI Principles of Cooperation has an appendix that includes the text of some of these protocols.

Conceptually, the first step in understanding these issues is to study the way that various countries treat the foreign assets of “home country” companies. In the United States, for example, a U.S. court may need to decide how to deal with the problem of a U.S. company in Chapter 11 with assets located all over the world. Once we have seen how the home country addresses the problem, we can turn the telescope around and explore the question of cooperation from the perspective of a court that controls assets belonging to a company with its home in another country.

1. Home Court: United States

It is difficult for other countries to defer to U.S. bankruptcy courts if U.S. courts do not assert worldwide jurisdiction over the assets of U.S. bankrupts. In fact, the 1978 Code exerts just such a broad reach as to the assets of the debtor. §541(a)(1). The legislative history to that subsection’s predecessor in the old Act makes it clear that the Code asserts jurisdiction over the assets of the bankrupt “wherever located” in the world. A number of other countries employ the same rule. See, e.g., Insolvency Act §436 (United Kingdom); Trib. Comm. Seine 2 Fév. 1882 (France); American Law Institute, Transnational Insolvency Project, International Statement of Canadian Law at 24, n.6 (Tentative Draft, April 15, 1997) (approved May, 1997; forthcoming).

The following case illustrates both the broad reach of U.S. jurisdiction claims with respect to the debtor’s property and the serious, practical difficulties of enforcement. Although the style of the case is “*In re McLean Industries, Inc.*,” the principal operating company among the bankrupt group of corporations was United States Lines, one of the largest shipping companies in the world. We provide excerpts from two opinions in the case.

In re McLEAN INDUSTRIES, INC.
68 B.R. 690 (Bankr. S.D.N.Y. 1986)

DECISION AND ORDER

Howard C. BUSCHMAN III, Bankruptcy Judge.

United States Lines, Inc., 2 debtor herein (the "debtor") seeks from this Court a preliminary injunction restraining defendant GAC Marine Fuels Ltd. ("GAC Marine") from taking any action to arrest or interfere with vessels and other property of this estate. It further seeks an order holding GAC Marine in civil contempt for violating both the automatic stay applicable to this proceeding by the filing of the petition, 11 U.S.C. §362, and the restraining order issued by this Court. GAC Marine, although essentially admitting the underlying facts, opposes these motions, declaring that it, as a non-domiciliary corporation organized under the laws of the United Kingdom and with a principal place of business in London, is not subject to the in personam, jurisdiction of this Court. The Debtor disputes this assertion and thus, the principal issue to be resolved by this Court is whether GAC Maxine is subject to in personam jurisdiction before this Court.

I

The debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (1984) (the "Code") on November 24, 1986. On that date, this Court issued an order, which restated the automatic stay provided by §362(a) of the Code and not excepted by §362(b) of the Code. The Debtor has remained in possession and continues to operate its trans-Pacific and western hemisphere cargo shipping services. It is in the process of terminating its around the world and North Atlantic services.

The facts are not in dispute. On December 4, 1986, ten days after the petition was filed, GAC Marine commenced an in rem admiralty action in the Supreme Court of Hong Kong against the debtor, pursuant to a Writ of Summons, for the payment of \$173,750 allegedly owed it for fuel oil delivered on board the *American Utah*, a vessel owned by the debtor, in October 1986 in Khorfakkan Port, United Arab Emirates. On December 9, 1986, upon application of GAC Marine, the Hong Kong court issued a warrant of arrest against the *American California*, also owned by the debtor. As a result, this vessel has since been restrained from leaving Hong Kong harbor.

On December 8, 1986, GAC Marine commenced an admiralty proceeding in the High Court of the Republic of Singapore against the debtor as the owner of the *American*

Oklahoma. This proceeding was commenced to recover \$69,500 allegedly owed by the debtor to GAC Marine for fuel oil delivered on the vessel *American Washington* on November 5, 1986, also in Khorfakkan Port. The Singapore court issued, on December 8, 1986, a warrant of arrest directed at the *American Oklahoma*; also owned by the debtor.

GAC Marine took these actions with knowledge of the debtor's filing of its reorganization petition and the resultant automatic stay provided by §362 of the Code, and after being informed by the debtor that such actions would be improper, carried out a threat contained in a telex from GAC Marine to the debtor dated November 28, 1986. That telex stated:

As outlined below, our invoices nos. AG86/10/010 and AG86/10/011 fell due for payment on the 27th November 1986. On request by agents for payment of these invoices, we have been informed of your refusal to settle all outstandings as your company has filed for bankruptcy under Chapter 11 of the U.S. Law.

Accordingly, all invoices as set out hereunder and [sic] applicable to the following ships must be settled immediately.... Chapter 11 procedure in the USA is not enforceable in foreign jurisdictions. Therefore we are entitled to arrest any U.S. Lines ship abroad and unless prompt settlement is made to us, we will have no recourse other than to take such action as is deemed necessary by our lawyers for the protection of our interests. We will therefore arrest your ships one-by-one unless settlement is made immediately....

GAC Marine is, we are told by its counsel, a subsidiary of a Liechtenstein corporation, apparently known as Gulf Agency Company ("GAC") which has its central office in Athens, Greece. GAC Marine's principal offices are located in London, England but its invoices state that it also has offices in Hong Kong & Norway, United Arab Emirates and Basking Ridge, New Jersey. The New Jersey office is apparently located in the same office as that of G.A.C. Shipping (North America) Ltd. ("GAC Shipping"), another GAC subsidiary. That office is staffed by one Norman Schmidt, Georgianne Temple and Marilyn Taylor, who are paid by GAC Shipping with funds supplied by GAC. But Schmidt styles himself as manager of GAC's U.S. office and his business card is under the name of the defendant GAC Marine. GAC and GAC Marine, according to Schmidt, "apparently are run by the same people." Schmidt describes his duties for GAC Marine as "sales and contact and follow through." As this description implies, he and his fellow workers do more than merely solicit business from potential American customers seeking to purchase marine fuel (bunkers) for delivery overseas....

IV

[We now turn] to consideration of whether the defendant is subject to in personam jurisdiction here on these causes of action and generally.

The limits of such in personam jurisdiction are apparently conceded by both sides to be tested by due process. This is not a case in diversity where state law concepts govern the extent of personal jurisdiction. Rather, this is a case involving the violation of a federal statute and related court order. There is nothing that indicates that Congress sought to assert in personam jurisdiction on any standard other than due process in an action concerning a breach of the automatic stay through arresting, seizing or attaching estate property.

Two grounds for the exercise of such jurisdiction consistent with due process are asserted here: (i) transactional jurisdiction as set forth in 1 Restatement (Second) of Conflicts of Laws §47(1) (1971) (the “Restatement”) and (ii) general “doing business” jurisdiction as set forth in §47(2) of the Restatement.⁴

Here it is clear that the defendant transacts business in the United States. It regularly affords, in the United States, quoted prices and terms for delivery of bunkers abroad. Agreements for the same are reached in the United States upon the acceptance of the quoted prices and terms. Its representative in the United States is apparently empowered to sign letters and to deliver documents on its behalf with respect to U.S. customers. It repeatedly holds itself out to the world as having an office in the United States. It is also clear that the second half of the test, i.e., that the cause of action asserted arose from business done here, has also been satisfied even though the acts complained of, the procuring of the Hong Kong warrant and the Singapore arrest, took place abroad. While the term “arising from” the business transacted in the state might convey the implication that the business transacted must itself give rise to the claim, the courts have construed the phrase far more broadly, holding, in effect, that the claim need only relate to that business in a general way. All that has been required is a

⁴ No claim is made on this motion that in personam jurisdiction may be posited on the notion that the interest of the United States in administering bankruptcy proceedings of domestic corporations is so strong as to justify the right of its courts, in the exercise of exclusive jurisdiction over the property of the estate afforded by 28 U.S.C. §1334(d), to enjoin attempts to divest them of that jurisdiction and to determine the rights of all creditors wherever they may be. Nor is any claim made on this motion that jurisdiction may be found on the basis that the warrant and arrest of the two vessels had a substantial, direct and foreseeable effect on the administration of this estate of exactly the type that 11 U.S.C. §362(a) was designed to prevent. Those highly interesting issues are left to another day.

relationship between the underlying controversy and the forum state. A. von Mehren & D. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1148-51 (1966). Consequently, the Supreme Court has recently taken to expressing the formula in terms of claims that “arise out of or relate to” forum business activities or activities directed at residents of the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)

Here, both a strict relevance test and a historical connection test are satisfied. It is undisputed that the New Jersey agreements to obtain bunkers in Sharjah concern the same subject matter, i.e., the debts, upon which the Hong Kong and Singapore proceedings were based. Further, they are relevant to the cause of action asserted at least insofar as it is claimed that those proceedings are attempts to collect pre-petition debts. Those debts are the matters negotiated and agreed to in New Jersey and where consideration in the form of payment of antecedent debts was delivered. The defendant is thus subject to in personam jurisdiction here on those claims

Furthermore, GAC’s contention that it is not subject to jurisdiction under the general “doing business” test of §47(2) of the Restatement is without merit. That section provides:

A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.

Although the relationship between GAC Marine and GAC Shipping is apparently structured to enable GAC not to have bank accounts here, it is nevertheless clear that the business of GAC in New Jersey is business done “not occasionally or casually, but with a fair measure of permanence and continuity.” *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917). The seven to fifteen transactions per month negotiated in a fashion similar to the transactions at issue here, the receipt of checks in New Jersey, the use of its letterhead by personnel located in New Jersey, the assertions of having a New Jersey office, all show GAC Marine’s continued presence here. While GAC Marine claims that GAC Shipping lacks the power to confirm agreements, Schmidt’s testimony that confirmations are rarely given from abroad and that the arrangements nevertheless proceed shows that such are not usually required or material.

It is beyond cavil that the mere presence of even a wholly owned subsidiary does not afford jurisdiction over the parent. Restatement §52, Comment b. But

[i]f a subsidiary corporation does an act, or causes effects, in the state at the direction of the parent corporation or in the course of the parent corporation's business, the state has judicial jurisdiction over the parent to the same extent that it would have if the parent had itself done the act or caused the effects.

Ibid. Accordingly, a corporate parent or affiliate is present for jurisdictional purposes not because of the affiliation but rather because of the intercorporate relationship which is characterized by services in the forum for the parent by the subsidiary beyond mere solicitation, and by frequent communication between them....

For these reasons, finding jurisdiction need not rely on GAC Marine's description of itself as having an office in New Jersey at the address occupied by GAC Shipping. But that it has so described itself makes clear what this record demonstrates: anyone wanting to do business with GAC Marine here need only telephone it in New Jersey by dialing the number it states on its letterhead and invoices.

IV

We thus find that, with the debtor's success on the merits being virtually conceded on this motion and with its injury being, and deemed to be, irreparable, a preliminary injunction should issue since in personam jurisdiction is established. We further find that a contempt citation should issue since all that need be shown is a knowing violation of the automatic stay. Although willfulness is not required in view of the remedial nature of the remedy, the brazenness of GAC Marine's conduct makes that remedy particularly appropriate.

An injunction and finding of contempt notwithstanding, the fish continued to wiggle on the hook.

In re McLEAN INDUSTRIES, INC.

76 B.R. 291 JBankr. S.D.N.Y. 1987)

DECISION AND ORDER

Howard C. BUSHMAN III, Bankruptcy Judge.

United States Lines, Inc. (the "Debtor") seeks an interlocutory judgment finding GAC Marine Fuels Ltd. ("GAC Marine") to be in continuing civil contempt and requiring GAC Marine to pay to the Debtor all accrued, unpaid contempt sanctions for the period from December 23, 1986, through February 3, 1987, as set forth in an order of this Court dated December 29, 1986. GAC Marine, in opposition, principally insists that it is impossible

for it to comply because it assigned its pre-petition claims against the Debtor to another entity. Upon these claims it had instituted foreign proceedings and obtained warrants of arrest against vessels operated by the Debtor. It further contends that the order should not have been entered.

I ...

At the hearing on [the previous order], the only disputed issue was whether GAC Marine was subject to the in personam jurisdiction of this Court. No claim was made that the order would be ineffectual, that the injury was not irreparable or that the automatic stay was not violated. Even though GAC Marine now claims to have assigned its claims on December 22, 1986, apparently in either Vaduz, Liechtenstein or Sharjah, United Arab Emirates, no evidence of the assignment was introduced. The evidence at the hearing indicated that GAC Marine owned the claims and was actively protecting them in the foreign proceedings. If the assignments occurred on December 22, given the six hour time difference between New York and Vaduz and the nine hour time difference between New York and Sharjah, GAC Marine could seemingly have telefaxed the assignment to counsel, prior to the hearing. Upon the closing of the record, counsel for GAC Marine was given until the morning of December 29, 1986, to file a brief addressing that issue. No brief was filed and the Court announced its decision that afternoon.

At trial on the instant matter, the parties stipulated to the evidence. That evidence indicates that on December 23, 1986, the Debtor received a telex from International GAC Marine Fuels Limited which informed it of an assignment of the claims underlying the foreign proceedings to FAL Bunkering Company Limited of Sharjah, United Arab Emirates ("FAL"). Apparently, GAC Marine occasionally transacts business with FAL. In consideration of the transfer of these claims, FAL granted GAC Marine a discharge of 50% of the debt owed by GAC Marine for bunkers sold to it by FAL which GAC Marine had sold to the Debtor.

The following day, GAC Marine's counsel made an ex parte application to the Supreme Court of Hong Kong, on behalf of GAC Marine and FAL, to have FAL substituted as plaintiff in place of GAC Marine and thereby continue the arrest proceeding commenced by GAC Marine. The Hong Kong court entered such an order on that date. On December 26, 1986, GAC Marine's counsel made a similar ex parte application to the High Court of Singapore, which also was granted with the same effect. As

stipulated by the parties, the vessels originally arrested by GAC Marine continue to be restrained at Hong Kong and Singapore ports, at least through February 3, 1987.

A notice of motion in the name of GAC Marine was filed in the Singapore court requesting that court to direct a judicial sale of a vessel belonging to the Debtor, known as the *American Oklahoma*, which was scheduled to be heard on January 23, 1987....

III

GAC Marine's principal argument on this motion is that the assignment renders it impossible to comply with the December 29th order...

...[N]o evidence was offered to show that GAC Marine cannot buy back the claim from FAL; FAL did not testify that it would not retransfer the claim. On this score, nothing more than assertions of counsel were made. These bald assertions do not amount to the plain and unmistakable evidence contemplated by the Second Circuit in considering this defense....

Indeed, GAC Marine does not even assert, much less prove, that it could not obtain orders from the Hong Kong and Singapore courts vacating the orders it obtained, whereby the arrest proceedings were continued for the benefit of FAL. Thus, instead of taking steps to discontinue those arrest proceedings as the contempt decree required, GAC Marine took the active steps of ensuring their continuation. GAC Marine thus violated 11 U.S.C. §§362(a)(1), (a)(4) and (a)(6) anew. It appears that even today GAC Marine would prefer to continue to harass the Debtor, as it continued to carry out the threat, announced in its telex of November 28, 1986, of keeping the Debtor's vessels arrested "one-by-one" until it was paid its pre-petition debts.

IV

Failing to sustain its defense of inability to comply, GAC Marine makes the further assertions (i) that the Court is somehow "extending" its jurisdiction by holding in contempt those who would seize foreign assets of a United States debtor, (ii) that the assignments here are permitted by Rule 3001 of the Rules of Bankruptcy Procedure, and (iii) that the contempt decree is "ineffectual" because it will not free the debtor's vessels since other foreign creditors have joined the arrest proceedings. These

points are of no merit, even if they could be considered as excuses for GAC Marine's violations of the automatic stay

With GAC Marine having conceded the bankruptcy court's power to enter a contempt decree upon a violation of the automatic stay codified in 11 U.S.C. §362(a), its assertion of an "extension" of jurisdiction is premised on the notion that contempt should not be found where the violation takes place overseas. That notion is belied by both 28 U.S.C. § 1334(d) and 11 U.S.C. §541 which speak of the debtor's property "wherever located" and vest the district court, and the bankruptcy court on reference pursuant to 28 U.S.C. §157(a), with exclusive jurisdiction over it

Further, GAC Marine did not, it must be stressed, lack a remedy if its interests were unfairly prejudiced by the automatic stay. Pursuant to 11 U.S.C. §362(d), it could have sought modification of the stay and introduced evidence of cause for modification, as that section requires. Indeed, this Court, in this bankruptcy case, has entered orders permitting entities having pre-petition maritime liens that are actually secured by value in a vessel, see 11 U.S.C. §506(b), to join in foreign arrest proceedings commenced by others so that those liens could be protected in those proceedings. Instead of availing itself of the opportunity to demonstrate cause and asserting that it has a lien secured by value, GAC Marine flouted 11 U.S.C. §362(a) by starting an arrest proceeding for one vessel and joining in an arrest proceeding for another. Those acts cannot be excused.

GAC Marine's claim that all it did was assign a claim, as permitted by Rule 3001, also cannot be sustained. As this record shows, it did far more in petitioning the Hong Kong and Singapore courts to enable FAL to step into its shoes as an arresting party....

Also without substance is the assertion that the December 29th contempt decree is "ineffectual" because it does not achieve the goal of freeing the Debtor's vessels from arrest, as other foreign creditors were also parties to the arrest proceedings and are not subject to this Court's jurisdiction. While the arrests would remain, as GAC Marine points out, even if GAC Marine were to withdraw, the purpose of the contempt decree was to secure compliance by GAC Marine, which is subject to in personam jurisdiction, with §362 of the Bankruptcy Code. All GAC Marine need concern itself with is obedience to United States law as it affects business transacted here. The participation of foreign creditors in those arrest proceedings affects only the question of damages claimed by the Debtor - a question to be resolved at the ultimate trial on the merits ...

The evidence being clear that GAC Marine has not purged itself of civil contempt and has continued to act in violation of the automatic stay, the Debtor's motion must be, and hereby is granted

to the extent that an order is to be entered in favor of plaintiff and against defendant declaring defendant in further contempt of 11 U.S.C. §362(a), ordering defendant to pay accrued sanctions as set forth in the Order of December 29, 1986 through February 3, 1987, and further ordering that judgment against defendant and in favor of plaintiff in that sum be entered if defendant fails to make such payment of such sum within five days after the date of such order. It is so ordered.

In this case, the recalcitrant creditor had enough contacts with the U.S. to permit enforcement of the stay. Where that is not true, restraint of creditors will depend on the cooperation of foreign courts. If it is not forthcoming, reorganization or an orderly, value-maximizing liquidation may be impossible. Conversely, the extension of the stay to overseas assets to the extent the U.S. courts have personal jurisdiction over creditors creates a serious risk of conflict with other countries. Our frequent interactions with Canada are illustrative. The large Canadian banks have operations in the United States and therefore can be effectively prevented from collection action in Canada, a fact that has led to considerable resentment at U.S. “overreaching.” On the other hand, the courts in the two countries routinely cooperate with each other, so that conflict has generally been avoided. The ALI Principles of Cooperation lay down specific rules designed to avoid a conflict in stays and to give the parties guidelines as to which stay applies when. ALI Principles, Procedural Principle 4: Stay Upon Recognition, at 56.

2. Home Court: Elsewhere

Obviously we cannot do a survey of foreign cases in which a home country court tries to deal with foreign assets and claims. There are far too many countries with far too many rules, and the variations are complex. But the following example offers some insight. It comes from an annual report and commentary on Netherlands law, so the statement of the case, as well as the commentary, are as reported by a scholar in the Netherlands, Titia M. Bos, of the University of Amsterdam.

X v. SCHENKIUS (receiver for Y)
Court of Appeal of ‘s-Hertogenbosch, 6 July 1993
KG 1993, 406; NIPR 1993 No. 469; NJ 1994, 250
Reported in 42 Netherlands International Law Review 121 (1995)

THE FACTS

On 6 June 1988 the *Arrandissementsrechtbank* (District Court) of the Hague granted a divorce to X and Y. X petitioned the same court to declare Y bankrupt. The bankruptcy order was rendered on 18 July 1988 and Schenkus was appointed receiver. The divorce decree was officially registered on 6 December 1988.

X and Y had been married in community of property under the Dutch Civil Code. Their joint estate included a plot of land with two villas in Spain. In summary proceedings before the President of the District Court of 's-Hertogenbosch, the receiver demanded that X be ordered to cooperate in the sale, of this real estate for the benefit of the bankrupt estate. For this purpose the receiver required, among other things, a power of attorney for the sale signed by X and the original title deeds. X disputed this, arguing that since her former husband's bankruptcy had been declared in the Netherlands, its territorial effect was restricted to those parts of the estate located in the Netherlands. On 7 September 1992, the President of the District Court of 's-Hertogenbosch ordered X to cooperate in the sale of the Spanish property. In doing so, the President took into account that a bankruptcy declared in the Netherlands comprises the entire estate, thereby obliging the debtor (in this case Y) as far as possible to place any foreign property at the disposal of the receiver. The legal force of the bankruptcy attachment as such may be restricted to the Netherlands, but property located abroad is nevertheless part of the bankrupt estate and the bankrupt is obliged to cooperate so as to enable the receiver to include this property in the liquidation. This applies equally to X as the ex-wife of the bankrupt, since X and Y were married in community of property and their divorce was not yet final (had not been entered in the civil register) at the time when the bankruptcy was declared.

On appeal against this judgment at the *Gerechtshof* (Court of Appeal) of 's-Hertogenbosch, X submitted the following objections:

- (1) The judgment was incorrect in assuming that the bankruptcy comprised the entire estate, including those items of property located abroad.
- (2) The President had incorrectly based his decision on a supposed distinction between the bankrupt estate, on the one hand, and the bankruptcy attachment, on the other, so that the debtor's property abroad is seen as belonging to the bankrupt estate.
- (3) The President had incorrectly ruled that the bankrupt was obliged to cooperate so as to enable the receiver to include this foreign property in the liquidation of the estate, and that this obligation applied equally to X as

the ex-wife of the bankrupt to whom she was married in community of property under the Civil Code.

THE JUDGEMENT

The Court of Appeal affirmed the judgment of the President of the District Court. The Court of Appeal concurred with the President's judgment, that the bankruptcy comprised the entire estate and that this included all property belonging to the joint estate arising from the bankrupt's community of property marriage contract. A bankruptcy commenced in the Netherlands is assigned territorial effect out of respect for the sovereignty of other countries and in the absence of reciprocity in recognizing bankruptcies declared elsewhere. Despite this, the receiver may attempt to liquidate, for the benefit of the bankrupt estate, any property belonging to the bankrupt that is located abroad....

[COMMENTARY]

... The Insolvency Code ... states that the bankruptcy comprises the bankrupt's entire estate, a provision that implies a pretension to international force for a bankruptcy commenced in the Netherlands. In other words, items of property located abroad which belong to a debtor who has been declared bankrupt in the Netherlands, are considered to be part of the bankrupt estate....

... The impression that Dutch international insolvency law is characterized by a "negative attitude to foreign bankruptcy decrees and is based on" "the principle of territoriality" needs to be refined in the light of more recent case law in the Netherlands....

This case reflects both the traditional, highly territorial view of bankruptcy common in much of the world for a long time and the modern stirrings of a more cosmopolitan view in the Netherlands and elsewhere. There are countries that adopt the territorial view so strictly that they make no claim whatsoever to overseas property. Japan has been an example of this, although its new legislation is beginning to change that rule. Others, like the Netherlands, try to overcome the disadvantages of that doctrine when they are the home country by forcing cooperation from the debtor, thus avoiding the need for foreign judicial recognition of their insolvency proceedings. In both countries, and throughout the world, scholars are leading a movement toward a less territorial and more cooperative rule.

C. COOPERATING WITH THE HOME COUNTRY COURT

1. Cooperating Court: United States

The United States has taken a leadership role in encouraging international cooperation by frequently deferring to proceedings in other countries as to companies not based in the United States. Following the failure of a huge German bank, Herstatt, in the mid-1970's which generated massive, expensive litigation in the United States among creditors trying to seize the bank's United States assets, an eminent scholar, Professor Stephen Riesenfeld, argued that we needed a simple and reliable method of managing the American aspects of such cases and that the management should be in the hands of the bankruptcy judges who had the necessary expertise. He convinced Congress to include in the 1978 Code sections 303(b)(4), 304, 305(b), and 306, which were designed to permit and encourage U.S. bankruptcy courts to cooperate with home country bankruptcy courts abroad. (The shorthand reference to these provisions collectively is "section 304.") This unilateral initiative did not require reciprocity and did not attract much reciprocity at first, a point illustrated by the seizure of U.S. Lines ships all over the world with little or no reference to the U.S. bankruptcy court. More recently, other countries have begun to move in the direction of cooperation, thus vindicating Professor Riesenfeld's vision.

Section 304 permits U.S. bankruptcy courts to defer to foreign courts and to cooperate with them by halting U.S. lawsuits and attachments and turning assets over to the home country court. The mechanism is an "ancillary proceeding" brought by the foreign bankruptcy administrator for these purposes. Section 305(b) permits a foreign administrator to ask the U.S. court to abstain in favor of the foreign court, and section 306 permits the foreign administrator to make a limited appearance in the U.S. courts, avoiding creditor counterclaims. Because an ancillary proceeding under section 304 may not accomplish all that is necessary (for example, may not permit a preference avoidance against a U.S. creditor), section 303(b)(4) permits the foreign administrator to bring a full U.S. involuntary bankruptcy against the debtor.

The provisions of section 304 are inherently contradictory. It creates a mechanism for cooperation at the same time that it requires protection of U.S. creditors. §304(c). Subsection (c) could be read to mean we will cooperate only when the provisions of the other law are not different in any way that would adversely affect

some U.S. creditor, which would mean we would rarely cooperate. On the other hand, it could be understood as requiring only a general similarity to our law, a similarity that may be found in the laws of a number of other countries. As so often happens, faced with two conflicting policy goals - international cooperation and protection of U.S. creditors - Congress simply incorporated them both and left it to the courts to sort out. The resulting confusion was reflected at first in decisions such as *In re Toga Manufacturing*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983), in which the court refused to defer to a Canadian proceeding because the Canadian court would not have enforced the judgment when the United States creditor had obtained against the Canadian debtor. A few other U.S. cases have been parochial, although generally because of misunderstandings of foreign law. The more recent cases, especially in the Southern District of New York, have moved decisively in the direction of cooperation.

In re TRECO

239 B.R. 36 (Bankr. S.D.N.Y. 1999)

SCHWARTZ, District Judge.

The Bank of New York and JCPL Leasing Corp. (“Appellants”) appeal from the judgment of the bankruptcy court granting partial summary judgment and requiring Bank of New York (“BNY”) to turnover certain funds to Appellees, the foreign liquidators of Meridien International Bank Limited (“MIBL”). Appellants contend that the turnover order (i) is an abuse of discretion under 11 U.S.C. §304(c) because BNY holds a security interest in said funds, (ii) is not lawful because the bankruptcy court failed to provide adequate protection for BNY’s alleged security interest before ordering turnover, and (iii) is not lawful because it prevents BNY from exercising its set-off rights. For the reasons that follow, the decision of the bankruptcy court is affirmed.

FACTUAL BACKGROUND

In June 1993, MIBL entered into a loan agreement with BNY. Pursuant to a pledge agreement executed on June 15, 1993, (the “MIBL Pledge Agreement”), MIBL pledged certain of its own bank accounts (the “MIBL Accounts”) as security for that loan. Later that year, BNY agreed to permit MIBL to overdraw these accounts, but required that Meridien BIAO Bank Tanzania Limited (“Meridien Tanzania”), a related company, pledge certain of its accounts at BNY to BNY (the “Meridien Accounts”) as security

for MIBL's overdrafts. Meridien Tanzania pledged those accounts to BNY in a November 15, 1994 agreement (the "Meridien Pledge Agreement"). The Meridien Pledge Agreement provided that BNY could use funds on deposit in the Meridien Accounts to satisfy MIBL's loan obligations if at any time BNY deemed itself to be insecure. BNY's advances to MIBL ultimately aggregated in excess of \$15 million. These funds were never repaid by MIBL.

On or about March 28, 1995, Meridien BIAO Bank of Swaziland Limited commenced an involuntary liquidation proceeding against MIBL in the Supreme Court of the Bahamas. By order dated April 25, 1995, the Bahamian court directed that MIBL be placed into compulsory liquidation, and appointed Appellees as MIBL's official liquidators. Effective March 28, 1995, BNY applied all of the funds in the Meridien Accounts to MIBL's debt with BNY. BNY did not, however, liquidate the funds remaining in the MIBL Accounts.

In April 1995, the Central Bank of Tanzania appointed a Manager to operate Meridien Tanzania, who subsequently questioned the validity of the Meridien Pledge Agreement and demanded that BNY return the \$15 million that it had removed from the Meridien Accounts. In June 1995, BNY commenced an action in the United States District Court for the Southern District of New York (the "1995 action") against MIBL, Meridien Tanzania, and certain other entities....

THE PROCEEDINGS BELOW

On September 29, 1995, Appellees, as MIBL's liquidators, commenced this action by filing a petition on behalf of MIBL pursuant to 11 U.S.C. §304 ("§304"). Section 304 permits a foreign representative, often a liquidator, to file an "ancillary proceeding" in a United States bankruptcy court, authorizing the bankruptcy court to administer assets located in the United States in order to "Prevent dismemberment by local creditors of assets located here." *In Re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 348 (2d Cir. 1992). Among the powers given to a bankruptcy court acting pursuant to §304 is the ability to "order turnover of the property of [the debtor's] estate, or the proceeds of such property, to such foreign representative. . . ." See 11 UIC. §304(b)(2).

In the bankruptcy court, Appellees sought, *inter alia*, an order directing that all persons or entities in possession of MIBL's assets turn over those assets, or the proceeds thereof, to Appellees. BNY opposed the turnover order, asserting that it should not be required to turnover the funds in the MIBL Accounts, of which approximately \$600,000 remain.

BNY opposed the application for a turnover order on various grounds, two of which are relevant here. First, BNY

asserted that it was a secured creditor with respect to the MIBL Accounts,⁵ and that, although BNY's secured status would be recognized by the Bahamian courts, it is unlikely that BNY will recover the value of its collateral in the Bahamian proceeding because of one particular difference between Bahamian and U.S. bankruptcy law. In particular, BNY asserted that, under Bahamian law as opposed to U.S. law, BNY's interest will be subordinated to (i) the administrative costs of the liquidation, (ii) taxes, (iii) pre-petition wages, and (iv) personal injuries to workmen. BNY asserted in the bankruptcy court that (i) this priority system, (ii) the severe shortage of funds available to the liquidators, (iii) the high fees paid for estate administration, and (iv) the large amount of outstanding claims, together raised a serious question as to whether there would be any funds available for its own secured claim.

The second rationale that BNY asserted in opposing the turnover request was that BNY was entitled to set-off MIBL's debts to it from the funds remaining in the MIBL Accounts. BNY asserted that it was improper to order turnover given that the bankruptcy code explicitly preserves its set-off rights ...

The Court will review the decision of the bankruptcy court de novo for questions presented that are matters of statutory interpretation. The bankruptcy court's reliance on the factors of §304(c) and its decision to defer to the Bahamian proceeding will be reviewed for an abuse of discretion.

I. That BNY May Be a Secured Creditor Does Not Prevent Turnover

BNY asserts that, if it is found to be a secured creditor, turnover is an inappropriate exercise of discretion for a §304 ancillary court because the guidelines in §304(c) do not weigh in favor of turnover. In particular, BNY contends that the distribution of funds under Bahamian procedure would not be substantially in accordance with that under U.S. bankruptcy law. See §304(c)(4). Additionally, BNY asserts that, although §304 does not, on its face, further limit the bankruptcy court's ability to order turnover, the bankruptcy code requires that property in the possession of a secured creditor not be the subject of a turnover order in a §304 proceeding unless the court insures that "adequate protection" is provided to the creditor. Third, BNY asserts that, even if the

⁵ BNY asserts here that it is a secured creditor of the MIBL Accounts in two respects: (i) by virtue of the fact that MIBL pledged these accounts to BNY in the MIBL Pledge Agreement; and (ii) as assignee of Meridian Tanzania's claim under the law of subrogation.

bankruptcy code does not require adequate protection, turnover absent adequate protection, under the circumstances of this case, will amount to a taking in violation of the Fifth Amendment to the United States Constitution. The Court finds no merit to any of these contentions.

A. Distribution of the MIBL Accounts in the Bahamian Proceedings Will Be Substantially in Accordance with the Order Prescribed by the Bankruptcy Code

...[N]one of the factors listed in §304(c) is an absolute requirement - rather, these factors are "guidelines ... designed to give the court maximum flexibility in handling ancillary cases." In re Culmer, 25 B.R. 621, 628 (Bankr. S.D.N.Y. 1982) (citing legislative history of §304).

In exercising the discretion granted by §304, bankruptcy courts have taken a variety of approaches, with the two principal theories known as "universality" and "territoriality."⁷ U.S. courts "are increasingly supportive of the philosophy underlying universality and are employing the doctrine in an ever growing number of cases and circumstances." See *Hourani*, 180 B.R. at 64. This Court agrees with this trend towards granting deference to foreign proceedings, which furthers the purposes of §304 in promoting efficiency in international bankruptcies and encouraging other countries to defer similarly to U.S. proceedings.

BNY asserts that the distribution of proceeds in the Bahamian proceeding will not be substantially in accordance with the order prescribed by the U.S. bankruptcy code. Section 304(c)(4), however, "does not command that the distributive scheme wholly replicate ours." In re Brierley, 145 B.R. 151, 166 (Bankr. S.D.N.Y. 1992). In fact, prior U.S. courts have already concluded that the distribution scheme of the Bahamas, "a sister common law jurisdiction," is fundamentally fair and generally satisfies the standard set forth in §304(c)(4). See, e.g., *Culmer*, 25 B.R. at 629-632 (stating that the "liquidation laws of the Bahamas are in harmony with those of the United States" and should be afforded comity); In re Hackett, 184 B.R. 656, 658 (Bankr.

⁷ As one court describes them: "'[u]niversality' is commonly defined in terms of a primary proceeding in a debtor's domiciliary country, with ancillary proceedings in other jurisdictions where the presence of assets or other matters require local assistance to the primary court. Universality places an emphasis on deference, through comity, to foreign insolvency proceedings. It is contrasted with 'Territoriality' or the 'Grab Rule' which describes the process whereby courts in each national jurisdiction sequester the property of a multinational in default and distribute it according to local rules." In re Hourani, 180 B.R. 58, 64 n.9 (Bankr.S.D.N.Y. 1995) (Bankruptcy Judge Lifland) (citing Jay Lawrence Westbrook, Choice of Avoidance Law in Global Insolvencies, 17 Brook. 1. Int'l L. 499 (1991)).

S.D.N.Y. 1995) (affording comity to a Bahamian bankruptcy proceeding and citing *Culmer*).

The only relevant difference between U.S. and Bahamian law as applied to this motion is that the Bahamian proceeding will give priority to its administrative expenses over BNY's alleged security interest. The Court finds that this difference is not sufficient to render turnover inconsistent with §304(c)(4). Cf. *Brierley*, 145 B.R. at 167 (stating that turnover should be denied where the foreign scheme is "repugnant to some fundamental American legal principle"). Prior cases that have denied turnover of collateral subject to a security interest have primarily involved situations where the foreign jurisdiction would not have recognized the claim of the creditor as secured, instead relegating the claim to unsecured status. Here, however, all parties agree that the Bahamian system will preserve any security interest held by BNY.

BNY cites dicta of the Second Circuit in *Koreag* as support for its claim that turnover of property in the possession of a secured creditor is not proper. The Court finds, however, that the language of that case does not aid BNY. See *Koreag*, 961 F.2d at 358. In *Koreag* the court had noted that the creditor in that case "could assert no valid security interest or other benefit of domestic law whose deprivation might render a turnover unfair or otherwise improper." *Koreag*, 961 F.2d at 358 (emphasis added). However, this language suggests only that, in certain circumstances, the turnover of property held by a secured creditor may be improper, and implies that, in many circumstances, the turnover order would be proper. The *Koreag* court, in noting the possibility that turnover may be improper under certain circumstances, was likely referring to cases where the differing treatment accorded secured creditors was much more significant than that which may occur in this case. This is supported by the fact that the *Koreag* court relied upon *Toga* - a case where the foreign jurisdiction completely failed to recognize the secured status of a claim. This Court concludes that the language in *Koreag* is entirely consistent with the view that turnover should be permitted under circumstances where the foreign jurisdiction recognizes a claim as secured but provides priority for legitimate administrative expenses in a manner that ultimately may be detrimental to the interests of a secured claimant.

For these reasons, the Court concludes that, under the circumstances of this case, where the secured creditor's claim will be recognized as secured, but merely be subordinated to administrative expenses, the turnover order issued by the bankruptcy court was not an abuse of that court's discretion.

B. Adequate Protection Was Not Required Before Ordering
Turnover in This Case . . .

Nothing in the bankruptcy code ... provides that turnover orders in an ancillary proceeding pursuant to 11 U.S.C. §304(b)(2) are subject to the requirement of adequate, protection, and in fact the wide discretion accorded to the bankruptcy court in §304 implies that no such requirement was intended.

The security interest taken by BNY in the property of MIBL was, since its inception, subject to various limitations under U.S. and Bahamian bankruptcy law. BNY took a security interest from a Bahamian corporation and therefore implicitly subjected itself to Bahamian law. As Judge Lifland stated in *Culmer*.

[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.... He is conclusively presumed to have contracted with a view to such laws of that government.... [quoting *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 537-38, 3 S.Ct. 363, 27 L.Ed. 1020 (1883)]. Thus, . . . [the debtor's] creditors' rights are subject to foreign laws and [each creditor] must be required to pursue its remedies in the Bahamian liquidation. One who invests in a foreign corporation subjects his investment to foreign law and may not seek to obtain greater rights than his co-creditors by suing in an American court.

Culmer, 25 B.R. at 632. BNY does not deny that it was on notice that Bahamian law provides that the administrative expenses of the liquidation proceedings have priority over security interests.⁹

There was no Fifth Amendment taking in this case because the value of BNY's security interest has never been absolute, but has always been limited as provided by the law in effect at the time of the signing of the MIBL Pledge Agreement. Here, the relevant limitations are those imposed on BNY by Bahamian bankruptcy law and §304 of the U.S. bankruptcy code. Section 304 explicitly envisions that the order of priority for creditors of a foreign bankrupt will be determined by the foreign jurisdiction, as long as the proceedings in that jurisdiction satisfy §304(c). There is no

⁹ BNY also attempts to evade turnover on the grounds that the MIBL Pledge Agreement provided for New York law and a New York forum for resolving disputes. We find this argument to be meritless given (i) the limited scope of the MIBL Pledge Agreement, (ii) §304's intent that claims related to bankruptcy proceedings be litigated in a single forum when the factors of §304(c) support deference, and (iii) the established case law granting comity to foreign proceedings despite operative forum selection clauses.

evidence that §304 is being used by the bankruptcy court to destroy a previously existing property right, because there is no assertion that the MIBL Pledge Agreement was signed prior to the enactment of §304 or the relevant Bahamian laws...

*11. Turnover May Be Granted Regardless of Whether BNY
Has a Valid Set-off Right*

The Court need not address whether any common law or contractual right of BNY's to set-off is preserved, because any set-off claim may be fully addressed by the Bahamian court. The Court notes that the bankruptcy code does not create a right of set-off - the right exists, if at all, under applicable non-bankruptcy law....

This result is supported by the decision in *Culmer*, where the Court found that the Bahamian court should adjudicate the set-off issue. Bankruptcy Judge Lifland was dealing with a §304 proceeding that involved Bahamian liquidators seeking inter alia, the turnover of funds held by two U.S. banks. Judge Lifland concluded that the banks' rights to set-off "should properly be determined in the Bahamian liquidation." Judge Lifland did not order turnover in that case because the foreign liquidators had conceded that the funds subject to set-off could be exempt from the turnover order. *Id.* Here, however, in the context of a case where the foreign liquidators have requested turnover of funds subject to set-off, and the order of priorities with respect to the debtor's property will be properly addressed by a Bahamian proceeding meriting this Court's deference, this Court will grant turnover. Custody of the MIBL Accounts may remain in the hands of the Bahamian liquidators while the Bahamian court decides whether BNY is entitled to the funds in those accounts by reason of its set-off or other claims.

CONCLUSION

For the foregoing reasons, the decision of the bankruptcy court is AFFIRMED.

2. *Cooperating Court Elsewhere*

Slowly but surely, courts in other jurisdictions have begun to respond to the section 304 initiative. Independently, often in cases not involving the United States, courts in several countries have shown a willingness to cooperate with a home-country court. The following example from Canada illustrates this trend. Once again, it is one of the huge mass-tort cases that makes new law.

**ROBERTS v. PICTURE BUTTE
MUNICIPAL HOSPITAL**
[1999] 4 W.W. R. 443 (Alberta QB)

1. This is an application by the Defendant Dow Coming Corporation (“DCC”) for a permanent stay of proceedings against it. DCC is now the only remaining Defendant in this action, as the actions against the other four Defendants were dismissed on the basis of having been commenced outside of the applicable limitation periods. DCC applies for a permanent stay of these proceedings on the grounds that this Court should recognize the jurisdiction of the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division. The Plaintiffs, Wanda and Alan Roberts, argue that a stay is inappropriate.

BACKGROUND

2. The female Plaintiff underwent surgery in 1981 for bilateral fibrocystic disease and mammary dysplasia in both breasts. Also in 1981, she received silicone gel breast implants manufactured by McGhan Medical Corporation (“McGhan”), a former Defendant. After problems with those implants, they were replaced in June 1993 with silicone gel implants manufactured by DCC. Soon after, one implant was found to have ruptured, necessitating surgery to clean up as much silicone as possible from her system.

3. Since that time, the female Plaintiff alleges widespread pain and problems, which she blames on the silicone gel released her body. For this application, it is not necessary nor appropriate for me to comment on her symptoms or their cause.

4. The Plaintiffs started this action on August 31, 1989. There was also class action litigation in the U.S. which coordinated all claims arising out of the failure of both McGhan and DCC implants. That class action collapsed when DCC sought bankruptcy protection on May 15, 1995 under Chapter 11 of the United States Bankruptcy Code (the “U.S. Bankruptcy Code”). Section 362 of the U.S. Bankruptcy Code imposes an automatic stay on all actions or proceedings against DCC to recover claims that arose before the claims bar date.

5. The U.S. Bankruptcy Court set February 14, 1997 as the foreign claims bar date (the deadline for filing claims in the bankruptcy proceedings). The Plaintiffs filed proofs of claim in that U.S. proceeding on January 17, 1997. More than 700,000 proofs of claim were filed from many countries, including more than 30,000 by Canadian residents.

LEGISLATION

6. DCC is asking that this Court recognize the proceedings in the U.S. Bankruptcy Court. The U.S. Bankruptcy Code provides for an automatic stay once bankruptcy proceedings are commenced in the U.S.

7. . . . [T]he stay purports to be extra-territorial, applying, for example, in Alberta. It is then up to this Court to decide whether the principles of comity favour upholding the stay in this jurisdiction. As the Plaintiffs emphasize, comity is a discretionary matter. I am not bound by the stay imposed by the U.S. Bankruptcy Act.

8. I note that the Canadian legislation has a similar provision (Bankruptcy and Insolvency Act (“BIA”), R.S.C. 1985, c. B-3).

9. The Plaintiffs accept that the U.S. Bankruptcy Code governs DCC’s estate, and that the Plaintiffs are creditors under the jurisdiction of the U.S. Bankruptcy Court.

PLAN OF REORGANIZATION

10. DCC filed a Plan of Reorganization (the “Plan”) with the Bankruptcy Court on August 25, 1997. The Bankruptcy Court rejected this Plan, and an amended plan was presented on February 17, 1998. The Bankruptcy Court approved that Plan, which now has to be voted upon by the various classes of creditors

11. Breast implant claimants would have four settlement paths, based on their history, symptoms and past and proposed treatment. Any claims not settled by agreement under the Plan process would go to common issue trials. Any claims remaining after common issue trials would undergo individual claims review and mediation. The last resort would be individual litigation. These individual trials would be held in the U.S., dismissed in favour of litigation in the claimant’s home jurisdiction, or held in the U.S. using the law of the claimant’s home jurisdiction. The Plan is designed to solve as many claims as possible in an orderly and expeditious manner...

12. The U.S. procedure provides that once the Bankruptcy Court approves a Plan, it is sent to the creditors for a vote. The creditors vote by class. All of the Canadian breast implant claimants are in the foreign claimants’ class of creditors....

13. The originally proposed Plan did not make it to the creditor review stage. The Bankruptcy Court apparently had a number of concerns, one of which was the treatment of the foreign claimants. The Plaintiffs raise that concern in this Court also. The proposed settlement payments for foreign claimants would range from 35 to 60 per cent of those offered to U.S. claimants, on the

theory that product liability litigation yields lower damage awards in non-U.S. jurisdictions. The proposed settlement for Canadian claimants is 60 per cent of the payments offered to U.S. claimants....

15. The amended Plan will be put to the creditors. It may be that the Plan will be confirmed, even if the foreign claimants' class rejects it.

ANALYSIS

General Principles

16. Where an appropriate forum must be chosen, the Courts may grant a stay of proceedings. In the words of the Supreme Court of Canada: "This enables the court of the forum selected by the Plaintiffs (the domestic forum) to stay the action at the request of the Defendant if persuaded that the case should be tried elsewhere." (*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), at 912). This decision is completely discretionary. I am not bound to defer to the U.S. bankruptcy proceedings.

17. *Amchem* also discusses the vital principle of comity....

18. After cautioning against abusing the power to enjoin foreign litigation, the S.C.C. in *Amchem* outlined the test for restraining foreign proceedings. Although a case on anti-suit injunctions, the first part of the test also relates to stays. The Court must determine if there is a forum other than the domestic forum which is "clearly more appropriate" (at 931). If not, the domestic forum should refuse to stay the domestic proceedings. At 931-932, the S.C.C. continued:

In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

19. As La Forest J. stated in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.) at 268, modern states “cannot live in splendid isolation.” They must follow comity, which is “the deference and respect due by other states to the actions of a state legitimately taken within its own territory.”

20. Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty.

21. I also note that U.S. Courts have shown themselves willing to grant comity in similar circumstances. For example, a Bankruptcy Court granted comity in *Tradewell Inc. v. American Sensors & Electronics Inc.*, 1997 WL 423075 (U.S. S.D.N.Y. 1997). In that case, all proceedings against the Defendant Canadian corporation were stayed under the Companies’ Creditors Arrangement Act. The Defendant successfully applied to the U.S. Bankruptcy Court for a stay in the U.S. based on comity. That Court stated that U.S. public policy should recognize the foreign proceedings, thus facilitating the “orderly and systematic distribution” of the debtor’s assets. This was especially true for Canada, which has similar procedures and procedural safeguards.

DISCUSSION

22. The U.S. Bankruptcy Code provision imposing a stay once bankruptcy proceedings have begun is comparable to Canada’s BIA provision. They also both have the same underlying philosophy - to ensure a fair distribution of assets among all creditors, not just those who happen to have begun proceedings prior to the initiation of bankruptcy. In a situation such as DCCs, there is another motive - if all matters can be stayed, there is a better chance that the DCC will be able to restructure successfully.

23. The number of claims is significant. The U.S. Bankruptcy Court has decided that it is impractical and unfair to have thousands of individual claims going through the adversarial court system. Instead, it agrees with DCCs proposal to settle as many as possible, hold common issue trials as appropriate, then have as many individual trials as still necessary. This appears logical and in the interests of all creditors as a group.

24. An additional consideration is that the Plaintiffs have filed proofs of claim in the U.S. bankruptcy proceedings. The Plaintiffs have, therefore, attorned to the jurisdiction of the U.S. Bankruptcy Court...

25. The Plaintiffs argue that foreign claimants are not treated fairly by the proposed Plan because their settlement package would be at a discount from that given to U.S. claimants.

However, there are several safeguards to prevent unfairness. First, the Plaintiffs, along with the rest of the class, have the opportunity to vote against the Plan. If, as a class, they vote against it, the U.S. Bankruptcy Court can only confirm the Plan if it feels the Plan does not “discriminate unfairly” against classes which rejected it. I understand this to mean that treatment can be fair across classes without being equal, as long as there is equality within the class itself. Second, the Plaintiffs are not obliged to settle under the Plan. They may proceed to trial. Third, this Plan actually protects creditors. If there were no stay and no Plan, only the first to trial and judgment would receive any compensation at all, and trials could potentially drag on for many years. Under the Plan, each creditor will receive something and will receive it much sooner....

ORDER

31. In the circumstances of this case, the U.S. Bankruptcy Court has apparently decided that fairness among creditors is achieved without having complete equality across all classes of creditors. The Plaintiffs attorned to that jurisdiction. However, even had there been no attornment, I find that common sense dictates that these matters would be best dealt with by one Court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court. Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant’s stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs’ attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding. Lastly, while not determinative, I found it significant that there has been acceptance of the Plan in Ontario and Quebec. This not only suggests that the Plan proposes a reasonable offer, but it also suggests that the parties affected in these provinces have accepted the principle that international comity should be recognized in these proceedings.

Application granted.

It is particularly interesting that the Alberta court went out of its way to avoid relying on the filing of a claim in the United States as the sole ground for binding these plaintiffs, but instead emphasized the role of comity regardless of “attornment” to the foreign jurisdiction.

D. INTERNATIONAL LAW REFORM

A number of international institutions - notably the international Monetary Fund and the World Bank - have gotten interested in reform of bankruptcy laws, both domestic and international. Law reform organizations have also developed projects in international bankruptcy cooperation. These projects have not addressed choice of law, our next subject, but have focused on cooperation among courts in managing international cases.

The United Nations Commission on International Trade Law (UNCITRAL) has promulgated a Model Law on Cross-Border Insolvencies. Unlike a treaty or convention, a model law is offered for adoption by each country in the hope that its adoption by a number of countries will begin the process of cooperation and, eventually, harmonization. The Model Law does not change the substantive rules in any country's bankruptcy law, but rather provides for cooperation among courts in multinational bankruptcies. It provides for equal treatment for foreign creditors and for a relatively fast and simple process of recognition of a bankruptcy, especially a bankruptcy in the home country of the debtor company (called a "main" proceeding). Upon such recognition, a stay goes into effect in the recognizing country that imposes the status quo on both the debtor and its creditors. Subject to various limitations, the Model Law provides a framework for cooperation, including turnover of assets to the main proceeding.

The Model Law has been adopted in Mexico and is part of proposed legislation in several other countries, including the United Kingdom. It has been included as a new Chapter 15 in the legislation pending in the United States and is expected to be adopted here if and when new bankruptcy legislation is finally passed in Congress and signed into law.

The Transnational Insolvency Project of the American Law Institute was mentioned earlier. Its purpose is to go the next step beyond the Model Law to improve cooperation among the three NAFTA countries, Canada, Mexico, and the United States, in multinational insolvencies. The Project has produced authoritative summaries of the bankruptcy laws of each of the three countries and a statement of Principles of Cooperation. At the heart of the ALI Principles is the idea of a global perspective. Each Principle is designed to encourage the courts and the parties to look at such cases overall, seeking the best results for the creditors regardless of local advantage.

Finally, the European Union has adopted a bankruptcy "regulation," which is a law issued at the European level that is binding on all of the fifteen member countries and enforceable in their courts. Effective May, 2002, it will have the effect of

improving cooperation and coordination in trans-EU cases, although it does not go as far in the cosmopolitan direction as many observers had hoped. Its most important feature may simply be the fact that it is an EU regulation and therefore will be subject to uniform interpretation through the European Court of justice. It thus will offer the first example of a truly international bankruptcy regime.

E. CHOICE OF LAW

As we noted earlier, choice of forum and choice of law are closely intertwined issues in the bankruptcy field and the analyst must keep them sharply distinct while simultaneously remaining aware of their close interaction — a difficult business at best. The following cases reflect several key points: (a) choice of law is often a distinct issue; (b) choice of law is always related to which country is the home country and therefore to choice of forum; (c) choice of law for application of avoidance law is in many ways the single most important question in international insolvency, at least from a litigant's point of view. It should be noted that we are discussing choice of which *bankruptcy* law to apply. In any cross-border bankruptcy case the court will also be required to choose which *nonbankruptcy* law to apply to a particular dispute. Thus, for example, if a TIB in such a case attacks the enforceability of a security interest, the court must ascertain first, which jurisdiction's secured-credit law applies to determine the validity of the security interest (e.g., in the United States, whether the creditor has met the obligations imposed by Article 9 of the UCC), and second, which nation's bankruptcy avoidance provisions apply (e.g., in the United States, does section 544 or 547 of the bankruptcy code void an otherwise enforceable security interest?).

Although there are many issues in a bankruptcy case that may require determination of the applicable bankruptcy law, three areas are most crucial: avoiding powers, distribution (priority) rules, and discharge. There are very few cases (much less statutory provisions) anywhere in the world addressing choice of law for any of the three. In this section, we discuss the avoiding powers.

Both of the next two cases arise from the Maxwell bankruptcy. One legal point is key to the dispute: Unlike United States preference law, British insolvency law requires that a payment is not avoidable unless the debtor had a desire to prefer the creditor. The consequence was that the preference under attack in these cases was likely to be avoidable under section 547 of the U.S. Bankruptcy Code, but likely to be unavoidable under section 239 of the English Insolvency Act 1986. Note also that an "overdraft facility" is simply a type of loan.

**BARCLAYS BANK P.L.C. v. HOMAN
AND OTHERS**

Court of Appeal (Civil Division)
[1993] BCLC 680, [1992] BCC 757 (8 October 1992)

GLIDEWELL, L.J.

Maxwell Communications Corporation plc is an English company which was controlled by the late Mr. Robert Maxwell. It is registered in England, and until its collapse last December was quoted on the London Stock Exchange and managed by a board of directors in London. However, its principal assets were and are in the United States. They are shares which Maxwell Communications owns, indirectly through two wholly-owned subsidiary companies, in Macmillan Inc and Official Airline Guides Inc, American companies with American subsidiaries. The total assets in the United States are worth many times the value of the assets outside America, which are estimated to be worth less than £100m. Barclays Bank plc is an English bank, with the majority of its branches in the United Kingdom. In the United States Barclays has branches in the state of New York and offices in other major cities.

THE FACTS

Until November 1991 Maxwell Communications had an agreement with Barclays for an overdraft facility at the bank's branch in Holborn, London. The limit on the facility was expressed in sterling but drawings could be made in any convertible currency. The agreement provided that drawings in foreign currencies were to be repaid to such bank or branch of the bank as the bank shall specify. By October 1991 \$US30m[illion] had been drawn, against this facility. As is now well-known, by that date it was apparent to their creditors that Maxwell Communications and other companies in which the late Mr. Robert Maxwell was interested were in severe financial difficulties. Barclays started to express concern about the extent of Maxwell Communications' overdraft drawings.

On 5 November 1991 Mr. Robert Maxwell died. Shortly before that, on 1 November 1991, MacMillan Inc had sold one of its subsidiary companies, QUE, to Prentice-Hall Inc for \$US157.5m. The purchase price was paid by Prentice-Hall to National Westminster Bank plc in New York, where it was credited to a suspense account on 18 November. On the following day it was credited to Maxwell Communications' \$US account with National Westminster in London....

On 26 November 1991 Mr. Pelly met Mr. Kevin Maxwell in London and again threatened action if the \$30m was not paid. On the same day a payment was made of the \$30m plus accrued interest from the NatWest dollar account to Barclays' branch in New York, through which all payments in dollars to Barclays are routed. It was then credited to pay off the overdraft account at the Holborn branch.

PROCEEDINGS IN THE UNITED STATES AND ENGLAND

On 16 December 1991 Maxwell Communications by its directors filed a petition in the United States Bankruptcy Court in the Southern District of New York under ch 11 of the US Bankruptcy Code. Although Maxwell Communications is an English company, it is not disputed in this court that the United States court has jurisdiction to entertain the petition on the ground that Maxwell Communications has property in the United States. The effect of presenting the petition was under §362 of the code to bring into operation an automatic stay on all proceedings against Maxwell Communications by creditors subject to the jurisdiction of the United States court. However, this did not prevent action being taken in England by other creditors.

On 17 December 1991 Maxwell Communications presented a petition to the High Court in England for an administration order. On 20 December 1991 Hoffmann, J. appointed the first three respondents to this appeal as administrators. On the same day the United States bankruptcy judge in New York, the Hon Tina L. Brozman, ordered the appointment of an examiner under § 1104 of the code. Subsequently, Mr. Richard A Gitlin, a distinguished Connecticut lawyer, was appointed examiner.

The administrators in England and the examiner in New York, subject to the respective jurisdictions of their courts, have carried on the administration of Maxwell Communications in cooperation with each other....

THE PRESENT PROCEEDINGS

On 6 July 1992 Millett, J., on an ex parte application made on behalf of Barclays, granted them an interim injunction restraining the respondents ...

(b) in particular...from. making a claim against the Applicant for payment or the return of the relevant payment in any proceedings under the Bankruptcy Code of the United States of America

...On 28 July 1992, after a hearing inter partes, Hoffmann J. dismissed the motion by Barclays and struck out their application. It is against this decision that Barclays now appeal.

THE PRINCIPLES TO BE APPLIED

...In *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak* [1987] 3 All ER 510, [1987] AC 871, the plaintiff's husband was killed in a helicopter accident in Brunei. The helicopter had been manufactured by Aerospatiale, a French company, which carried on business in Texas. The plaintiff started actions both in Brunei and Texas for damages. The Judicial Committee of the Privy Council, in a judgment delivered by Lord Goff of Chieveley, granted an injunction restraining her from proceeding in the courts of Texas....

In my view, in relation to the circumstances of the present case, the principles to be derived from the judgment of the Privy Council in *Aerospatiale* can be summarised as follows: (i) If the only issue is whether an English or a foreign court is the more appropriate forum for the trial of an action, that question should normally be decided by the foreign court on the principle of forum non *conveniens*, and the English court should not seek to interfere with that decision. (ii) However if, exceptionally, the English court concludes that the pursuit of the action in the foreign court would be vexatious and oppressive and that the English court is the natural forum, ie. the more appropriate forum for the trial of the action, it can properly grant an injunction preventing the plaintiff from pursuing his action in the foreign court. (iii) In deciding whether the action in the foreign court is vexatious and oppressive, account must be taken of the possible injustice to the defendant if the injunction be not granted, and the possible injustice to the plaintiff if it is. In other words, the English court must seek to strike a balance....

At a later stage in his judgment, [Judge Hoffman] considered the extent to which the facts disclosed a connection with the jurisdiction of the United States Bankruptcy Court. He took into account in particular the fact that, although Barclays received the repayment of the overdraft at their branch in Holborn, in practice the money derived from the proceeds of the sale of QUE in the United States.

The reasoning which led the judge to his main conclusion was as follows. He said:

“It seems to me probable that an English court would regard the transaction as sufficiently connected with England to justify assuming jurisdiction under §239. But it does not follow that it would be unjust or unconscionable for a United States court to

assume jurisdiction under §547. I do not think it necessary for me to express a view on whether an English court, faced with the mirror image of the facts of this case and exercising its discretion in accordance with the guidelines in *Re Paramount Airways Ltd* [1992] BCLC 710, [1992] Ch 160, would accept or decline jurisdiction. The fact that a United States court might take a different view of the weight of the relevant connecting factors is not in itself a ground upon which this court would grant an injunction. This was made clear by Lord Goff of Chieveley in *Aerospatiale* [1987] 3 All ER 510, [1987] AC 871, when he dealt with what seems to me the analogous case of the discretion to stay proceedings on grounds of *forum non conveniens*: in a case in which there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court [cannot] arrogate to itself, by the grant of an injunction, the power to resolve that dispute.’ In other words, the normal assumption is that the foreign judge is the best person to decide whether an action in his own court should proceed. Comity requires a policy of non-intervention not only for the same reason that appellate courts are reluctant to interfere with the exercise of a discretion, namely that in the weighing of the various factors, different judges may legitimately arrive at different answers. It is also required because the foreign court is entitled, without thereby necessarily occasioning a breach of international law or manifest injustice, to give effect to the policies of its own legislation....

The judge also considered, I believe as a secondary matter in coming to his conclusion, that if he did grant an injunction in the circumstances of the present case, it might well be futile. He said:

“It seems to me, therefore, that an injunction (were I otherwise disposed to grant it) could serve no purpose except to antagonise the United States court and prejudice the cooperation which has thus far prevailed between the ch 11 and the English administration. If the United States judge does not think that there is a sufficient connection with America to justify a preference action against Barclays, she will dismiss the company’s suit. If she does think so, she will not be deflected from securing the prosecution of that claim by any injunction I may make.” . . .

Finally, Mr, Merriman argues that because Barclays are or may be at a disadvantage under §547 of the United States Code as compared with their position under §239 of the Insolvency Act, this of itself makes proceedings in America against them oppressive or vexatious. I do not accept that this is correct. I have already indicated that the authorities require the disadvantage to Barclays to be balanced against the advantage to the administrators/the examiner, acting on behalf of the creditors of Maxwell Communications. While it is true that American law

differs from English law in this respect, of itself there is nothing inherently oppressive about the difference

For the reasons I have sought to set out, I agree with the conclusion which the learned judge reached. I would therefore dismiss this appeal.

MANN, L.J.

I have had the advantage of reading in draft the judgments of Glidewell and Leggatt LJJ. I agree with them and for the reasons which they give I also would dismiss this appeal.

LEGGATT, L.J.

On behalf of Barclays Bank plc (the bank) Mr. Nicholas Merriman QC contends for two main principles: (1) The primary insolvency proceeding is that which takes place in the insolvent company's country of incorporation, and (2) the recovery of assets as preferences (and possibly as fraudulent transfers) must be judged according to the law of the country of incorporation or of the natural forum for the recovery of preferences.

In the insolvency of MCC in which both assets and creditors are distributed worldwide, it cannot sensibly be suggested that any one forum is the natural forum, that is, the forum in which exclusively proceedings should be brought. If proceedings are legitimately brought and maintained in another jurisdiction, both forums are to be regarded as natural, and there is no need for this court to seek to interfere with the conduct of the foreign proceedings....

In this case the presence in the United States of substantial creditors, of assets and of moneys derived from assets, coupled with the absence of any challenge to the ch 11 proceedings, suffice to explain the assumption of jurisdiction by the United States court, and militate against the conduct of them being regarded as unconscionable according to English notions....

For myself I would want no part in any order, the intended effect of which would be to recommend to Judge Brozman what orders to make in her own court. That would represent unacceptable hubris. For the reasons given by Glidewell LJ and in this judgment I reject Mr. Merriman's propositions. I see no reason to disturb the even tenor of the way projected by Hoffmann J, and I too agree that the appeal should be dismissed.

Disposition: Appeal dismissed. Leave to appeal to the House of Lords refused.

The administrators proceeded to file their preference actions in the United States, with the following result.

In re MAXWELL COMMUNICATION
CORP. PLC

93 F.3d 1036 (2d Cir. 1996)

CARDAMONE, Circuit Judge:

The demise of the late British media magnate Robert Maxwell and that of the corporation bearing his name, the Maxwell Communication Corporation plc, followed a similar and scandalous path, spawning civil and criminal litigation in England and around the world. This case illustrates that some positive consequences have resulted from these parallel demises. From Maxwell's mysterious death, which forced his international corporation into bankruptcy, was born a unique judicial administration of the debtor corporation by parallel and cooperative proceedings in the courts of the United States and England aimed at harmonizing the laws of both countries and also aimed at maximizing the benefits to creditors and the prospects of rehabilitation.

We have before us a small but significant piece of the swirling legal controversy that followed the collapse of Robert Maxwell's media empire. The question to be addressed is whether Maxwell Communication, as a debtor estate in Chapter 11, may recover under American law millions of dollars it transferred to three foreign banks shortly before declaring bankruptcy...

BACKGROUND

A. Events Preceding the Dual Fillings ...

Maxwell alleges that in the fall of 1991, less than 90 days before its Chapter 11 filing, it made several transfers - transfers it now seeks to avoid - to three European banks (collectively, the banks) with whom it had credit arrangements. Two of these banks are Barclays Bank plc (Barclays) and National Westminster Bank plc (National Westminster), both of which have their headquarters in London and maintain an international presence, with branches in New York and elsewhere. The other bank is Societe Generale, a French Bank headquartered in Paris with offices, among other places, in London and New York....

[The court described the payments to the three banks, which were similar to that described in the Barclays opinion: payments in London that may have derived from sale of U.S. subsidiaries, for a total paid to the three during the 90 days of approximately US\$ 100 million.]

B. The Dual Insolvency Proceedings

On December 16, 1991 Maxwell filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court for the Southern District of New York. The next day, it petitioned the High Court of justice in London for an administration order. Administration, introduced by the Insolvency Act 1986, is the closest equivalent in British law to Chapter 11 relief. Acting under the terms of the Insolvency Act, justice Hoffman, then of the High Court (now a member of the House of Lords), appointed members of the London office of the accounting firm of Price Waterhouse as administrators to manage the affairs and property of the corporation.

Simultaneous proceedings in different countries, especially in multi-party cases like bankruptcies, can naturally lead to inconsistencies and conflicts. To minimize such problems, Judge Brozman appointed Richard A. Gitlin, Esq. as examiner, pursuant to 11 U.S.C. §11041c), in the Chapter 11 proceedings. The order of appointment required the examiner, inter alia, to investigate the debtor's financial condition, to function as a mediator among the various parties, and to "act to harmonize, for the benefit of all of [Maxwell's] creditors and stockholders and other parties in interest, [Maxwell's] United States Chapter 11 case and [Maxwell's] United Kingdom administration case so as to maximize [the] prospects for rehabilitation and reorganization."

Judge Brozman and Justice Hoffman subsequently authorized the examiner and the administrators to coordinate their efforts pursuant to a so-called Protocol, an agreement between the examiner and the administrators. In approving the Protocol, Judge Brozman recognized the English administrators as the corporate governance of the debtor-in-possession. As the bankruptcy judge later explained, this recognition was motivated not only by the need for coordination but also because Maxwell was "incorporated in England and run ... by [Maxwell] executives out of Maxwell House in London subject to the direction of an English board of directors." Maxwell I, 170 B.R. at 817. Justice Hoffman reciprocated, granting the examiner leave to appear before the High Court in England.

These joint efforts resulted in what has been described as a "remarkable sequence of events leading to perhaps the first worldwide plan of orderly liquidation ever achieved." Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 *Fordham L. Rev.* 2531, 2535 (1996).... The mechanism for accomplishing this is embodied in a plan of reorganization and a scheme of arrangement, which are interdependent documents and were filed by the administrators in the United States and English courts respectively.

...The plan and scheme treat all of Maxwell's assets as a single pool and leave them under Maxwell's control for distribution to claimants. They allow any creditor to submit a claim in either jurisdiction. And, in addition to overcoming many of the substantive differences in the insolvency laws of the two jurisdictions, the plan and scheme resolve many procedural differences, such as the time limits for submitting claims.

...[T]hey did not address the instant dispute regarding the debtor's ability to set aside pre-petition transfers to certain creditors.

C British Denial of Anti-Suit Injunction...

Following a hearing, Justice Hoffman ... declined to interfere with the American court's determination of the reach of our avoidance law... This ruling was affirmed by the Court of Appeal, and leave for further review by the House of Lords was denied....

II. INTERNATIONAL COMITY

A. The Doctrine

Analysis of comity often begins with the definition proffered by Justice Gray in *Hilton v. Guyot*, 159 U.S. 113 (1895): "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Although *Hilton* addressed the degree to which a foreign judgment is conclusive in a court of the United States, the principle expressed is one of broad application.

... The doctrine does not impose a limitation on the sovereign power to enact laws applicable to conduct occurring abroad. Instead, it guides our interpretation of statutes that might otherwise be read to apply to such conduct. When construing a statute, the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international relations....

Moreover, international comity is a separate notion from the "presumption against extraterritoriality," which requires a clear expression from Congress for a statute to reach non-domestic conduct.... Comity is exercised with reference to "prevalent doctrines of international law." *Lauritzen*, 345 U.S. at 577. The

management of transnational insolvencies is concededly underdeveloped. However, certain norms shared among nations are relevant to the present case....

The factors enumerated in the [Restatement (Third) of United States Foreign Relations Law] correspond to familiar choice-of-law principles. The analysis must consider the international system as a whole in addition to the interests of the individual states, because the effective functioning of that system is to the advantage of all the affected jurisdictions.

B. Applicability of the Doctrine to the Case at Hand

Because Congress legislates against a backdrop that includes those international norms that guide comity analysis, absent a contrary legislative direction the doctrine may properly be used to interpret any statute. Comity is especially important in the context of the Bankruptcy Code for two reasons. First, deference to foreign insolvency proceedings will, in many cases, facilitate “equitable, orderly, and systematic” distribution of the debtor’s assets. *Cunard S.S. Co. v. Salen Reefer Servs.* AB, 773 F.2d 452, 458 12d Cir. 1985). Second, Congress explicitly recognized the importance of the principles of international comity in transnational insolvency situations when it revised the bankruptcy laws. See 11 U.S.C. §304; see S. Rep. No. 989, 95th Cong., 2d Sess. 35, reprinted in 1978 U.S.C.C.A.N. 5787, 5821 (explaining §304)....

III. PROPRIETY OF DISMISSAL BY THE BANKRUPTCY COURT

A. Standard of Review

Having established that the doctrine of comity applies, we now explain why we think dismissal was warranted, that is to say, why the statute was properly construed not to reach the pre-petition fund transfers to the defendant banks....

B. Primacy of English Law

England has a much closer connection to these disputes than does the United States. The debtor and most of its creditors - not only the beneficiaries of the pre-petition transfers - are British. Maxwell was incorporated under the laws of England, largely controlled by British nationals, governed by a British board of directors, and managed in London by British executives. These connecting factors indicated what the bankruptcy judge called the “Englishness” of the debtor, which was one reason for recognizing

the administrators - who are officers of the High Court - as Maxwell's corporate governance. These same factors, particularly the fact that most of Maxwell's debt was incurred in England, show that England has the strongest connection to the present litigation.

Although an avoidance action concededly affects creditors other than the transferee, because scrutiny of the transfer is at the heart of such a suit it is assuredly most relevant that the transfers in this case related primarily to England. The \$30 million received by Barclays came from an account at National Westminster in London and, while it was routed through Barclays' New York branch like all payments received in U.S. dollars, it was immediately credited to an overdraft account maintained in England. Plaintiffs claim no particular United States connection to the other alleged transfers to Barclays, all of which were denominated in the amended complaint in pounds sterling. Similarly, the transfers to National Westminster and Societe Generale were made to and from accounts maintained in Great Britain.

Further, the overdraft facilities and other credit transactions between the transferee banks and the debtor resulted from negotiations that took place in England and were administered primarily there. English law applied to the resolution of disputes arising under such agreements. We recognize that some of the money transferred to the banks came from the proceeds of the sale of Maxwell subsidiaries in the United States, which is a subject we discuss in a moment. In almost all other respects, however, the credit transactions were centered in London and the fund transfers occurred there.

C Relative Interests of Forum and Foreign States

Given the considerably lesser American connection to the dispute, the bankruptcy court believed its forum's interests were "not very compelling." Maxwell I, 170 B.R. at 818. Virtually the only factor linking the transfers to the United States - that the sale of certain Maxwell subsidiaries in the United States provided the source of some of the funds - is not particularly weighty because those companies were sold as going concerns. Hence, the potential effect that such sales might have had on local economies is not here implicated....

Because of the strong British connection to the present dispute, it follows that England has a stronger interest than the United States in applying its own avoidance law to these actions. Its law implicates that country's interest in promoting what Parliament apparently viewed as the appropriate compromise between equality of distribution and other important commercial

interests, for instance, ensuring potentially insolvent debtors' ability to secure essential ongoing financing. In addition, although complexity in the conduct of transnational insolvencies makes choice-of-law prognostication imprecise, we agree with the lower courts that English law could have been expected to apply...

D. Cooperation and Harmonization: Systemic Interest

In addition to the relative strength of the respective jurisdictional interests of England and the United States, there is a compelling systemic interest pointing in this instance against the application of the Bankruptcy Code. These parallel proceedings in the English and American courts have resulted in a high level of international cooperation and a significant degree of harmonization of the laws of the two countries. The affected parties agreed to the plan and scheme despite differences in the two nations' bankruptcy laws. The distribution mechanism established by them - beyond addressing some of the most obvious substantive and procedural incongruities - allowed Maxwell's assets to be pooled together and sold as going concerns, . . . - the return to creditors. And, by not requiring a creditor to file its claim in both forums, the arrangement eliminated many of the inefficiencies usually attendant in multi-jurisdiction proceedings.

Taken together, these accomplishments - which, we think, are attributable in large measure to the cooperation between the two courts overseeing the dual proceedings - are well worth preserving and advancing. This collaborative effort exemplifies the "Uspirit of cooperation" with which tribunals, guided by comity, should approach cases touching the laws and interests of more than one country.

Where a dispute involving conflicting avoidance laws arises in the context of parallel bankruptcy proceedings that have already achieved substantial reconciliation between the two sets of laws, comity argues decidedly against the risk of derailing that cooperation by the selfish application of our law to circumstances touching more directly upon the interests of another forum....

CONCLUSION

... [I]n this unique case involving cooperative parallel bankruptcy proceedings seeking to harmonize two nations' insolvency laws for the common benefit of creditors, the doctrine of international comity precludes application of the American avoidance law to transfers in which England's interest has primacy. We decline to decide whether, setting aside considerations of comity, the "presumption against

extraterritoriality” would compel a conclusion that the Bankruptcy Code does not reach the pre-petition transfers at issue. Thus, we express no view regarding the banks’ contention that the Bankruptcy Code never applies to non-domestic conduct or conditions....

Accordingly, for the reasons stated, the order appealed from is affirmed.

Among the important lessons in Maxwell are these:

(a) Every international bankruptcy case requires both a choice-of-forum and a choice-of-law analysis, unlike most litigation in which only a choice-of-law problem is presented. The result of the forum selection decision (e.g., deference because of comity) may change the resolution of formal legal issues such as choice of law, so that choice-of-law results are difficult to predict. Indeed, they cannot be reasonably predicted except in combination with predictions about choice of forum.

(b) Protocols of cooperation in the administration of an international case are crucial to the achievement of a satisfactory result in the absence of effective legal rules. The converse, of course, is that any substantial stakeholder involved in a case may be able to block cooperation, with no legal mechanism available to substitute for agreement.

(c) Politeness matters.

When the founders of our country gathered in Philadelphia to make a Constitution, the achievement of free trade and national enterprise among the former colonies was a central concern. In that context, they took it as a given that the new national market required that the national legislature be empowered “to Establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. Const., Art. 1, §8, cl. 4. just as surely, the growth of international trade and transnational enterprise requires the achievement of international agreement on the rules of transnational insolvency. If the U.S. precedent illustrates the need, it also illustrates the difficulty, because it took our ancestors 100 years to fulfill the constitutional command, failing to enact a permanent bankruptcy law until 1898. We must hope that the international community will not be so long delayed.

Problem Set 44

44.1. Maple Leaf Components, Inc., a consumer electronics company based in Calgary, had a plant there and in York, Ontario, along with warehouses in several other Canadian cities and four U.S. locations. Maple Leaf filed liquidation bankruptcy in Calgary yesterday under the Bankruptcy and Insolvency Act. Your client,

CompuTech, Inc., based in Detroit, wants to obtain pre-judgment attachments against each of the U.S. warehouses to secure payment of the \$275,000 Maple Leaf owes to it. Jim Parsons, the CompuTech general counsel, has lots of questions. Does the Canadian stay affect our client's right to seize the inventory? What is the likely next step by the Canadian bankruptcy trustee for Maple Leaf? What effect will it have on our client? Overall, Jim wants to know our take on their likelihood of success in grabbing the inventory.