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# Choice of Avoidance Law in Global Insolvencies

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# CHOICE OF AVOIDANCE LAW IN GLOBAL INSOLVENCIES

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## I. INTRODUCTION

This Article is about one important aspect of transnational bankruptcy, the avoidance of prebankruptcy transactions. When a multinational[1] enters bankruptcy proceedings in its home country, it will nearly always have engaged in prebankrutpcy transactions having substantial contacts with two or more nations. Every other party to each of those transactions may be a defendant in an avoidance action[2] brought by the Trustee in Bankruptcy (TIB) in an "avoiding" court, which is a court in a nation that is not the home country of the multinational, but which has substantial contacts with the transaction and has jurisdiction over an avoidance defendant.[3] The avoiding court must choose which avoidance law to apply.[4] This Article discusses the most common and simplest case in which the choices are two: (1) local (avoiding court) law; or (2) home-country (domiciliary) law.

The most important single variable in this choice of avoidance law should be the identity of the "distributing" court, which is the court that will determine the distribution of the proceeds of a successful avoidance action. As a general rule, the avoiding court should apply its own law if it will distribute the proceeds, but should apply the home-country avoiding law if it will turn over the proceeds to the home country court for distribution. Because the choice of the distributing court will depend upon the system of international cooperation to which the avoiding court is committed, an avoiding court in a "Grab Rule" or

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* Visiting Professor, Harvard University 1991-92. Benno C. Schmidt Chair in Business Law, The University of Texas at Austin.  Wherever this paper persists in error, it is despite the the helpful comments on an earlier draft that I received from Hans Baade, Douglas Laycock, and Russell Weintraub.

1. This Article is concerned only with the bankruptcies of multinational enterprises. *See infra* note 16.

2. "Avoidance" of a transaction refers to: (1) a judicial order requiring the return of certain property transferred by a debtor; (2) the canceling of certain obligations incurred by a debtor; or (3) the award of a monetary judgment against the beneficiary of a transaction in the amount of the benefit received.

3. This Article does not consider transactions importantly involving three countries.

4. *See infra* note 11.

Secondary Bankruptcy jurisdiction should usually apply its own law, but an avoiding court in a jurisdiction embracing Modified Universalism should generally apply home-country law.[5] In both instances the avoiding court should not apply some combination of both laws; that is, it should not (1) avoid the transaction if either one of the two laws would avoid; or (2) refuse to avoid unless both laws would avoid. The avoiding court should follow these general rules to the maximum extent feasible rather than applying a case-by-case conflicts analysis based upon counting contacts, governmental interests in the particular case, and other such conflicts rules designed for nonbankruptcy disputes between specific parties, because individual disputes do not implicate the distributional and systemic variables inherent in bankruptcy cases.

Although my own perspective on these matters is unreservedly internationalist, one element in the analysis is the rejection of the traditional incantation that all national avoidance laws have in common the goal of equality of distribution.[6] In fact, inequality of distribution is the rule in virtually every national bankruptcy system.[7] Therefore, the correct statement is that avoidance laws have as their function the protection and vindication of the priorities set by each national distribution scheme. That is, avoidance laws have as their central purpose overriding the results of individual creditor self-help in favor of politically determined community priorities. This perspective has considerable implications within a national system, but its relevance here is that good sense and good policy require linkage between the national avoidance law to be applied and the national priority system that will govern distribution of the avoidance proceeds.

In the present primitive state of transnational bankruptcy law,[8] relatively little attention has been given to the choice of avoidance law. The discussion that follows attempts in a preliminary way to describe the problem and to identify some important aspects of its analysis. A fully realized theory of avoidance in multinational bankruptcies will be a large undertaking and its attempt without further litigation might be imprudent, so my

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5. These types of cooperation rules are described *infra* in Section IV.

6. *See infra* Section III(2)(B).

7. *See infra* Section III(2)(B).

8. *See* Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 466 & n.30 (1991) [hereinafter Westbrook, *Global Insolvencies*].

conclusions are tentative and suggestive at most.

This Article has four major subdivisions: (1) the general pattern of avoidance laws in the principal domestic bankruptcy regimes; (2) the pattern of distribution priorities in those regimes; (3) the international system of bankruptcy cooperation (or lack thereof); and (4) an exemplary analysis of the choice of avoidance law problem in the bankruptcy of a multinational enterprise. The first section describes the sorts of avoidance laws found in the leading commercial jurisdictions and the policies underlying them. The second section provides a similar introduction to the principal distribution (priority) schemes found in commercial countries. It describes the great diversity of priority schemes, but it also reveals common elements that may offer an approach to greater cooperation or harmonization. The third section presents the principal existing and proposed systems of international cooperation in managing the general financial default of a multinational enterprise. Each system represents the context in which choice of avoidance law must operate and the context is indispensable to understanding the relevant policies. This section also summarizes briefly the importance of international cooperation in bankruptcy proceedings. The final section offers some introductory ideas about the proper analysis of choice of avoidance questions using as examples current multinational cases.

The discussion that follows is limited to specific sorts of problems. The entire field of international insolvency is so unformed that the possible variations in facts and law are endless. Coherent analysis requires considerable limitation of the questions to be discussed. In my view that theoretical constraint also applies to practical problems of law reform in this area: the difficulty of the problems suggests we should carve out important, but manageable sectors for reform, leaving other issues for later attention. This Article discusses only the bankruptcies of multinational enterprises[9] of a commercial nature[10] which are legal,

9. That is, enterprises with assets or operations in more than one sovereign state.

10. Commercial enterprises run for a profit. Like all definitions, this definition could be troublesome at the margins, but it is directly analogous to the limitation of international conventions to "commercial contracts" or "commercial disputes," an approach that has worked very well in practice. A notable example is the United Nations Convention on the Recognition is one area in which systemic considerations may require and Enforcement of Arbitral Agreements and Awards, June 10, 1958, T.I.A.S. No. 6997; 330 U.N.T.S. 3, and its sibling, the Inter-American Convention on International Commercial Arbitration, June 16, 1976, O.A.S.T.S. No. 42, *reprinted in* 14 I.L.M. 336 (1975), which

not natural, persons.[11] I will limit the discussion to liquidations, ignoring reorganizations (rescues),[12] and for the most part I will not discuss security interests (liens or special property).[13] I will generally use United States terminology. The footnote provides cross references to terminology commonly used in other countries.[14]

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apply only to arbitration of commercial disputes.

11. I am frankly puzzled that so many proposals for reform in this field purport to include natural persons. *See, e.g.*, Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings, June 1980, E.C. Bull. Supp. 2/82 [hereinafter EEC Draft Convention], *reprinted in* JAN DALHUISEN, 2 DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY, App. B (1986) [hereinafter J. DALHUISEN]. To include natural persons is to implicate a number of the most fundamental social and normative policies of each nation-state, because of questions like exemptions (property to be kept by the individual safe from creditors), discharge, spousal rights, and criminal penalties. A limitation to legal persons, all "entities" that are not human beings, eliminates most of these issues and reduces the rest to more manageable proportions.

12. *E.g.* 11 U.S.C. §§ 1101-1174 (1991) (Chapter 11 reorganization under United States law).

13. I realize that this last omission of liens or special property amounts to Hamlet without Claudius from the perspective of unsecured, general creditors, but the addition of that subject would have made this effort at least twice as long and indigestible at a single sitting.

14. "Bankruptcy" describes any system for the management of general default; this includes proceedings often called "insolvency" elsewhere. In the United States both personal (individual) and legal-person insolvencies are called "bankruptcy." I will follow that usage, although my concern is entirely with the latter. "Liquidation" refers to any proceeding by which a business is wound up, its assets collected and sold, and the proceeds distributed to creditors. "Reorganization" refers to proceedings like rescue or composition through which the company is taken under court control for the purpose of attempting to save the business and continuing its operation, with or without a sale of the business to a new owner. "Inception of the financial crisis" refers to a legally defined moment, such that transactions taking place after that moment might be subject to avoidance. For the usage of "avoidance," see *supra* note 2. "Creditors" generally means all the potential claimants against a debtor whose interests receive attention in the relevant bankruptcy system. Creditors may include employees, unions, stockholders, guarantors, local communities threatened by closure, and others of whose interest local law takes account. "Trustee in Bankruptcy" (TIB) refers to an official or officials appointed to manage the bankrupt's affairs, a task often including gathering assets and selling them, ruling on creditors' claims, and distributing proceeds to creditors as local law proscribes. The more universal English terms for TIB are liquidator or administrator. The term "security interest" refers to a creditor's priority claim to the proceeds of specific collateral and is approximately the same as a "special preference" or "charge" in other systems. "Priority" refers to the right of a creditor without a security interest to be paid in preference to other unsecured creditors, and is roughly the same as the terms "general preference" creditor or "preferred" creditor used elsewhere. "Preference," on the other hand, in United States usage means a voidable transaction that overfavors a particular creditor, as for example the prepayment of an unsecured creditor shortly before bankruptcy and at a time when the debtor was insolvent. 11 U.S.C. § 547 (1991). "Fraudulent conveyance" means a transaction avoidable because: (1) it was in fraud of creditors; or (2) it resulted in too little value to the debtor in comparison to the value given up by the

Because this discussion is about a choice of law problem, I should declare my general views about such questions. I will devote little attention to the traditional approach to such problems, despite its continuing vitality in many, if not most, jurisdictions around the world. Although I feel great deference toward highly sophisticated systems of jurisprudence that still include traditional choice of law doctrine, I believe that traditional approaches are simply unsuited to current realities. The formal manipulation of rules that purport to make "territorial" distinctions in multi-territorial transactions offers scant help in analyzing conflicts questions arising from modern multinational enterprise.[15] On the other hand, I often find myself in disagreement with some modern United States conflicts scholars, at least as to business problems, because they seem to give too little weight to the "one-law" policies, like predictability and reduction of litigation,[16] and to ignore the importance of an effective scheme of regulation of multinational enterprise.[17] In commercial matters, which are the ones I know something about, I look to a group of seven policy factors that represent my own distillation of the scholarly thought that has been devoted to choice of law in the business context.[18]

Having said all of that, both traditionalists and modernists could agree with the arguments made here, because of the very specific problem discussed in this Article. I limit myself to trans-

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debtor. 11 U.S.C. § 548 (1991).

15. *See generally* RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAW (3d ed. 1986) [hereinafter WEINTRAUB]; ROBERT LEFLAR, LUTHER MCDOUGAL, & ROBERT FELIX, AMERICAN CONFLICTS LAW §§ 86-88 (1986) [hereinafter ROBERT LEFLAR, LUTHER MCDOUGAL, & ROBERT FELIX]; Jay L. Westbrook, *Extraterritoriality, Conflicts of Laws, and the Regulation of Transnational Business*, 25 TEX INT'L L.J. 71 (1990) [hereinafter Westbrook, *Extraterritorial Regulation*].

16. Westbrook, *Extraterritorial Regulation, supra* note 15 at 79-81.

17. Westbrook, *Extraterritorial Regulation, supra* note 15 at 84-86.

18. Westbrook, *Extraterritorial Regulation, supra* note 15 at 74-86. Much of the difficulty potentially created for business planning and economic efficiency by modern conflicts analysis is obviated, at least in the law journals, by the general acceptance of party autonomy. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187; Weintraub, *supra* note 15, at § 7.3C; ROBERT LEFLAR, LUTHER MCDOUGAL, & ROBERT FELIX, *supra* note 15, at § 147; Westbrook, *Extraterritorial Regulation, supra* note 15, at 80 n.29. Party autonomy is of little value, however, in choice of avoidance law, because the essence of avoidance law in every jurisdiction is vindication of the rights of strangers to the contract (other claimants against the debtor) and the community's choices of distribution priorities. *See infra* Section III(2)(A). Obviously the parties cannot be left free to choose the law governing the rights of others or altering a mandatory statutory scheme of distribution. *See, e.g.*, UCC § 1-105 (1989) (enforcing party autonomy in choice of law except with regard to mandatory provisions and the rights of third parties).

actions with substantial contacts with more than one jurisdiction, precisely those where even a territorialist will concede a territorial rule is least helpful. My subject is bankruptcy, which is a unique multiparty proceeding requiring a unique level of international cooperation for the benefit of every claimant, so that a modernist might be convinced that bankruptcy is one area in which systemic considerations may require application of general, rough-justice rules.

## II. Overview of Avoidance Rules

All but the most formalistic of choice of law scholars want to know something about the laws that might be chosen before choosing one, so it is appropriate to summarize briefly (and admittedly to simplify and distort) the sorts of avoidance rules found in various countries.[19]

Most countries seem to have rules that permit the avoidance of transactions that take place after the inception of a debtor's financial crisis.[20] Fraud is the most common ground. It

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19. The student is greatly indebted in such an effort to three sources in particular: (1) the pioneering work of the International Business Bankruptcy Subcommittee of the Business Bankruptcy Committee of the American Bar Association, *International Loan Workouts and Bankruptcy: Protecting Loans and Investments in Argentina, Brazil, Canada, Egypt, England, France, Germany, Israel, Italy, Japan, Mexico, the Netherlands, Switzerland and Venezuela*, 1987 A.B.A. Sec. Pub. Corp., Banking and Business Law, Division of Professional Education [hereinafter American Bar Association]; (2) R. Gitlin & R. Mears, International Loan Workouts and Bankruptcies (1989); and (3) the outstanding seminar organized by Professor Ian Fletcher at Aberystwyth, Wales, in 1989, *Cross-Border Insolvency: Comparative Dimensions*, *in* 12 United Kingdom Comparative Law Series (Fletcher ed. 1990) [hereinafter Fletcher]. Each resulted in the publication of extremely helpful summaries written by practitioners and scholars knowledgeable about the bankruptcy laws of various nations. These summaries included brief descriptions of avoidance laws. Of course, the standard reference remains 1 J. Dalhuisen, *supra* note 11, at Part II, §§ 1.04[1], 1.08, 2.132.14-.16. There are also a number of very helpful individual articles, some of which are referred to in this Article.

These sources collectively do not purport to cover most of the world. It goes without saying that this Article does not. On the other hand, it is probably fair to say that European domination of much of the world over a substantial period has resulted in bankruptcy laws following one or another of the European models in most countries with market economies and functioning commercial laws. The laws in a few countries also reflect a United States influence. Thus the patterns discussed in these sources are typical, in a general way, of laws found in the great majority of countries outside what used to be the Communist bloc.

20. For a remarkable overall discussion, *see* 1 J. Dalhuisen, *supra* note 11, at Part II, § 1.04; Part III, § 2.05[1] n.30a; Part III, § 2.05[2] n.48a (some of this material is not up to date, but the basic concepts remain valid). *See generally* American Bar Association, *supra* note 19, at 54-55 (Argentina), 118-19 (Brazil), 191-93 (Canada), 271-73 (Egypt), 331 (England), 416-17 (France), 460-62 (Germany), 555-60 (Israel), 604-05 (It-

is fair to say that the great majority of jurisdictions permit avoidance of transactions that involve actual fraud against creditors. Most also permit avoidance in at least some circumstances where the transaction yielded the debtor substantially less value than the debtor gave in the transaction (in the felicitous British phrase, "transactions at an undervalue"[21]), especially if the debtor was, or was rendered, insolvent or unable to pay its debts. The two types of actions are together embraced within the concept of fraudulent conveyance in the United States,[22] while in systems based on European models they would be found under the heading *actio Pauliana*.[23] There are, of course, a number of important variations in the definitions of fraud, insolvency, and inadequate value, as well as in various procedural points like burden of proof.

Many countries go beyond avoiding fraudulent conveyances to avoidance of transactions that in the United States are called "preferential." That is, they permit avoidance of transfers and other transactions that benefited certain creditors to the prejudice of creditors generally. Payment of unsecured debt is the leading example. In some countries (including until recently the United States), this sort of avoidance is available only in bankruptcy.[24]

As to both types of avoidance actions, there are national differences with respect to defenses. The most important category of difference is the extent and nature of the defenses of good faith and lack of knowledge. These defenses are more or less easily established depending on the deference paid in a particular

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aly), 778-79 (the Netherlands), 830-32 (Switzerland), 883-84 (Venezuela); Fletcher, *supra* note 19, at 52-53 (Australia). Virtually all permit avoidance of transactions that take place after an insolvency or bankruptcy proceeding has been opened and any necessary public notification given. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, 2.05[1] n.28. Jurisdictions that require publication may consequently resist applying avoidance law against a transaction executed prior to publication in the state of the transaction. *See, e.g.*, Michael Bogdan, *Report for Sweden, in* 12 UNITED KINGDOM COMPARATIVE LAW SERIES at 113 (Fletcher ed. 1990) [hereinafter Bogdan]; 1 J. DALHUISEN, *supra* note 11, at Part II, 1.02[5], 1.04[4] (Germany and the Netherlands).

21. Insolvency Act, 1986, § 238 (Eng.).

22. 11 U.S.C. § 548 (1991); UNIFORM FRAUDULENT TRANSFER ACT §§ 4(a), 5(a) (1984).

23. *See* Case C-115/88, Reichart v. Dresdner Bank, A.G., E.C.R. (Fifth Chamber) (Jan. 10, 1990); *see generally* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.05[1] n.30.

24. There was no generally available nonbankruptcy preference action in the United States until the recent promulgation of the Uniform Fraudulent Transfer Act. UNIFORM FRAUDULENT TRANSFER ACT § 5(b) (1984). Some countries permit "preference" avoidance only where the debtor paid an unmatured unsecured debt (that is, prepaid). 1 J. DALHUISEN, *supra* note 11, at Part II, 1.04[4] (France and the Netherlands).

avoidance regime to the risk of commercial disruption and uncertainty as a result of avoidance actions. There is necessarily a tension between the desirability of preventing fraud and preserving assets for fair collective distribution, on the one hand, and on the other the risk of uncertainty (and outrage) created by the voiding of transactions that would be unexceptionable absent insolvency and the imminence of default. The avoidance systems in various countries can be characterized by a greater concern with the values protected by avoidance or with the values of commercial certainty.[25] Virtually all systems distinguish for this purpose between the initial transferee (in United States parlance)[26] and subsequent transferees from the initial transferee. The subsequent transferees are given broad protection nearly everywhere, especially if they gave value without knowledge, often leaving the liquidator with only a damage action against the initial transferee.[27]

The defenses available in some systems focus on the debtor's good faith or lack of intent to prefer,[28] while others are primarily concerned with the knowledge and good faith of the transferee.[29] Even where a transaction is avoided, most systems provide some protection for value actually given[30] and reinstate the claim of a preferred creditor that has been forced to disgorge a payment.[31]

Virtually all systems place time limits on avoidance actions, some of remarkable complexity.[32] The main categories are two, the systems that establish a fixed period, often dated back from

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25. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.05[1] n.30.

26. 11 U.S.C. § 550(a) (1991). "The party to the transaction" is the English term approximately equivalent to the "initial transferee" in United States law. Insolvency Act, 1986, § 241(2) (Eng.).

27. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.05[1] n.30. *See, e.g.*, Insolvency Act, 1986, § 241 (Eng.); American Bar Association, *supra* note 19, at 192 (Canada).

28. *E.g.*, Insolvency Act, 1986, § 238(5) (Eng.) (debtor's good faith); *id.* at § 239(5) (debtor's intent to prefer). *See* ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 151 (1990) [hereinafter ROY GOODE]; *see also* American Bar Association, *supra* note 19, at 560 (Israel).

29. *See, e.g.*, American Bar Association, *supra* note 19, at 831 (Switzerland); *see generally* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.05[1] n.30.

30. *See, e.g.*, 11 U.S.C. §§ 548(c), 550(d)(1) (1991); 1 J. DALHUISEN, *supra* note 11, at Part I, § 3.07[2] (Germany).

31. United States law is curiously silent about the revival of the claim, although it is generally assumed. Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 272 n.200 (1989).

32. *See, e.g.*, HARRY RAJAK, COMPANY LIQUIDATIONS 280, 285 (1988) [hereinafter HARRY RAJAK] (England); American Bar Association, *supra* note 19, at 604-05 (Italy).

the opening of the bankruptcy proceeding,[33] and those that leave the fixing of the period to the courts.[34] United States law is a simple example of the first type, limiting avoidance of fraudulent conveyances to one year prior to the bankruptcy petition and most preference avoidance to ninety days.[35] Where the law is of the second type, the courts generally determine as a matter of fact the moment prior to bankruptcy at which the debtor ceased to pay (or ceased to be able to pay) its debts, the "cessation of payments." The period from that time to the opening of the bankruptcy is the "suspect period" within which transactions are most often open to avoidance.[36] There is generally a maximum period prior to the bankruptcy behind which the court may not go.[37] The period of avoidance necessarily varies from case to case under the second approach and even among the fixed-period countries there is great variation in the periods chosen.[38]

In summary, most bankruptcy systems make provision for the avoidance of transactions that took place during a certain period prior to the opening of a bankruptcy proceeding. Despite great variations among systems, it can be said that most permit such avoidance in certain cases of fraud on creditors, transactions at an undervalue, and transactions overfavoring certain creditors. In most cases an action can be brought by the liquidator against the initial transferee or party to the transaction for return of the transferred property or for damages. Perhaps the greatest diversity is found in the nature and extent of a good faith defense by the beneficiary of the transaction being attacked.

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33. *E.g.*, 11 U.S.C. §§ 547(b)(4), 548(a) (1991); American Bar Association, *supra* note 21, at 191 (Canada), 830-31 (Switzerland); HARRY RAJAK, *supra* note 32, at 280, 285 (England). *See generally* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.05[1] n.30.

34. *See* American Bar Association, *supra* note 19, at 54-55 (Argentina), 271 (Egypt), 416 (France), 460-61 (Germany), 883 (Venezuela); *see generally* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.05[1] n.30.

35. 11 U.S.C. §§ 548(a), 547(b)(4) (1991). A number of systems are hybrid, having both fixed periods and a "suspect period." *See, e.g.*, American Bar Association, *supra* note 19, at 557-60 (Israel), 604-05 (Italy).

36. See *supra* note 34.

37. *See, e.g.*, American Bar Association, *supra* note 19, at 54-55 (Argentina), 416 (France), 883 (Venezuela); *see generally* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.05[1] n.30.

38. *See supra* note 32.

## III. Distribution Schemes

### A. *The Relationship Between Avoidance and Distribution*

The policies affecting choice of avoidance law are intimately related to those underlying the systems of distribution of bankruptcy estates, because the result of avoidance is distribution of the proceeds of avoidance under some scheme of statutory priorities. Avoidance laws have the purpose and effect of re-ordering the distribution of a debtor's assets, erasing the results of debtor and creditor actions in favor of the collective priorities established by the distribution statute.

It is always said that all, or virtually all, domestic bankruptcy systems share the common principle of equality of distribution,[39] which is therefore the common goal of avoidance laws.[40] I am one who has said that[41] and it is true in a certain sense. But it is importantly not true. All of us who proclaim the universality of the equality principle know very well — and generally concede in the next breath — that in virtually every country the bankruptcy distribution system creates all sorts of priorities for a variety of beneficiaries. "All creditors are equal, but some are more equal than others."[42] A neutral observer, having recently arrived from another solar system, might express polite astonishment at the notion that the nations' systems of bank-

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39. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 177-78 (1977) (equality of distribution is most important reason for preference rules). *See also* Kurt Nadelman, *Legal Treatment of Foreign and Domestic Creditors*, 11 Law & Contemp. Prob. 696, 697 (1946); Robert Weisbert, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 Stan. L. Rev. 3 (1986); Charles Seligson, *Preferences under the Bankruptcy Act*, 15 Vand. L. Rev. 115 (1961) ("equity is equality" is cornerstone of bankruptcy); John Lowell, *Conflict of Laws As Applied to Assignments for Creditors*, 1 Harv. L. Rev. 259 (1888) [hereinafterr Lowell]. *See generally* 1 J. Dalhuisen, *supra* note 11, at Part II, § 1.01[3].

40. In the United States, avoidance laws, especially the preference rules, have another purpose that in my view is even more important than protection of the statutory priorities. They are designed to lower the incentives to dismember a financially distressed debtor and to encourage out of court workouts to keep the debtor business going. See Jay L. Westbrook, *Two Thoughts About Insider Preferences*, ___ Minn. L. Rev. ___, at n. ___ (forthcoming) (1991). A knowledgeable creditor is aware that repossessed collateral or levied property may have to be returned if the debtor files bankruptcy. On the other hand, the creditor knows that it can more safely work with a troubled debtor because noncooperating creditors will face a preference action if they seize property from the debtor (or force payment) and bankruptcy follows. But this policy, which is convergent with the strong U.S. commitment to reorganization once bankruptcy is filed, is not commonly cited in support of avoidance rules in other countries.

41. *See* Westbrook, *Global Insolvencies*, *supra* note 8, at 466 n.30.

42. *Cf.* George Orwell, Animal Farm (1946).

ruptcy distribution represent a commitment to equality of distribution.

It is fair to say something considerably more narrow about bankruptcy distribution systems: virtually all such systems are committed to equality of distribution among creditors who belong to a class of creditors given equal priority treatment. Fortunately, that statement is not quite a tautology. It is not the same as saying that a creditor should be treated equally unless it is not. Instead, it is saying that creditors will be treated equally within classes of creditors, even though some classes are treated much better than others. That amounts to saying merely that we will apply objective criteria to categorize each claim and give it such priority in distribution as local law provides for that category. That is a good legal principle, and it is especially important internationally when linked with national treatment for foreign creditors, but it is considerably short of a commitment to equality of distribution to creditors.

When distribution systems are so understood, the accurate generalization is that avoidance actions are protective of the legally mandated system of distribution priorities in that bankruptcy system.[43] That is, the policy behind avoidance is to impose collective, societal priorities in preference to the results of individual, self-help results.[44] So, for example, most societies believe employees of the enterprise should receive certain priorities in default. The prebankruptcy value-seizing activities of more sophisticated and aggressive creditors would frequently win out over the interests of employees as defined and limited in the default distribution scheme. Avoidance actions recapture some of the fruits of that self-help for the benefit of those given priorities under the local statute, including employees.

Routinely in discussions of domestic bankruptcy systems "equality of distribution" is invoked as the fundamental policy

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43. One recent casebook speaks in these terms, but without drawing unconventional conclusions. DOUGLAS BAIRD & THOMAS JACKSON, BANKRUPTCY LAW 423-24 (2d ed. 1990). One of its authors sees the preference rules as protecting the hypothetical "bargain" struck among creditors. Thomas Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 758-59 (1984) [herinafter Jackson, *Powers*]. *See also* C. Robert Morris, *Bankruptcy Law Reform: Preferences, Secret Liens, and Floating Liens*, 54 MINN. L. REV. 737, 738 (1970).

44. *But see* Jackson, *Powers*, supra note 43, at 758-59 (arguing that priorities are or should be determined by a hypothetical "creditors' bargain."). Of course, a creditors-bargain system of priorities would represent a political, societal choice to regulate a market by enforcing purely private market decisions, giving them the coercive force of law.

of bankruptcy law, but in fact the avoidance laws, and other "equality" policies, are designed to protect statutory priorities of which the equality of general, unsecured creditors is usually the last, often empty category.[45] It follows that to the extent nations have common distribution policies, they have common goals for avoidance laws; to the extent distribution priorities are different, avoidance goals are different. For me, this realization does not reduce the desirability of international cooperation, although it makes the rhetoric more complicated.

If we add to this point the related fact that avoidance goals in every country are balanced against competing values — especially certainty and minimal disruption in the marketplace — then we can state the general proposition that avoidance laws have common goals to the extent that they serve similar distribution schemes and draw similar balances in weighing protection of the statutory priorities against the costs and risks of permitting avoidance of normally acceptable transactions.

### *B. Overview of Distribution Schemes*

Because the effect of a successful avoidance action by a liquidator is to make an asset or its value available for distribution according to a particular scheme of distribution priorities, we have to work through to the distribution of the proceeds of the avoidance action to understand fully the effects of a particular avoidance regime. Therefore it is appropriate to consider, in a summary way, the patterns of distribution found in various countries. As with avoidance rules, the summary is necessarily simplistic.

Distribution systems are even more diverse than avoidance systems, but some generalizations are possible. At the highest level, virtually all systems distinguish four types of claims: (1) secured (special preference); (2) administration (against the estate itself); (3) priority (general preference); and (4) general, unsecured.

Secured claims are at once the highest and the most limited in priority, because they are generally paid prior to all other claims from the proceeds of the collateral, but they have no special priority as to the proceeds of other assets.[46] Nations vary

45. *See infra* note 74.

46. *See generally* American Bar Association, *supra* note 19; *see* 1 J. DALHUISEN, *supra* note 11, at Part II, § 1.06.

greatly in the extent to which law and culture permits broad, "blanket" security interests, but the special priority of a valid lien seems to be universally recognized.[47]

Administration claims, the expenses of the bankruptcy proceeding itself, generally enjoy a very high priority, for obvious practical reasons.[48] This fact gives great comfort to the universal order of lawyers, although even administration claims are sometimes trumped.[49]

Aside from secured and administration claims, priority systems are bewildering in their variety, reflecting various cultural and political preferences.[50] Nonetheless, it can be said that the great majority of systems give high priority to the claims of employees and of public entities, especially revenue authorities.[51] No other categories of claimants come even close to these in the near universality of their favored status.

There is very little empirical evidence available about the actual operation of bankruptcy systems anywhere. There is not much in the literature about their practical results even on an anecdotal basis. But what evidence we have suggests that in most bankruptcies around the world relatively little is left for distribution to anyone after the payment of secured, administration, and priority claims.[52] The consequence is that it is fair to say that the effect of avoidance of transactions in the average liquidation is almost entirely to increase distributions to priority creditors, especially employees and government authorities.

On the other hand, it is plausible that this general proposi-

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47. One caveat is that systems based on English Law may give higher rank to certain general priority (general preference) claims even as to collateral proceeds where the lien is a "floating charge." *See, e.g.*, ROY GOODE, *supra* note 28, at 76.

48. *See, e.g.*, American Bar Association, *supra* note 19, at 41 (Argentina), 187 (Canada), 264 (Egypt), 325 (England), 457 (Germany), 740 (Mexico), 776 (the Netherlands), 822 (Switzerland), 680 (Japan). *See* 1 J. DALHUISEN, *supra* note 11, at Part II, § 1.06[2].

49. *See, e.g.*, 11 U.S.C. §§ 507(b) ("super priority" for certain secured claims), 364(c)(1) ("super-super priority" for certain postpetition financing) (1991).

50. *See* 1 J. DALHUISEN, *supra* note 11, at Part II, § 1.06[1]. *See generally* American Bar Association, *supra* note 19.

51. *See, e.g.*, American Bar Association, *supra* note 19, at 41-44 (Argentina), 115 (Brazil), 263 (Egypt), 325 (England), 408-09 (the Netherlands), 822 (Switzerland); John D. Honsberger, *The Canadian Experience, in* 12 UNITED KINGDOM COMPARATIVE LAW SERIES 27, 32 (Fletcher ed. 1990) [hereinafter Honsberger]; R.W. Harmer, *Report for Australia, in* 12 UNITED KINGDOM COMPARATIVE LAW SERIES 42, 48-49 (Fletcher ed. 1990) [hereinafter Harmer]; Ulrich Drobnig, *Report for Germany, in* 12 UNITED KINGDOM COMPARATIVE LAW SERIES 95, 101 (Fletcher ed. 1990) [hereinafter Drobnig]; *see generally* 1 J. DALHUISEN, *supra* note 11, at Part II, § 1.06.

52. *See infra* note 74.

tion does not apply to the largest cases and therefore may not apply to the bulk of transnational cases. Experience suggests that large companies may often be successful in avoiding encumbering most of their assets with liens, at least prior to the onset of the financial crisis. Because many international cases involve large enterprises, there may be sufficient unencumbered property in such cases that priority creditors can be paid with a significant surplus for other claimants. Even where many of the debtor's assets have been encumbered, the liens may have been granted after the inception of the financial crisis. In those systems that permit avoidance of liens acquired for pre-existing debt after the inception of the crisis (or during a fixed period that usually includes that moment), avoidance of postcrisis liens may yield substantial recoveries. Thus it is plausible that distributions to nonpriority claimants in transnational cases may fairly often be importantly affected by the availability of avoidance actions.

The actual effects of avoidance will be of great importance to policymakers (and should be to scholars) in fashioning or agreeing upon choice of law rules for avoidance in transnational bankruptcies. Two points appear most crucial: (1) we need more evidence of all kinds (ideally empirical) about the actual results of liquidations in various countries; and (2) we should address the conceptual and policy problems of employee and governmental priorities as the key area necessary to international agreement about international bankruptcy, especially avoidance actions.

## IV. Choice-of-Forum: Three Current Notions of Transnational Bankruptcy

The most important determinant of the distributional result of an avoidance action in a transnational insolvency case is the type of international system to which the avoiding court is committed. That system will guide the avoiding court in its choice of the "distributing court," the court that will distribute the proceeds of avoidance. Because bankruptcy courts always apply the priority system of the *lex fori*,[53] the choice of distribution forum

53. There is at least one remarkable exception to this proposition. *Re* Sefel Geophysical, Ltd., 54 D.L.R.4th 117 (Can. 1985). In that case, the Canadian court treated avoidance proceeds from the United States as a trust fund to be distributed according to United States priorities. The decision represents a very interesting and creative ap-

represents the choice of the priority system of that forum to govern the distribution. Because that choice in turn depends upon the system of international cooperation (or lack thereof) to which the avoiding court is committed, every question of choice of avoidance law demands that we examine the avoiding court's rule for choice of distribution forum in international cases.

At the present time one may speak of three conceptions of the treatment of an international general default: (1) territoriality; (2) universality; and (3) what I will call "limited cooperation."[54] The first two lie at opposite ends of a continuum stretching from a multitude of unconnected, country-by-country proceedings (territoriality), where distributions would always be local, to the broadest attempt to administer the debtor's affairs cooperatively under a single legal regime (universality),[55] where all distributions would be controlled by a single court. The third, limited cooperation, is a term to describe various approaches that lie somewhere between territoriality and universality.

### A. *Territoriality*

Territoriality may fairly be characterized as the "Grab Rule." In the event of general default by a multinational legal person, the courts in each national jurisdiction seize the property physically within their control and distribute it according to local rules. Although this approach is often defended as a way to protect local creditors,[56] most modern legal systems permit foreign creditors to share on a basis of equality in the local distri-

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proach to international bankruptcy cooperation, but its solution has not been adopted elsewhere, as far as I know. One author has made the interesting suggestion that proceeds in a Universalist system be distributed according to the country of origin of the funds, making the *Sefel* approach a principle. *See* PHILIP SMART, CROSS-BORDER INSOLVENCY, 207-08, 248 (1991) [hereinafter PHILIP SMART].

Most countries, including Canada, usually apply the *lex fori* in distribution. *See, e.g.*, Honsberger, *supra* note 51, at 33 (Canada); Drobnig, *supra* note 51, at 102 (Germany); PHILIP SMART, *supra*, at 205 (England).

54. There are many discussions of these conceptions, using one terminology or another. One standard description is found in 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3]. *See also* IAN FLETCHER, THE LAW OF INSOLVENCY 542-43 (1990) [hereinafter IAN FLETCHER].

55. The phrase "unity of bankruptcy" is sometimes used to describe a principle similar to universality. Although usage is not consistent, "unity" seems to refer more to choice of forum, to a bankruptcy administered entirely in one forum, while "universality" refers to a single, universal legal regime. *See, e.g.*, Drobnig, *supra* note 51, at 103-04; PHILIP SMART, *supra* note 53, at ix n.13.

56. *See, e.g.*, Bogdan, *supra* note 20, at 114-15 (Sweden). *See generally* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3].

bution under the principle of national treatment.[57] In the modern world, sophisticated multinational creditors are increasingly able to claim in local proceedings all over the world. Thus it is fair to say that the primary effect of the Grab Rule is to protect the primacy of local procedures and local law, with local creditors and sophisticated multinationals sharing significant practical advantages as a result.

Most defenses of the territoriality rule have been conceptual and formal rather than based upon commercial or other policies.[58] In part its justification seems to be a sigh of despair: bankruptcy is simply too complicated for international cooperation to work.[59] To the extent one can try to extract more satisfactory policy support for the principle, one could argue that territoriality serves three bankruptcy goals: (1) it is relatively simple and therefore relatively cheap, always a strong argument in insolvency matters;[60] (2) it protects creditors used to relying on local law and procedures; and (3) it provides a rough-justice allocation of assets among nations, because the location of assets at the time of general default may fairly often reflect to some extent the debtor's level of commercial activity in each country.

### B. *Universality*

Universality in its ultimate realization would provide a single forum applying a single legal regime to all aspects of a debtor's affairs on a worldwide basis.[61] Creditors throughout the

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57. National treatment is provided in most commercially important countries, except that foreign tax claims are almost never recognized. *See, e.g.*, Fletcher, *supra* note 19, at 14 (England); Honsberger, *supra* note 51, at 31 (Canada); Harmer, *supra* note 51, at 48 (Australia; not clear regarding tax); Drobnig, *supra* note 51, at 100 (Germany); Bogdan, *supra* note 20, at 113-14 (Sweden; no mention of tax claims). *See generally* 1 J. DALHUISEN, *supra* note 11, at Part II, § 1.05[2]. *See, e.g.* Felixstowe Dock and Railway Co. v. U.S. Lines, Ltd., [1987] 2 Lloyd's Rep. 76 (Dutch creditor using British protective procedures). There are countries where national treatment is not granted. *See, e.g.*, American Bar Association, *supra* note 19, at 29 (Argentina). The share awarded to foreign creditors is often subject to adjustment to reflect amounts they may have received in other jurisdictions. *See infra* note 107.

58. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3] nn.40-45.

59. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3] nn. 48-49. Other leading scholars are not in despair, but seem to have only modest hopes. *See, e.g.*, IAN FLETCHER, *supra* note 54, at 624-28.

60. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3] n.45.

61. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3] n.46 and accompanying text; IAN FLETCHER, *supra* note 54, at 542-43; John D. Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 633-34 (1980) [hereinafter Honsberger, *Conflict*].

world would be paid under one system of priorities from the realization of all the debtor's assets, wherever located. It is hard to imagine the realization of that ideal short of establishment of a supranational institution with that responsibility, so even the most optimistic proponent of the universality idea cannot expect its complete fulfillment in the foreseeable future. Therefore universality has been commonly defined in terms of a primary proceeding in a debtor's "home" or domiciliary country, with "ancillary" proceedings in other jurisdictions where the presence of assets or other matters require local assistance to the primary court.[62] It has been said that universality, even in this more realistic formulation, requires that one law, the *lex fori*, be applied to all aspects of the debtor's affairs,[63] although I do not share that view.[64]

Universality is a very appealing approach and has long been accepted as the proper goal of international bankruptcy law by leading writers.[65] Its attraction is both formal and pragmatic. It is intellectually elegant and it would increase overall recoveries for everyone concerned with financially troubled companies.[66] It also invokes idealism and altruism as a system that would be more fair and would better serve the public policy, broadly understood, of every concerned nation.[67] Nonetheless, universality is as difficult to achieve as it is appealing and nothing close to a universal regime exists anywhere except within a few small regional treaty groups.[68] It is fair to say that the Grab Rule is the dominant doctrine in most countries, even those that have made some effort toward international cooperation.

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62. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3] nn.49-51; IAN FLETCHER, *supra* note 54, at 546; Hans Hanish, *Survey Over Some Laws on Cross-Border Effects of Foreign Insolvency Procedures on the European Continent*, *in* 12 UNITED KINGDOM COMPARATIVE LAW SERIES 149, 159 (Fletcher ed. 1990) [hereinafter Hanish].

63. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3].

64. *See* Westbrook, *Global Insolvencies*, *supra* note 8, at 462-64.

65. *See, e.g.*, Lowell, *supra* note 39, at 259.

66. *See* Westbrook, *Global Insolvencies*, *supra* note 8, at 465.

67. Westbrook, *Global Insolvencies*, *supra* note 8, at 465. *See* 1 J. DALHUISEN, *supra* note 11, at Part III, § 2.03[3] nn.33-39. *See also* Westbrook, *Extraterritorial Regulation*, *supra* note 15 (arguing that transnational regulation of emerging multinational enterprise is necessary in the larger public interest).

68. Convention Regarding Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 115 (Nordic Convention).

### C. Limited Cooperation

There is almost unanimous agreement that more international cooperation in insolvency matters is required and that the Grab Rule in its pure form is undesirable. There is much less agreement about the right course for reform.[69] From the general conviction that more cooperation is needed, there has emerged some movement away from the Grab Rule toward limited cooperation. The court cases and legislation, enacted or proposed, that make up this trend can be divided into two categories: (1) secondary bankruptcies; and (2) modified universality.

The approach often called secondary bankruptcies seems to command considerable European academic support.[70] One of the most sophisticated and elaborated proposals of this sort is the Istanbul Convention, recently opened for signature by the Council of Europe.[71] The secondary bankruptcies approach is a modification of the Grab Rule in several respects, two of which are most important. The first modification gives the home-country liquidator easier and more complete access to the courts of cooperating countries and may permit the utilization of local procedures to halt actions against the debtor, to collect the debtor's local assets, and the like.[72] The second key modification found in the secondary bankruptcies approach is the possibility of turnover to the home-country bankruptcy court of some of the debtor's local assets, after a priority distribution is given to certain local creditors, such as secured (special preference) creditors and priority (general preference) creditors.[73] The result is to give substantially more international effect to the home-country bankruptcy than is currently the case in most countries and to provide a universal distribution as to part of the debtor's assets, viz. those available to general, unsecured creditors under the various local laws. On the other hand, the Grab Rule remains in

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69. Two recent proposals are nearly polar extremes. MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT, *reprinted in* 12 UNITED KINGDOM COMPARATIVE LAW SERIES at 287 App. (Fletcher ed. 1990) [hereinafter MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT]; European Convention on Certain International Aspects of Bankruptcy, *opened* June 5, 1990, E.T.S. 136, art. 14 [hereinafter Istanbul Convention]. The first commands complete deference to the home-country court by all other courts, while the second provides only for recognition of the home-country liquidator and a limited amount of sharing of assets.

70. *See, e.g.*, IAN FLETCHER, *supra* note 54, at 624; Hanish, *supra* note 61, at 158.

71. *See* Istanbul Convention, *supra* note 69.

72. Istanbul Convention, *supra* note 69, at ch. II.

73. Istanbul Convention, *supra* note 69, at arts. 18-19.

place as to secured and priority (preferential) creditors. Because it appears that throughout the world there is little left in most bankruptcy estates after those creditors have been fully satisfied,[74] there might be little change in distributions as a result of this approach, although there may be an increase in assets subject to some collective sharing if it is true that international cases often involve less secured debt.

The other branch of limited cooperation can be called modified universalism. It accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors. The leading example is section 304 of the United States Bankruptcy Code,[75] but various current proposals for legislation[76] and recent court cases[77] may also be put in this

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74. *See, e.g.*, Patricia Ghozland, Preferential Claims in Cross-Border Insolvency (Oct. 19, 1988) (paper, British Inst. Int. and Comp. Law, Seminar on Cross-Border Insolvency, copy on file with author) (effect on ordinary creditors of preferential claims in French liquidations); Michael Herbert & Domenic Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed in 1984-1987*, 22 UNIV. RICH. L. REV. 303 (1988) (little left in United States business or consumer bankruptcies after paying secured and priority creditors). *See generally* 1 J. DALHUISEN, *supra* note 11, at Part II, 1.01[2], 1.01[3].

75. 11 U.S.C. §§ 304-306 (1991). United States usage often refers only to section 304 as a sort of shorthand, but in fact the deference procedures are found in sections 304-306. The best recent survey of section 304 litigation is found in Douglass Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729 (1987) [hereinafter Boshkoff]. Another excellent discussion of section 304 is found in Honsberger, *Conflict*, *supra* note 61, at 659-75. Recent section 304 cases are discussed by the dean of American international bankruptcy scholars in Stefan Riesenfeld, *Transnational Bankruptcies in the Late Eighties: A Tale of Evolution and Atavism*, *in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW 409 (David Clark ed., 1990) [hereinafter Riesenfeld].

76. *See* MODEL INTERNATIONAL INSOLVENCY CORPORATION ACT, *supra* note 69. The Bilateral Treaty approach proposed by Mr. Peter Totty, a prominent London insolvency practitioner, is akin to modified universalism, although it depends upon bilateral treaties between cooperating nations. Dimensions, *supra* note 12, at 280. It is properly included in the category of modified universalism because it gives broad and direct effect to an insolvency in a foreign jurisdiction which has a treaty relationship with the cooperating country.

77. In the United States: *See, e.g.*, *In re* Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd* 115 B.R. 442 (Bankr. S.D.N.Y. 1990), *appeal dismissed* 924 F.2d 31 (2d Cir. 1991); *In re* Gercke, 122 B.R. 621 (Bankr. D. D.C. 1991). *See generally* cases discussed in Boshkoff, *supra* note 75.

In France: Kleber v. Friis Hansen, Cass. civ. 1re (1986), J.C.P. II, No. 20776, with annotation by Judge Remery, J.C.P. II, No. 14969. In Germany: P.N. KG u.a. v. RA O, 95 BGHZ 256 (1985). Both the French and German cases gave a measure of extraterritorial effect to a foreign bankruptcy. The first made the foreign adjudication effective to

category. Modified universalism can be best understood as a weak or tentative version of universalism, just as the secondary bankruptcies approach is a somewhat internationalized version of the Grab Rule.

The section 304 procedure in the United States reflects the two sides of modified universalism. It serves universalism by providing specific procedures for international cooperation and deference to the home-country court. The court may protect local assets with injunctions and may ultimately turn over those assets for distribution in the foreign proceeding.[78] On the other hand, section 304(c) provides a whole list of excuses for refusing cooperation and enormous discretion to defer or refuse deference is vested in the trial court.[79]

Although this paper is not the appropriate place to expand upon the arguments for increased international cooperation, arguments that have been made elsewhere,[80] the analysis requires a brief summary of some crucial points. The central fact is that international cooperation will materially change results for particular creditors in every case. The inevitable consequence is that local claimants will be prejudiced in some cases. International cooperation will be achieved despite local prejudice only if policymakers are convinced of two things: (1) that over a run of cases local prejudice in some cases will be balanced by local gains in others; and (2) that a cooperative system will greatly benefit all claimants by increasing distributions in bankruptcy cases and by lowering transaction costs in international credit transactions. Those two propositions in turn depend upon a system that promises an adequate level of (1) reciprocity; and (2) predictability. These points are crucial because they form the policy framework for examining choice of avoidance law in regimes that are committed to some level of international

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invalidate an attachment lien obtained subsequent to the foreign adjudication but prior to any action by the foreign liquidator in France, a major advance from prior French law. The second case overruled years of German law in giving effect to a Belgian bankruptcy for the purpose of entitling the Belgian liquidator to claim (and sue for) a debt in Germany. *See* Riesenfeld, *supra* note 75.

78. 11 U.S.C. § 304 (1991).

79. *See* In re Axona, 924 F.2d 31 (2d Cir. 1991) (appeals court expresses concern about nonreviewability of bankruptcy court decision under sections 304 and 305).

80. *See, e.g.*, Westbrook, *Global Insolvencies, supra* note 8; Stefan Riesenfeld, *The Status of Foreign Administrators of Insolvent Estate: A Comparative View*, 24 AM. J. COMP. L. 288 (1976).

cooperation.[81]

## V. ANALYSIS

Having sketched the systems of avoidance, distribution, and international management, I may turn to the principal subject, choice of avoidance law. The literature contains very few reports of cases in which a court has made an international choice of law in an avoidance action.[82] I want here to offer a first-level, illustrative analysis using a fairly typical factual pattern drawn from recent United States cases.

It is not surprising that we find a lack of precedent for choice of avoidance law, given the paucity of statutes and cases addressing international insolvency conflicts in general. One reason for the lack of conflicts authority across the board is that the Grab Rule reduces, although it does not eliminate, the need for choice of law rules. To the extent that the Grab Rule turns on

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81. For a discussion of each of the points, see Westbrook, *Global Insolvencies*, *supra* note 8.

82. A recent report of Argentine law describes two instances in which the Argentine court as home-country jurisdiction applied its own law to avoid a transaction local to another country. Juan Dobson, *The Law of Argentina*, *in* UNITED KINGDOM COMPARATIVE LAW SERIES 119, 137-40 (Fletcher ed. 1990). *See generally* Kurt Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 HARV. L. REV. 1025, 1051-56 (1946). The Draft European Convention gives exclusive avoidance jurisdiction to the home-country (principal place of business) court. *See* EEC Draft Convention, *supra* note 11, at arts. 3, 15. However, it applies the whole law of the home-country (with some exceptions), which might in turn refer to another law, such as the *lex situs*. EEC Draft Convention, *supra* note 11, at art. 18. *See generally* J. Lemontey, *Report on the 1980 EEC Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings*, *reprinted in* 2 J. DALHUISEN, *supra* note 11, at B-56-57, B-84-86; D. LASOK AND P. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 405 (1987).

A recent French case gave effect to a Danish bankruptcy from its opening, but declined to address the applicability in France of Danish prebankruptcy avoidance law. Kleber v. Friis Hansen, Cass. civ. 1re (1986) J.C.P. II, No. 20776, with annotation by Judge Remery, J.C.P. II, No. 14969. *See supra* note 77. In a few instances, Canadian courts have applied United States avoidance law. Honsberger, *supra* note 51, at nn.40, 63-65. It is said that Germany will permit a foreign administrator in a foreign *ancillary* bankruptcy to bring an avoidance action in Germany, but only as to assets in the administrator's jurisdiction. Drobnig, *supra* note 51, at 104. The view has also been expressed that avoidance might require voidability under both German and foreign law, but that at least one case in Germany has applied foreign law alone to void a transaction. Drobnig, *supra* note 51, at 107.

Obviously jurisdictions that do not give any effect to the passage of title of property to a bankruptcy estate by virtue of a foreign bankruptcy are not likely to apply the foreign avoidance law. The refusal to recognize the proprietary effects of foreign bankruptcies is the rule in a number of countries. *See, e.g.*, Bogdan, *supra* note 20, at 115 (Sweden). Until recently, it was the rule in Germany. *See supra* note 77.

the physical power to compel recovery of property or payment of damages, the application of local rules to a transferee subject to local jurisdiction seems obvious. Conversely, distant parties and transactions are assumed to be beyond local bankruptcy jurisdiction,[83] even though many countries assert power over a local debtor's property everywhere in the world.[84] On the other hand, the theorists and reformers who would modify or replace the Grab Rule have not often focused on choice of law. Some of them assume that selection of a single dominant forum under the universalist regime means the *lex fori* applies to all issues in the unified proceeding.[85] Others have concentrated so intently upon unification in a single forum that they have largely subsumed or ignored choice of law issues.[86] The main area in which choice of law issues have been addressed is in the allowance of claims.[87]

These factors have been especially effective in submerging choice of law questions as to avoidance actions. In the prevailing Grab Rule context, application of local law to a local transferee

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83. *See, e.g.*, Fotochrome, Inc. v. Copal Co., Ltd., 517 F.2d 512 (2d Cir. 1975) (stay does not reach foreign arbitration). *But see In re* McLean Industries, Inc., 76 B.R. 291 (Bankr. S.D.N.Y. 1987) (enforcing automatic stay against foreign creditor for foreign collection activities where creditor subject to jurisdiction because doing business in the United States). English law seems to assume that the local court can apply local avoiding powers ("relation back") to local transfers, but would not apply them to transfers of property elsewhere. *See* PHILIP SMART, *supra* note 53, at 51-52; *but see id.* at 119 (English court treated American assignment for creditors as fraudulent conveyance, *in Re* Henry Hooman, 1 L.T.R. 46 (1859)).

84. The United States is one of many jurisdictions which asserts jurisdiction over the property of a debtor "wherever located." *See* 11 U.S.C. § 541(a) (1991); Honsberger, *supra* note 51, at 32 (Canada); Harmer, *supra* note 51, at 48 (Australia); Bogdan, *supra* note 20, at 111 (Sweden; protesting contrary view expressed in some reports). *See generally* KURT NADELMANN, CODIFICATION OF CONFLICTS RULES FOR BANKRUPTCY 64-67 (1974), *reprinted in* Hearings on H.R. 31, 32 Before the Subcomm. on Civil and Constitutional Rights, H.Reps. 31, 32, 94th Cong., 2d Sess. at 1457 (1976) [hereinafter KURT NADELMANN]. It is repeatedly said that German law asserts worldwide jurisdiction if the debtor is a German domiciliary. *See, e.g.*, Drobnig, *supra* note 51, at 99. Yet the effect of various German rules, especially the refusal to force an accounting for foreign recoveries, seems to undercut that proposition substantially. *See* Kurt Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Co.*, 52 N.Y.U.L. REV. 1, 6 n.20 (1977). *But see* Hans Hanish, *Crediting a Creditor with Proceeds Recovered Abroad Out of the Debtor's Assets Situate Abroad in Domestic Insolvency Proceedings, in* 12 UNITED KINGDOM COMPARATIVE LAW SERIES 192, 195-96 (Change in German law requiring for accounting for foreign recoveries).

85. *See supra* note 53.

86. *See* Westbrook, *Global Insolvencies, supra* note 8, at 461-64.

87. *See, e.g.*, Fletcher, *supra* note 19, at 14 (England; discussion of application of the proper law of the contract to foreign claims); Bogdan, *supra* note 20, at 114 (Sweden; same).

may not appear problematic in many cases, while an avoidance action against a nonlocal transferee would often be impossible. An issue of choice of avoidance law is likely to arise only if: (1) a transferee is subject to the jurisdiction of more than one country where insolvency proceedings have been opened as to a given debtor; or (2) a relevant country has a system of deference to home-country bankruptcy proceedings.

For these reasons, it is not surprising that recent cases raising these issues have arisen in the United States, where the section 304 deference procedure creates a context in which they become visible and important. Because of the increasing recognition everywhere of the need for a more internationalist regime for multinational bankruptcies, a discussion of these cases will provide a useful example of the problems that will confront courts throughout the world in the coming years.

The leading case is *In re Axona Int'l Credit & Commerce, Ltd.*[88] In *Axona*, a Hong Kong wholesale bank was the subject of an insolvency proceeding in Hong Kong. The bank had substantial assets and liabilities in the United States, primarily through correspondent and credit relationships with United States banks. When Axona's financial crisis transpired, the United States banks, notably Chemical Bank (Chemical), took steps to protect their interests, including the obtaining of collateral and attachments against United States assets and the exercise of setoff against United States accounts. Chemical's actions were taken in close cooperation with Axona and involved both its New York and Hong Kong branches in the transfers and restructurings of the credit relationship.[89] The decisive setoff by Chemical took place in New York.

A little over two months later, a creditor's proceeding was brought against Axona in Hong Kong and liquidators were appointed. The creditors brought a full involuntary bankruptcy proceeding against Axona in the United States. The proceeding was not a section 304 "ancillary" action, but was the same sort of general proceeding that would be brought against a debtor domiciled in the United States. The United States Bankruptcy

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88. 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd* 115 B.R. 442 (Bankr. S.D.N.Y. 1990) *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991).

89. 88 B.R. at 599-600. The actions of these United States creditors were apparently in conflict with an attempted cooperative liquidation in Hong Kong coordinated by a committee of creditors that included other United States banks. *See* American Expresss Int'l Banking Corp. v. Johnson, [1984] HKLR 372, 374.

Code explicitly permits this sort of action by a foreign administrator or liquidator, giving the foreign representative a choice between an "ancillary" proceeding and a full-blown United States bankruptcy.[90] The United States Trustee in Bankruptcy then commenced preference-avoiding actions against the United States banks. It appears that the facts were such that the challenged transactions were clearly avoidable preferences under United States law. All these actions were settled, but Chemical's settlement reserved its right to challenge the "jurisdiction" of the bankruptcy court "to administer Axona's U.S. bankruptcy case."[91] The TIB and the liquidators (Axona's representatives) then applied to "suspend" the United States case and have the recovered assets turned over to the liquidators for distribution through the Hong Kong insolvency proceeding.

When the hearing for suspension and turnover was held, Chemical opposed the application. Its opposition was based upon its reserved right to challenge the court's jurisdiction. Its central complaint was that Axona's representatives were unfairly manipulating United States law by first using a full United States proceeding to void transfers under United States bankruptcy law and then turning over the proceeds to be distributed under another law, especially where the transaction was centered outside the United States and the law of the debtor's domicile (Hong Kong) would not have permitted avoidance.[92] Axona's representatives responded that the United States statute expressly permitted the result they sought.[93] They also claimed that the transactions in question would have been avoidable under Hong Kong law as well.

The bankruptcy court granted the application for suspension and turnover. Its decision rested largely on the express United States statutory provisions authorizing both the bringing of the case and its suspension in favor of a home-country proceeding. But it also rejected Chemical's claim of unfairness in the application of United States law to a transaction that Chemical claimed took place in Hong Kong. The court noted the

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90. 11 U.S.C. § 303(b)(4) (1991).

91. 88 B.R. at 602.

92. *Id.* at 603. Chemical also made a constitutional argument against bankruptcy court jurisdiction. *Id.*

93. 11 U.S.C. §§ 303(b)(4) (power of foreign representative to bring full United States proceeding), 305(a)(2) (suspension of United States proceeding in deference to foreign proceeding) (1991).

United States contacts with the transaction and held that ". . . Chemical must be presumed to have been on notice that it would or could be subject to United States law applicable to its conduct even when it is acting in the international context."[94] At the same time, the court rejected Chemical's matching argument that it was unfair to subject it to Hong Kong law in the distribution, citing *Canadian S. Ry. v. Gebhard*[95] for the proposition that Chemical was on notice of the applicability of the bankruptcy laws of its debtor's domicile.

What must have been very frustrating to Chemical is that the court never really addressed its central point: it was being subjected to a bit of this law and a bit of that one, producing a result that it argued would have been unavailable under either law standing alone, an illegitimate "mix and match" of two different legal regimes. That sort of argument is fairly often made in international conflicts cases and can be a very powerful one. But the court's opinion never really treated the question presented as a choice of law issue, except to say that Chemical should have anticipated the possible application of either law.[96] On the other hand, existing conflicts doctrine would not support the view that "mix and match" is always illegitimate; *dépeçage*, the application of different laws to different issues, is well established.[97]

*Axona* is the state-of-the-art case in the United States and perhaps in the world at the present time. Its facts and holding will be useful points of reference in the discussion that follows. Because of the procedural posture of the case, it is not possible to draw from it a clear choice of law rule. But a reasonable reading would be this: where a transaction has substantial contacts with the United States and the home-country, it may be avoided under United States avoidance law in favor of home-country distribution. Given that the court did not decide whether avoidance was possible under Hong Kong law, the rule would appear to apply whether or not the transaction is avoidable under the home-country avoidance law.[98]

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94. 88 B.R. at 617.

95. 109 U.S. 527 (1883).

96. In fairness, Chemical seems to have presented the argument more in terms of jurisdiction than conflicts of law.

97. *See* RUSSELL WEINTRAUB, *supra* note 15, at § 3.4A.

98. *See also In re* Pacat Finance Corp. 295 F. 394, 401-02 (S.D.N.Y. 1923); *In re* Pollmann, 156 F. 221 (S.D.N.Y. 1907). In *Pacat*, a United States creditor levied on the

A second United States rule can be derived from two related cases involving a German bankrupt. They suggest that the foreign, home-country avoidance law may be applied by a United States court to avoid a payment that was made in the debtor's home-country, but received by a United States transferee in the United States.[99] In both cases the payments were made in the home-country and received in the United States by the United States creditor.

We can use these cases and the factual pattern they share to work through an illustrative analysis of the choice of avoidance law problem.[100] It will be instructive to do so first from the perspective of a Grab Rule jurisdiction and then as the problem would be seen in a system committed to some form of modified universalism. As in those cases, the analysis will assume attempted avoidance of a payment or setoff made in favor of an otherwise unsecured, general (unpreferred) creditor in an international transaction that has substantial contacts with both the home-country and the local jurisdiction, but not with any third country. It will also assume, as in those cases, that the avoidance defendant is a legal person and the relevant transaction was in international commerce.

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French bank account of a United States debtor. When the creditor claimed in the United States home-country bankruptcy, the court set aside the levy as a preference under United States law. *Pollman* can be read to permit application of United States law to avoid as a preference a judicial lien obtained by a German creditor against German real property owned by the United States debtor, but the case really involved the United States "equalization" provision, or "hotchpot" notion, which, like similar provisions in many countries, requires equalization in making distributions to creditors who have partially satisfied their claims in foreign jurisdictions. *See infra* note 107.

99. *In re* A. Tarricone, Inc., 80 B.R. 21 (Bankr. S.D.N.Y. 1988) (dictum); *In re* Metzeler, 78 B.R. 674 (Bankr. S.D.N.Y. 1987). Aside from their procedural holdings that United States avoidance law can be asserted only in a full-blown United States bankruptcy, both cases indicate that German law might be applicable to create a cause of action against United States transferees of payments made in the United States by a German debtor that subsequently entered bankruptcy in Germany. 80 B.R. at 24 (resolve issue in litigation over representative's proof of claim); 78 B.R. at 677-78 (commencement of section 304 ancillary proceeding in the United States within one year of the German bankruptcy satisfied German avoidance-law requirement that action be brought within a year of bankruptcy). In *Metzeler* it is clear that the payment was made in Germany, although received in the United States, because it was made by wire transfer from a German bank to the account of the United States transferee-creditor in a New York bank. *Id.* at 675.

100. A review of current thinking should include recent European proposals for such conflicts rules. See *supra* note 82. A recent study suggests that the English courts could reach the *Axona* result under similar circumstances. *See* PHILIP SMART, *supra* note 53, at 52-53.

These are the possible choice of avoidance law rules:

The transaction will be avoided if (1) it is only avoidable under home-country law (that is, domiciliary law governs completely); (2) it is only avoidable under local law (that is, situs or forum law governs completely);[101] (3) case-specific choice of law rules choose home-country or local law based on the contacts and state interests presented in each case, and it is avoidable under the law thus chosen; (4) it is avoidable under *either* home-country or local law; or, (5) it is avoidable under *both* home-country and local law (that is, it is unavoidable unless both laws would avoid).[102]

The "rule" that seems to be emerging from the recent United States cases is the fourth: the transaction is avoidable if either law would avoid it. *Tarricone* apparently rejects the second and the fifth rules, and the silence in *Axona* about Hong Kong law suggests rejection of the first and the fifth rules. It would be plausible to extract from these cases the third rule, the rule that the court will determine which law applies and avoid if that law so requires, but the complete absence of choice of law analysis in all three recent cases implies that the fourth rule is the most correct reading.

None of the United States cases discuss the connection between choice of avoidance law and the priority system that will determine the effects of avoidance, the distribution of the avoidance proceeds. Yet the close connection between avoidance laws and the priority systems they protect suggests that the choice of avoidance laws and of distributing courts should ordinarily be closely linked.

### A. *The Grab Rule Analysis*

In a Grab Rule jurisdiction, it seems obvious that the second rule should be applied.[103] The distribution of the proceeds

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101. This second rule assumes application of internal law, without *renvoi*. *See infra* note 128 and accompanying text.

102. Where the transaction has no contact with third countries and both home-country and local law would avoid, it is hard to see a good reason to refuse avoidance. It should be noted, however, that this entire discussion deliberately eschews nuance. For example, both countries may avoid, but to different extents. In that case, the analysis must proceed on the basis that one avoids and one does not, to the extent of that difference.

103. To the extent that a Secondary Bankruptcy regime operates like a Grab Rule system in producing an entirely local distribution the following analysis would apply to such a system. To the extent a Secondary system would yield a home-country distribu-

of avoidance will be according to local rules. The court is expert in applying the local avoidance law and the usual expectations of local parties would be satisfied by its application. The local balance between protection of statutory priorities and avoidance of market disruption will be applied to the parties and the market for which they were designed.

On the other hand, application of home-country law is inconsistent with the premises of the Grab Rule. If home-country law would avoid a transaction not avoidable under local law, avoidance would not promote the home-country policies served by its avoidance rule, because the proceeds of avoidance would not be distributed according to the home-country priority system. The purpose of the home-country avoidance law is to protect distribution according to home-country priorities, but the proceeds of its application in a Grab Rule jurisdiction will made under the local priorities.[104] Conversely, where local law would avoid and home-country law would not, application of local law to avoid would be quite appropriate, because it would have its intended effect of protecting the local claimants who are the beneficiaries of the local priority system. Local avoidance defendants could not complain when their own law was applied in favor of their fellow local claimants, just as it would be in a domestic case. Foreign avoidance defendants subjected to suit under the local avoidance law would also have little basis for complaint, because, on our assumptions, these foreign parties were so maladroit as to obtain their advantages in transactions with substantial local contacts, subjecting themselves to local avoidance rules. For these reasons, it seems sensible and fair to apply local avoidance rules where any recovery will be distributed according to local law.

An avoidance defendant might argue for a distinction be-

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tion the later discussion of a universalist analysis would be more appropriate. One interesting question is whether a Secondary Bankruptcy court should look to the actual distribution in the case before it or to the general results in that system. For the reasons already discussed, it will generally be the case that a system of Secondary Bankruptcies will result in a largely local distribution, so that a Grab Rule analysis is probably the correct one.

104. The one potential home-country of which that is not true is the United States, because its avoidance rules serve the antidismemberment policy as well. But that policy is not often found in other countries. *See supra* note 40. While the United States could apply its own law to vindicate the antidismemberment policy even when it was not the debtor's home-country, it is not the sort of policy that can be easily advanced unilaterally where the home-country court does not share it.

tween the avoidance law itself and the defenses to avoidance. It might concede that local law should be applied to determine the avoidability of the transaction at the first stage, but contend that home-country defenses should be available to defeat avoidance. Rules making transactions avoidable are designed to protect a distribution scheme, but avoidance defenses are meant to protect a market from disruption. Therefore, if home-country law would provide a defense to avoidance, avoidance under local law would disserve the home-country's market protection policy. In other words, the home-country does have an interest in applying its avoidance defenses. Although this argument would have force in some contexts, we have limited our discussion to a transaction with substantial contacts with both markets.[105] In those circumstances, there is a true conflict in the interests of the two countries, the home-country's interest in protecting its market against disruption and the local interest in protecting its distribution scheme. The local court may fairly prefer giving priority to protecting its own distribution system, especially in a Grab Rule world.

It must be admitted that the pleasant symmetry of this analysis, application of local law by the local court, is only apparent, because of the serious disadvantages and anomalies of the overall Grab Rule system. The supposed centrality of local interests is eroded by the principle of national treatment, a principle that is followed in most important commercial countries.[106] The consequence is that sophisticated international creditors claiming in many local proceedings may do much better than the local supplier who is the paradigm for the Grab Rule.[107] Another

105. See the assumptions listed in the text following note 100. Note that the assumed transaction, which includes substantial contacts in both countries, is the common one in which "situs" rules are largely useless because the situs of the transaction can be plausibly assigned to either country.

106. *See supra* note 54.

107. The advantage accruing to sophisticated international creditors claiming in multiple proceedings will be reduced by sharing or "hotchpot" rules. *E.g.*, 11 U.S.C. § 508(a) (1991). *See* Fletcher, *supra* note 19, at 14 (U.K. hotchpot rule); Drobnig, *supra* note 53, at 100 (Germany); Bogdan, *supra* note 20, at 113 (Sweden; *should* be Swedish law). *See generally* 1 J. DALHUISEN, *supra* note 11, at Part II, § 1.05[2]. The advantage will not be eliminated. Among other things, various national rules require an accounting for some types of recoveries elsewhere, but not others. For example, the United States rule is limited on its face to recoveries in "foreign proceedings," which are defined as home-country proceedings in the nature of bankruptcy or reorganization proceedings. 11 U.S.C. §§ 101(23), 508(a) (1991). Thus equalization is not imposed if the creditor recovered 1) in a third country bankruptcy; or 2) by individual actions, even in the home country.

defect of the application of local law under the Grab Rule is that it gives the widest opportunity to creditors to manipulate transactions so as to evade territorial rules. Choice of law clauses and lightning transfers of funds may combine to put the pea under the most legally congenial shell. That factor also works to the benefit of the sophisticated multinationals. But the news is not all good even for these sophisticated players, because of two other problems with the Grab Rule. One is that application of local law to legal persons that are suable in many jurisdictions creates substantial risks of parallel litigation and double recoveries.[108] Worst of all for international financers, the results are manipulable without being truly predictable, maximizing transaction costs, especially legal charges, at each stage in the credit process, from extension of credit to collection.

### *B. Analysis Under Modified Universalism*

The analysis is very different in a court bound to a system of modified universalism. In such a court, the proper rule for the type of transaction we are considering[109] would be the first rule, applying the home-country rule exclusively.[110]

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One author suggests that the hotchpot approach may be the most sensible way to cooperate internationally, if courts will forward distributions to other courts to balance overall dividends, although that suggestion may reflect the very broad English commitment to the hotchpot principle. *See* PHILIP SMART, *supra* note 53, at 118, 151, 174-79, 193. The English courts have sometimes maintained equality of distribution by enjoining creditors from foreign collection efforts. *Id.* at 184-85.

The United States has a further twist on the equalization principle, in the form of a provision requring the surrender of a preference as a condition to payment of a creditor's claim. 11 U.S.C. § 502(d) (1991). Historically this provision was used primarily against domestic creditors, because of the old limitations on federal bankruptcy jurisdiction. *See* Jay Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 611 (1983). Today its importance is almost entirely international.

108. *See, generally* Baade, *An Overview of Transnational Parallel Litigation: Recommended Strategies*, 1 REV. LITIGATION 191 (1981).

109. See the assumptions in the text following note 100.

110. One of the recent United States cases implied in dictum that only United States avoidance law could be applied in a full-blown United States bankruptcy. *In re* A. Tarricone, Inc., 80 B.R. 21, 23 (Bankr. S.D.N.Y. 1988) (dictum). The court stated the converse of this proposition, that a German bankruptcy court would never apply United States law, even to a transaction like the one in that case with substantial United States contacts. Because the court made no reference to German law in that respect, it implied that bankruptcy courts would always apply local law, *lex fori*, to avoid transactions, even those with substantial foreign contacts. No authority was cited for this dictum and there is no *a priori* reason it should be true. That is, there is no general principle that prevents a bankruptcy court in any country from choosing a foreign law as applicable to avoidance of a transaction, just as it might choose foreign law for any other purpose. *See supra*

The most fundamental reason is that the avoiding court will ordinarily turn over the avoidance recovery to the home-country court, which will distribute the recovery in accordance with home-country priorities. The appropriate avoidance law will therefore be the law of the distributing, home-country court. In addition, applying home-country avoidance law will best serve the overall goals of the universalist approach.

I advanced earlier the notion that adoption of modified universalism depends ultimately on a conviction that the overall results of a cooperation system of transnational bankruptcy will more than offset any prejudice to local interests in a particular case.[111] That premise depends in turn on the adoption of a cooperation regime that yields high predictability of results and reciprocity.[112] No rule so well accomplishes those goals as nearly exclusive application of home-country avoidance law.[113]

Although circumstances will exist in which determination of the home-country of a corporation will be difficult,[114] it will usually be self-evident. If every creditor knows in advance that the debtor's home-country avoidance rules will be applied to all prebankruptcy transactions, the costs and risks of credit extension under various circumstances will be far more predictable than they are today. For example, the extent and timing of permissible setoffs will be known, so that the benefits of requiring maintenance of balances in lending banks can be calculated. The costs and benefits of obtaining security can be better predicted as well, in part because the degree of protection provided to the

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note 82. On the other hand, similar views have been expressed as to other jurisdictions. *See, e.g.*, Harmer, *supra* note 53, at 53 (Australia).

111. *See supra* text following note 80.

112. *See supra* text following note 80.

113. I say "nearly" exclusive because some matters will remain undeniably local for the indefinite future, the ultimate example being rights in real property (immoveables). Yet even there a recent decision of the European Court of Justice under the EC judgments convention held that an *actio Pauliana* (there a fraudulent conveyance, in United States terms) affecting title to real estate should be treated for jurisdictional purposes as a personal action to be brought at the defendant's domicile, rather than as an *in rem* proceeding to be brought at the situs of the real estate. Case C-115/88 Reichart v. Dresdner Bank A.G., E.C.R. (Fifth Chamber) (Jan. 10, 1990). Nonetheless, rights in real estate and security interests in personal property will be among the last interests to be subject to a central, home-country conflicts rule.

114. *See* IAN FLETCHER, *supra* note 54, at 621 n.16. *See also* Lynn LoPucki & William Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WISC. L. REV. 11, 17-19 (discussing venue-manipulation of "principal place of business" in reorganization cases within the United States).

unsecured creditors body can be assessed. Even more obviously, creditors will be better situated to evaluate the competing risks presented by a proposed restructuring of a troubled debtor, knowing the extent to which self-help by noncooperating creditors will be curable through a bankruptcy filing.

Such a cooperative regime would have the further advantage of serving the distributional policies of one highly interested state in each case, as opposed to the present situation where the ultimate worldwide distribution is frequently inconsistent with the policies, including the common policies, of all interested states. For example, the effect of chaos in the management of multinational default may be to permit sophisticated creditors to evade all avoidance rules and seize all of the value of a company, leaving employees in many countries without the benefit of their statutory priorities.[115]

If local laws are applied to avoidance questions under a system of modified universalism, most of these benefits will be lost. Avoidance results will depend upon the location of assets at a future time, which in turn will be a function of chance and of possible manipulations by the debtor and various creditors. The sheer number of variables, together with the complete unpredictability of many of them, will mean that creditors will be unable to evaluate accurately the costs and risks of the creation or restructuring of credit arrangements. These difficulties will result not only from exclusive application of local law under the second rule above, but also from concurrent application of local avoidance law under either the fourth or fifth rules above. The third rule, sporadic application of local law on some case-by-case conflicts approach, would be even more devastating, wrecking predictability and making reciprocity almost impossible to evaluate. Its effect on predictibility is obvious. The prejudice to reciprocity is less obvious, but just as important. Reciprocity is best served by transparency of law, making it easy for foreign courts to see that local courts have indeed applied an international principle evenhandedly. Any system of counting contacts or weighing interests in each case will make the choice of law unpredictable and opaque.

With these points in mind, we can reconsider *Axona*. Be-

115. *Cf.* Brittain v. United States Lines, Inc. (*In re* McLean Industries, Inc.), 884 F.2d 1566 (2d Cir. 1989) (In bankruptcy of United States domicilliary debtor, Singapore law, place of ship arrest, applied to defeat claims of injured seamen under United States law).

cause the United States is committed by section 304 to a modified universalism, it follows that *Axona*'s application of United States law to the Chemical payments was not consistent with the long-term goals of section 304. It served the key short-term objective of section 304, because it vividly demonstrated and reaffirmed the United States commitment to international cooperation. But application of United States law for the benefit of a Hong Kong distribution does not contribute to the long-term development of a set of rules that make sense in a system of modified universalism.[116] Only an exclusive home-country rule serves that purpose.

Applying local law has disadvantages beyond its bad systemic fit. Either the fourth or fifth rule may result in serious prejudice to local creditors and that prejudice may create irresistible pressures for relaxing local avoidance laws or abandoning international bankruptcy cooperation. Taking the fourth rule above, if, as may have been true in *Axona*, United States law is applied to avoid even if Hong Kong law would not avoid, the United States parties, the avoidance defendants, have suffered serious losses and United States claimants may realize little or nothing from the enhanced Hong Kong distribution. It may be that United States claimants will get nothing, because of distribution priorities favoring certain claimants, especially Hong Kong employees and public authorities. Even if there is a distribution to nonpriority United States claimants, the net return to United States claimants as a group will always be smaller because of an avoidance in the United States.[117] There might be a

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116. In *Axona*, application of Hong Kong law would likely have produced the same result as to the attachments obtained in the United States. The Hong Kong court in *Axona* noted that the attachments would have been ineffective in the liquidation under Hong Kong law because of the traditional English rule that attachments are not enforceable in insolvency unless they have been completed. American Express Int'l Banking Corp. v. Johnson, [1984] HKLR 372, 381. The situation is less clear as to the transfer and setoff involving Chemical, discussed earlier, because the Hong Kong court did not address that point and the United States opinion is not very clear about the facts or the specific aspects of that transaction that were attacked by the United States TIB.

117. For example, if there is a general distribution, the body of creditors in nonhome country A, where there has been a preference recovery against a local creditor, will always get less than if there had been no avoidance, unless virtually all the creditors of the debtor are in A, a most unlikely event. If the reader will forgive a formula: $(X/N)L > (X+Y/N+Y)(L+Y)-Y$.

Where X=preavoidance general funds; N=preavoidance claims; L=Aggregate local claims held by persons other than the preference defendant; Y=Amount recovered by avoidance, which is also the amount of postavoidance claim by the preference defendant.

The left side of the inequality is the preavoidance net return to local claimants as a

gain from the redistributive effects of avoidance for some United States claimants, but the amount gained per claimant will usually be small.[118] That benefit is not only small, but is apt to be obscured politically by the serious anomalies attendant on applying local law where home-country law would not avoid. For example, on the *Axona* facts it is possible that a Hong Kong bank that was preferred in exactly the same way as Chemical will not only deep its preference (unavoidable, we are assuming, under Hong Kong law), but will collect part of Chemical's payments as a further distribution against its claim. Local (United States) creditors contemplating that distribution will grow testy.

These sorts of results may produce enormous pressure in the United States toward one of two bad consequences: (1) elimination of the section 304 experiment; or (2) watering down United States avoidance law, generally or as applied to international transactions, so as to "level the playing field" between United States lenders and others. Every country applying the fourth rule will feel the same pressures, because local creditors will similarly "suffer" if local law avoids when home-country law would not.

In countries that remain committed to international cooperation in bankruptcy, the result will be competitive pressure to "deregulate," by weakening local avoidance laws. I say "deregulate," because avoidance laws regulate nonbankruptcy self-help in favor of societally determined priority systems.[119] The pressure to deregulate 304 weakening avoidance laws would be yet another instance of territorial rules operating to preclude social

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group and the right side is the postavoidance local net. It holds true for all values except X=L, the highly unlikely event that all general claims in the home-country proceeding are made by local creditors. The avoidance amount will always equal the postpetition claim of the avoidance defendants in a preference action, which the inequality assumes rearises after avoidance. In a fraudulent conveyance action, the avoidance amount Y would generally be net of a postavoidance claim (for example, a claim for improvements under 11 U.S.C. § 550(d) (1991)), there would be no postavoidance claim, and the formula would be modified.

118. If the preference recovery equals 10% of the preavoidance assets; and the preavoidance dividend is 10% to general creditors, the dividend to the other United States claimants after a preference avoidance in the United States would increase by 10%. For example, using the terms defined in note 117 *supra*, where X = US$100K, N = US$1 million, and Y = US$10K, and LC = U.S. $25,000, LCP = the preavoidance dividend on LC and LCA = the LC dividend after avoidance, LCP = (X/N)LC = $2,500; LCA = (X Y/N Y)LC = U.S. $2,750.00. US$250 would be the increased dividend, 10% higher than preavoidance).

119. *See supra* Section III(A).

regulation of transnational business,[120] a result many of us would deplore.[121] In effect, a national Grab Rule would be replaced by a Grab Rule in favor of sophisticated international creditors essentially freed from the avoidance policies found in virtually every country.

The second effect, pressure to denature local avoidance law, would also result if the fifth rule were adopted, the rule denying avoidance unless both laws would avoid. Because local claimants would almost always receive less than local avoidance defendants would lose when a local creditor suffered avoidance,[122] each country would benefit from having the weakest possible avoidance rule, even in a system of modified universalism.[123] A weak local avoidance rule would protect local avoidance defendants in bankruptcies domiciled elsewhere. On the other hand, a strong avoidance rule would be of little use when the court is the home-country court against creditors not subject to its jurisdiction, because the local courts have jurisdiction of those creditors will not avoid under the fifth rule, unless both laws would avoid.

The fifth rule has a deregulatory effect even prior to the effect of pressure to water down local avoidance laws. First, it is subject to manipulation because of its territorial (local law) component, just as with the Grab Rule system, and therefore sophisticated creditors will often be able to evade the regulatory effect of avoidance laws. Beyond that, the simple fact of an increase in the number of elements to be satisfied will reduce the number of successful avoidance actions. If each avoidance law has eight elements (including defenses), only two of which are common, then the combined requirement has fourteen elements and there is a much better chance the avoidance defendant can prevail on one of them. Again the effect will be to reduce the regulatory impact of avoidance rules in each jurisdiction.

This first-level analysis, although it admittedly ignores a number of important problems and variables, tends to demonstrate that application of United States avoidance law — exclu-

120. *See* Westbrook, *Extraterritorial Regulation, supra* note 15, at 85, 93.

121. *See* Westbrook, *Extraterritorial Regulation, supra* note 15, at 85, 93.

122. *See supra* notes 117-18.

123. This would be true under option the fifth rule (avoid only if both countries laws would avoid) even in those cases in which a given country was the home country, because a broader local rule extracts only from local creditors, while other "ancillary" jurisdictions will extract nothing from their locals unless their domestic rule also permits avoidance.

sively, concurrently, or sporadically — is a mistake in cases like the three recent United States cases mentioned above where the United States is acting "ancillary" to the home-country court.[124] In summary, the reasons are (1) because the purpose and effect of avoidance laws are to promote distribution under a particular priority scheme, there is a policy discontinuity, and resulting anomalies and injustices, in applying the avoidance law of one jurisdiction when the proceeds of avoidance will be distributed in another; (2) the system of modified universalism upon which home-country distribution is premised is far better served by a rule that applies home-country avoidance law only, because that rule maximizes predictability and discernible reciprocity, the two biggest payoffs for a system of modified universalism.[125]

There are, of course, a number of difficulties with a rule that applies only home-country avoidance law, even in a system of modified universalism. I have identified five. One of the difficulties has been ignored because of the narrowing assumptions made earlier. This analysis has excluded cases involving small creditors engaged in purely local transactions. There would be real difficulty in applying Hong Kong preference law to a small United States supplier who was dealing with a local branch of a Hong Kong debtor in a transaction that was in every way local except for the nationality of the debtor. On the other hand, the great majority of cases in which large amounts are apt to be disputed in international cases are within the limiting assumptions made above. These are the cases that are likely to come before the courts, in the United States and elsewhere.

A second difficulty in applying a home-country avoidance rule exclusively will exist in all cases: such an approach will sometimes require the local courts to understand and apply a very difficult and technical area of foreign law. That is a strong objection. But the force of this objection is greatly weakened by the fact that it will apply only sometimes. Where the avoidance defendant is subject to the jurisdiction of the home-country

124. This statement does not necessarily apply where there has been no bankruptcy proceeding opened in the home country. Although it will be the rare case when it is both legally possible and justified to open a bankruptcy proceeding in the United States when the debtor continues to operate elsewhere as before, such a case may often properly be treated as a local matter, applying local law.

125. One might be able to manufacture a system which applied local law in a way reasonably consistent with modified universalism, but the resulting doctrine would be very complex and could not serve as well as an exclusive home-country rule.

court, the United States will be able to dismiss or stay in deference to resolution of the issue by a court well-familiar with the applicable law.[126] Furthermore, the courts have already begun to develop devices by which they can communicate in international insolvency matters, so that the United States court may well be able to get judicial advice and help in applying home-country law even where the avoidance defendant is not subject to home-country jurisdiction.[127]

Another major question revealed by this first-level analysis is whether the ancillary court in a system of modified universalism should look to the whole law of the home-country or only to its internal avoidance law.[128] On the face of it, the court should look to the whole law of the home-country, including its choice of avoidance law rule. Suppose that in a case like *Axona* Hong Kong internal law would avoid, but United States law would not, and that the Hong Kong conflicts rule would apply United States law. If the United States court avoided under Hong Kong avoidance law, the United States creditors would suffer an avoidance recovery when it would not have been liable in the Hong Kong court and when no similarly situated creditor (say, a British bank) would have been liable even if the other creditor

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126. One obvious and now commonplace solution is forum non conveniens dismissals conditioned on the defendant's agreement to adjudication on a fair basis in the foreign court. *E.g., In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195 (2d Cir.) *cert. denied*, 484 U.S. 871 (1987) (dismissal subject to defendant's agreement regarding, *inter alia*, discovery and Indian jurisdiction); *cf. Remington-Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260 (3d Cir. 1987) (United States court defers to Dutch bankruptcy court conditioned on results under Dutch law). For a discussion of similar "conditional deferrals," *see* PHILIP SMART, *supra* note 53, at 239 n.15. For a discussion of forum non conveniens in bankruptcy, *see generally, id.*, Chapter 2. On a related point, some English cases have resulted in a sharing between liquidators in different countries. *Id.* at 214.

127. *See, e.g.*, Felixstowe Dock and Railway Co. v. U.S. Lines, Ltd., [1987] 2 Lloyd's Rep. 76 (United States Bankruptcy Court "order" amounting to a short treatise on United States Chapter 11 reorganization for the benefit of the United Kingdom court).

128. In general, *renvoi*, application of the whole law of another state, has no place in interest analysis in its pure form. But the analysis offered here is significantly different from pure interest analysis. It is not my concern in this paper to place its tentative, pragmatic bankruptcy conflicts analysis in the overall conceptual debate about conflicts, but it would be fair to say that the analysis offered here is only derivative of interest analysis, with much more emphasis on systemic, international interests than is generally found in interest analysis. These systemic interests are the common, shared concerns of nations about the functioning of a system of international bankruptcy cooperation. They represent the sort of systemic concerns that are at the heart of the traditional territorial approach, although that approach is often incapable of vindicating them. *See generally* Westbrook, *Extraterritorial Regulation, supra* note 15, at 79-82, 91-92.

was subject to Hong Kong jurisdiction. That result seems too one-sided to be tolerated.

On the other hand, looking to the whole law of Hong Kong has its own pitfalls. If Hong Kong would apply its own avoidance law, then so should the United States court. If Hong Kong would apply United States law[129] and United States law would avoid, then the United States court would have to avoid under United States law in order to reach the same result that Hong Kong would reach if the United States avoidance defendant were subject to Hong Kong jurisdiction. But it would be doing so under a rationale — application of home-country law in the service of modified universalism — that is defeated by the application of local (United States) law for all the reasons just discussed. Under those circumstances, there is a strong argument for not applying United States law to avoid, taking the position that United States courts will avoid only when the home-country would avoid under its own law. Further support for that position comes from the fact that it will help to protect United States avoidance defendants during the period of transition from a territorial, Grab Rule world (reflected in the hypothesized "situs" oriented conflicts rule in Hong Kong) and the development of a general system of international cooperation.

The fourth major problem raised by using an exclusive home-country rule is that its rationale does not apply unless the United States court is ultimately going to turn over the proceeds of avoidance to the foreign court or distribute in accordance with a worldwide distribution under the guidance of that court. In the minority of cases where United States courts refuse to defer to the home-country court under section 304, they will be applying a Grab Rule approach to the United States assets and therefore should arguably apply local avoidance law for the reasons discussed under that heading. That result — and the consequent loss of predictability and other unfortunate consequences of the Grab Rule — seems inevitable in any system that does not automatically defer to the home-country court.

The fifth problem in using a home-country rule is the pressure to de-regulate to attract multinationals. United States companies might move headquarters off-shore to enjoy the advan-

129. It appears that Hong Kong might do so. At least in the *Axona* case in Hong Kong it was held that U.S. law controlled the validity of the United States attachments and their status as preferences. American Express Int'l Banking Corp. v. Johnson, [1984] HKLR 372, 381-85.

tages of a jurisdiction where transactions with insiders would not be questioned. Their lenders might encourage them to do so, hoping for maximum opportunities for self-help not subject to retrospective avoidance. Although it is not likely that a company would re-locate purely in anticipation of insolvency, watered-down insolvency laws favoring powerful parties might be part of a package of low-regulation laws offered by jurisdictions seeking multinational headquarters. This problem is real and important but merely part of a much larger difficulty in the regulation of multinationals. It can be ameliorated in the United States by sensitive application of the section 304 requirement that the other country have roughly similar insolvency laws.

It is right to present candidly the difficulties with the home-country rule I propose for jurisdictions embracing Modified Universalism, but I would not want those difficulties to overshadow the fundamental virtues of the rule. No other approach will yield the transparency, reciprocity, and predictability necessary for international cooperation in insolvency matters. Although the difficulties it creates are substantial, the obstacles created by other approaches seem to me to be nearly insurmountable.

## VI. Conclusion

In a world in which we have barely begun to address the most basic aspects of bankruptcy cooperation internationally, it may seem premature to begin discussion of a sophisticated problem like avoidance of transactions in transnational cases. Yet the rather dramatic initiative taken by the United States in section 304 has already begun to generate cases requiring analysis of that problem.

This Article takes only the most tentative and preliminary first steps toward a general analysis, but it highlights three central points that will demand consideration as the law evolves. The first is that avoidance in transnational cases is ultimately a choice of law problem intimately related to more general choice of law issues in business cases, all of which rest ultimately on a vision of the appropriate regulation of multinational enterprise. Here, as elsewhere, to fail to fashion a transnational system that effectively regulates the conduct of multinational parties is to drop the reins of the powerful, high-strung capitalist horse. The point is especially acute in bankruptcy, because a multinational's general default creates a single worldwide crisis for many parties in many jurisdictions.

The second point is that cross-border avoidance issues are firmly linked in policy and consequence to related doctrines which will determine the distribution of the proceeds of avoidance. From that follows the third point, which is that the proper choice of avoidance law depends heavily on the system of international cooperation (or refusal to cooperate) to which a given national legal regime is committed.

I have failed to discuss many difficulties and possible variations because of their complexity. I have also deliberately focused on the larger policy questions, ignoring many details. I have done so because of my conviction that we cannot make progress in management of multinational defaults unless we take large steps.[130] Those of us who have devoted many years to studying the marvelous intricacies of our own domestic insolvency systems have to find the intellectual fortitude to step back from those fascinating details so that we may help to fashion a workable system of international cooperation in insolvency matters based on broadly understood notions of the common interest. If we help to create such a system, our reward will be to make an important contribution to the historic evolution now taking place, the binding-together of a world of nation states by the sturdy cables of commerce.

130. Westbrook, *Global Insolvencies, supra* note 8.