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UNITED STATES JUDICIAL ASSISTANCE IN CROSS-BORDER INSOLVENCIES

DOUGLASS G. BOSHKOFF*

MORE than 90 years ago, the *American Law Review* reported that a multinational conference on international bankruptcy was to take place in Holland. It added: "The *Law Journal* (London) does not seem to think that the conference will lead to practical results."¹ This prediction was accurate and the commercial world continues to wait for a rational, co-operative approach to the administration of those insolvency proceedings whose impact cannot be confined within the borders of one country. Each nation has its own scheme for dealing with the affairs of debtors in financial distress. A cross-border insolvency implicates the systems of more than one country. In theory, the law of a single jurisdiction should control all aspects of the proceedings so that the administration of the estate can go forward in a rational and efficient manner.² The primacy of a single nation's law is, however, not easily achieved when substantial interests of other nations and their citizens are involved. Efforts to harmonise the operation of conflicting insolvency systems by treaties have not been notably successful.³ It remains, then, for individual nations, motivated by the desire to promote international co-operation and to avoid wasteful duplication of effort, to establish unilateral procedures for the recognition of rights arising under foreign bankruptcy⁴ statutes.

A foreign administrator struggling to save or liquidate a business will

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1. (1894) 28 Am.L.R. 581.

2. There are two separate issues: the establishment of a single centre of administration and the reconciliation of competing principles of substantive law. The latter matter dominates the discussion in reported decisions.

3. For example, members of the EEC have been unable to agree on the terms of a bankruptcy convention. Gitlin and Flaschen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42 Bus. Law. 307, 311-313; Woloniecki, "Co-Operation Between National Courts in International Insolvencies: Recent United Kingdom Legislation" (1986) 35 I.C.L.Q. 644.

The usefulness of treaties as a vehicle for international co-operation is questioned in J. Dalhuisen, *International Insolvency and Bankruptcy* (1986) Vol.1, Part III, para.2.05[7]. The author also suggests that existing treaties have made it more difficult to resolve problems outside the scope of these treaties: *idem*, Part III, para.2.03[5], nn.74 and 75.

4. In the US, bankruptcy is a term commonly employed to refer to any proceeding authorised by Title 11 of the US Code. Such proceedings involve either individual debtors or business entities and can result in liquidation or rehabilitation. It is used in this article in the same sense, referring to all types of insolvency proceedings.

often wish to repatriate assets located in the United States, obtain discovery or avoid fraudulent conveyances and preferences. The American legal system has not been unresponsive to the need for international cooperation. US law offers three options for achieving these objectives:

1. the use of remedies available under state⁵ law;
2. the commencement of a full bankruptcy case in the United States; or
3. the commencement of an ancillary American administration in aid of the foreign insolvency proceedings.

The first option is often of questionable use, particularly when assets are widely dispersed. A full bankruptcy case, on the other hand, can be far too expensive and a cumbersome remedial device. The last option, an ancillary American administration, is a fairly recent innovation. Section 304 of the Bankruptcy Code,⁶ a statutory provision which became effective on 1 October 1979, authorises "a case ancillary to a foreign proceeding". More modest in scope and less complex than a regular bankruptcy, section 304 proceedings offer the possibility of an expedited procedure which should be of interest to many foreign administrators, particularly those appointed under English law.

This article examines each of these three options. It assumes that some form of liquidation or rehabilitation proceedings have been commenced outside the United States and that a representative of one or more creditors (a foreign administrator) needs American judicial assistance. Repatriation of assets receives the greatest attention since it is the relief most often sought by the foreign administrator.

I. USE OF NON-BANKRUPTCY PROCEDURES

AMERICAN courts are open to the foreign administrator who wishes to gain control of assets located in the US. An action may be commenced seeking a transfer of assets to the location of the original insolvency proceedings.⁷ Alternatively, the foreign administrator can appear in pro-

5. State law (e.g. the law of New York or North Carolina) will determine both the procedure for asserting the claim of a foreign administrator and the degree of deference to be accorded the foreign proceedings when the action is commenced in a state court. State law will also determine the outcome of the controversy when the foreign administrator commences an action in the US district court based upon diversity of citizenship. See text accompanying nn.16-23 *infra*.

6. 11 U.S.C. 304 (1983).

7. See e.g. *Disconto Gesellschaft v. Umbreit* 208 U.S. 570 (1908); *Clarkson Co. Ltd v. Shaheen* 554 F.2d 624 (1976); *Daniels v. Powell* 604 F.Supp. 689 (N.D. Ill.1985); *Waxman v. Keloha* 296 F.Supp. 1190 (1969); *In re Delehanty's Estate* 11 Ariz. 366, 95 Pac. 109 (1908); *Fincham v. Income from Certain Trust Funds of Cobham* 193 Misc. 363, 81 N.Y.S. 2d 356 (1948).

ceedings commenced by others and request the same relief.⁸ Either sequence of events should lead to the same substantive result. The court will have to decide whether or not to defer to proceedings being conducted elsewhere. A decision to defer is often characterised as a grant of comity to the foreign proceedings.⁹

Cunard Steamship Co. v. Salen Reefer Services AB,¹⁰ an important recent decision, shows how the doctrine of comity can assist a foreign administrator anxious to gain control of American assets. In *Cunard*, American creditors had responded to the commencement of Swedish insolvency proceedings by seizing assets of the debtor located in New York. This was effected by obtaining an order for attachment of assets from the US District Court for the Southern District of New York. The Swedish interim administrator then entered an appearance and requested the court to vacate the attachment so that the assets could be distributed to creditors in accordance with Swedish law. The trial court granted this request, finding "that the public policy of the United States is best served by extending comity to the Swedish court's announcement of Salen's bankruptcy . . ." ¹¹ The Second Circuit affirmed the decision

8. See e.g. *Cunard S.S. Co. v. Salen Reefer Servs. AB* 773 F.2d 452 (2nd Cir. 1985); *In re Stoddard* 242 N.Y. 148, 151 N.E. 159 (1926); *In re Waite* 99 N.Y. 433, 2 N.E. 440 (1885).

9. " 'Comity' summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain. However, the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international co-operation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced—the foreign court because its laws and policies have been vindicated; the domestic country because international co-operation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.

Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation States. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.

However, there are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act. . . ." *Laker Airways v. Sabena, Belgian World Airlines* 731 F.2d 909, 937 (D.C. Cir. 1984).

10. 773 F.2d 452 (2nd Cir. 1985).

11. *Cunard S.S. Co. v. Salen Reefer Servs. AB* 49 Bankr. 614, 618–19 (Bankr. S.D.N.Y. 1985).

and made these observations on the role of comity in cross-border insolvencies:

The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extending of comity to a foreign bankruptcy proceeding, by staying or enjoining the commencement or continuation of an action against a debtor or its property, has a somewhat different rationale. The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities . . . It has long been established that foreign trustees in bankruptcy were granted standing as a matter of comity to assert the rights of the bankrupt in American courts . . . Although the early cases upheld the priority of local creditors' attachments . . . the modern trend has been toward a more flexible approach which allows the assets to be distributed equitably in the foreign proceeding . . .¹²

There was ample precedent for this ruling. In the late nineteenth century, the Supreme Court in *Canada Southern Railway Co. v. Gebhard*¹³ approved the extension of comity to foreign bankruptcy proceedings. However—and this is an important qualification—application of the principle of comity is only permitted, not required. This became clear 25 years later when a German creditor commenced an action in a Wisconsin state court to reach funds allegedly deposited in a bank by a German citizen. Insolvency proceedings had been commenced in Germany and the plaintiff agreed to hand the proceeds over to the German estate. A Wisconsin creditor then intervened and the state court granted it priority over the German creditor. On appeal, in *Disconto Gesellschaft v. Umbreit*,¹⁴ the Supreme Court affirmed the decision, holding that it was appropriate for the Wisconsin court to decide whether or not the doctrine of comity required recognition of the German bankruptcy.

There being, then, no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the State of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the State permitted such recognition was a matter for the State to determine for itself. In determining that the policy of Wisconsin would not permit

12. 773 F.2d 452, 457–458. In *Cunard* the American claimant had not yet reduced its claim to judgment. *Victrix S.S. Co. v. Salen Dry Cargo AB* 65 B.R. 466 (S.D.N.Y. 1986) reached the same conclusion when the creditor's claim had been reduced to judgment.

13. 109 U.S. 527 (1883).

14. 208 U.S. 570 (1908).

the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the State, the Supreme Court of Wisconsin has done no more than has been frequently done by nations and States in refusing to exercise the doctrine of comity in such wise as to impair the right of local creditors to subject local property to their just claims. We fail to perceive how this application of a well known rule can be said to deprive the plaintiff in error of its property without due process of law.¹⁵

Disconto leaves each state free to decide what, if any, type of co-operation will be forthcoming when a cross-border insolvency occurs. The foreign representative accordingly runs the risk that applicable law will favour local creditors. This risk¹⁶ cannot be avoided by commencing an action in the federal court system¹⁷ or removing a pending state court case to the appropriate US district court.¹⁸ In *Erie Railroad Co. v. Tompkins*¹⁹ the US Supreme Court held that federal courts were obliged to apply state law when the court's jurisdiction was based upon the diverse citizenship of the parties. *Klaxon v. Stentor Electric Manufacturing Co.*²⁰ extended this ruling to choice of law rules. The recognition of foreign insolvency proceedings is a matter of state law.²¹ Federal judges are required to apply state comity concepts in diversity litigation.²² A uniform federal comity rule is not applicable until bankruptcy proceedings have been commenced.²³

15. *Idem*, p.580. The decision in this case prompted a protest by the German government. Nadelmann, "The National Bankruptcy Act and the Conflict of Laws" (1946) 59 Harv.L.R. 1025, 1048 n.23.

16. It should be noted that all the recent reported litigation involving the effect of foreign bankruptcies has occurred in the federal court system even when the foreign representative has not sought to benefit from the provisions of the American bankruptcy statute. See e.g. in addition to *Cunard, Clarkson Co. v. Shaheen* 544 F.2d 624 (2nd Cir. 1976) (action to compel transfer of corporate records); *Daniels v. Powell* 604 F.Supp. 689 (N.D. Ill. 1985) (action for conversion); *Drexel Burnham Lambert Group v. Galadari* 610 F.Supp. 114 (S.D.N.Y. 1985) (action against foreign representative), *affd.* in part, vacated and remanded in part 777 F.2d 877 (2d Cir. 1985); *Kenner Prods. Co.* (S.D.N.Y. 1982) (state court action removed to federal court prior to motion by foreign representative). No doubt it is assumed that federal judges, more familiar with problems of cross-border insolvencies and less parochial in outlook, will be more sympathetic to the claim of the foreign representative.

17. 28 U.S.C. 1332(a)(2) (1983).

18. 28 U.S.C. 1441(a) (1983).

19. 304 U.S. 64 (1938).

20. 313 U.S. 487 (1941).

21. It has been suggested that a uniform federal rule should be applied to the recognition of all foreign judgments, including those of insolvency courts, E. Scoles and P. Hay, *Conflict of Laws*, para.24.35 n.5 (1982), but no case so holds.

22. *Kenner Prods. Co. v. Société Foncière et Financière* 532 F.Supp. 478 (S.D.N.Y. 1982); *Daniels v. Powell* 604 F.Supp. 689 (N.D. Ill. 1985).

23. Once full or ancillary bankruptcy proceedings are commenced, federal concepts of comity should apply, although the US Supreme Court has never directly faced and resolved this issue. See J. Moore, W. Taggart, A. Vestal and J. Wicker, *Moore's Federal Practice* (2nd ed., 1985), Vol.1A, para.0.325.

II. COMITY AND RECIPROCITY

THERE is a pragmatic element in the decision to grant comity to a foreign adjudication. International co-operation is advanced and American citizens should eventually benefit from similar decisions by foreign courts. This suggests an interesting question. Must the foreign representative show that its jurisdiction, e.g. Sweden in the *Cunard* litigation, is similarly willing to defer to an American bankruptcy? In *Hilton v. Guyot*²⁴ the US Supreme Court held, by the narrow margin of five to four, that a French judgment was not conclusive on the merits, being only evidence of what the plaintiff sought to establish, because France would accord similar treatment to an American judgment.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.²⁵

Reciprocity is a controversial element of comity, not attracting universal support.²⁶ The *Cunard* court held that reciprocity was an appropriate but not essential constituent of comity, to be considered when deciding what relief should be extended in the case of a cross-border insolvency.

Cunard also argues that, since there is no indication that a Swedish court would grant comity to a United States bankruptcy court under analogous circumstances, the district court's granting of comity here was improper. We find this contention without merit. In nations which share our ideals of justice and concepts of procedural due process, it may almost be assumed that a final judgment of one of our courts of competent jurisdiction would be accorded deference. Nevertheless, while reciprocity may be a factor to be considered, it is not required as a condition precedent to the granting of comity . . .

24. 159 U.S. 113 (1895).

25. *Idem*, pp.227-228.

26. See *Collier on Bankruptcy* (15th ed., 1987), Vol.2, para.304.03; Huber, "Creditor Equality in Transnational Bankruptcies: The United States Position" (1986) 19 Vand.J. Transn.L. 741, 760; Nadelmann, "Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company" (1977) 52 N.Y.U.L.Rev. 1, 34-35; Powers and Mears, "Protecting a US Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity" (1985) 10 N.C.J. Int.L.J. Com. Reg. 303, 346-350; Stevens, "The Interpe-

Although *Cunard* has attempted to prove that a Swedish court would not grant reciprocity or recognize bankruptcy proceedings in the United States, Salen contends that a Swedish court would extend comity to a bankruptcy proceeding here. Both parties seem to concede that an equivalent situation has yet to be presented to a Swedish court. The proofs submitted by the parties do not establish conclusively whether reciprocity would be granted in Sweden. The district court did not decide this issue because it found reciprocity not to be determinative.

We agree with the district court that, while reciprocity may in some circumstances be considered a relevant factor, proof of reciprocity is not essential for the granting of comity . . .

Since reciprocity is not an essential element in granting comity, we hold that the district court did not abuse its discretion in vacating the attachment.²⁷

One suspects that the *Cunard* court would have been much less willing to grant comity to the Swedish insolvency proceedings if there had been proof that Sweden would not similarly extend recognition to an American bankruptcy.²⁸ It should also be remembered that attitudes towards all elements of the comity doctrine will vary throughout the United States. Each state is free, therefore, to determine whether or not reciprocity should be considered in reaching a decision on the comity issue.²⁹

III. A FULL AMERICAN BANKRUPTCY PROCEEDING

USE of non-bankruptcy procedures is not a practical alternative if assets are widely dispersed throughout the US. Separate proceedings will be necessary in each state where the debtor's assets can be found. Protecting the foreign estate through individual actions will be time-consuming and expensive. In this situation, the alternative of commencing normal American bankruptcy proceedings should be considered. These are effective beyond the borders of individual states and provide broader relief than is obtainable from a single court.

American bankruptcy law authorises both voluntary and involuntary proceedings. The Bankruptcy Code establishes certain requirements for

netration of Foreign Bankruptcy Laws in Domestic Proceedings Under H.R. 8200" (1978) 52 Am. Bankr. L.J. 61, 72-76; "Section 304 of the Bankruptcy Code: Has it Fostered the Development of an 'International Bankruptcy System'?" (1984) 22 Col.J. Transp.L. 541, 556-557.

27. 773 F.2d 452, 460.

28. For another refusal to presume a lack of reciprocity, see *In re Colorado Corp.* 531 F.2d 463 (10th Cir. 1976).

29. Cf. Restatement (Second) Conflicts of Law, s.98, comment e (1971), which notes that the court in *Hilton* did not decide whether the reciprocity rule was binding in litigation based solely on state law. Since the decision in *Erie Railroad v. Tompkins* 304 U.S. 64 (1938), each state is free to decide whether or not it will follow *Hilton* and a number have chosen not to do so: Scoles and Hay, *op. cit. supra* n.21, at s.24.35.

each type of case. Only certain debtors are eligible for bankruptcy and the eligibility requirements are slightly more demanding for involuntary proceedings.³⁰ Furthermore, an involuntary petition must show that the debtor is in financial difficulty.³¹ The foreign representative should not have much difficulty in establishing this condition.³² Eligibility of debtors has, however, been a problem in past cross-border insolvencies and may well continue to raise troubling issues in the future.³³

In 1974 the Israel-British Bank (London) Ltd was in financial difficulty. It had assets in the US, although it did no banking business there. Following attachment of these assets by American creditors, the bank commenced bankruptcy proceedings in the US and also petitioned in England for voluntary winding up. The objective of the American bankruptcy proceedings was to deprive American creditors of the advantage that they had obtained by moving quickly to secure writs of attachment. These creditors argued that the petition was not well-founded because the bank was not eligible for bankruptcy. The statute then in effect provided: "Any person, except a municipal, railroad, insurance, or *banking corporation* or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt [emphasis added]."³⁴ Literal application of this provision would have required dismissal of the case. The Second Circuit³⁵ quite sensibly reached the contrary conclusion. First of all, it noted that the American bankruptcy was ancillary to the English winding up.

We take the bankruptcy proceeding here to be in aid of the order of the High Court that the assets in the United States become available to the creditors on the basis of equality. If the assets involved had been situated in the United Kingdom, the High Court could have restrained and set aside the attachment and judgment as having been made within six months of the petition for winding up . . . But the High Court, of course, has no extraterritorial jurisdiction beyond the United Kingdom.

If there is jurisdiction to sustain the American adjudication in bankruptcy of IBB, the American trustee will be in a position to bring a proceeding for avoidance of liens obtained by attachment or judgment within

30. Cf. 11 U.S.C. 109(b) (1983) (applicable to both types of proceedings) and 11 U.S.C. 303(a) (1983) (applicable only to involuntary proceedings).

31. 11 U.S.C. 303(h) (1983).

32. It is not clear whether the foreign representative is required to prove a cessation of payments in the US or whether it may also rely on defaults occurring in other jurisdictions. See Honsberger, "Conflict of Laws and the Bankruptcy Reform Act of 1978" (1980) 30 Case W.L. Rev. 631, 648-649. However, the foreign representative need not demonstrate a cessation of payments when a s.304 petition is filed.

33. Debtor eligibility can also be a problem when a petition is filed under s.304. See text accompanying nn.48-53 *infra*.

34. Act of 15 June 1910, Chap.412, 36 Stat. 838, 839 (repealed 1979).

35. *Israel-British Bank (London) Ltd v. Fed. Deposit Ins. Corp.* 536 F.2d 509 (2nd Cir. 1976).

four months of the filing of the petition if the bankrupt was insolvent at the time . . . If there is no jurisdiction to entertain a voluntary bankruptcy petition for IBB, the liens will be good and appellees will fare better than United States creditors—among others.³⁶

The court then reasoned that the banking exclusion was intended to preserve state liquidation procedures for domestic institutions and had no relevance when the American bankruptcy court was merely assisting the foreign effort to liquidate a foreign debtor.³⁷ Congress later codified the result in this case by amending the statute and authorising bankruptcies for foreign banks with no American banking operations.³⁸ The basic issue raised by the *IBB* litigation, nevertheless, remains unresolved. There are still some debtors who are not eligible for one or more types of American bankruptcy proceedings. Farmers are exempt from involuntary bankruptcies³⁹ and estates of deceased persons are wholly outside the domestic bankruptcy process.⁴⁰ Other countries do not so limit the operation of their insolvency systems. What result can be anticipated when a foreign representative files an insolvency petition concerning a debtor not eligible for bankruptcy in the US? As long as the American bankruptcy is only in aid of the foreign proceedings, the effective administration of the entire pool of assets will best be advanced by making the American bankruptcy process available even though the debtor is not eligible for bankruptcy relief in the US. Failure to do so will not assist in the implementation of any American bankruptcy policy. Even if the bankruptcy case is dismissed, some court must decide whether it is appropriate to co-operate with the foreign proceedings. Dismissal of the American case only shifts the burden of making the comity decision to another court and increases the difficulty of integrating the operation of the multiple legal systems that regulate the debtor-creditor relationship in a cross-border insolvency.

The overall desirability of avoiding dismissal is apparent when one considers the relief available if the American bankruptcy is allowed to go forward. The filing of the petition triggers a moratorium (automatic stay) which effectively restrains individual creditors.⁴¹ Through bankruptcy, preferences can be avoided, including those resulting from the

36. *Idem*, p.511.

37. A full bankruptcy did not follow. The American proceedings were eventually suspended and the assets were placed at the disposal of the English liquidator. The unreported decision of the bankruptcy judge is reproduced in Nadelmann, "Israel-British Bank (London) Ltd: Yet Another Transatlantic Crossing" (1978) 52 *Am. Bankr. L.J.* 369.

38. 11 U.S.C. 109(b)(3) (1983).

39. 11 U.S.C. 303(a) (1983).

40. *In re Estate of Brown* 16 *Bankr.* 128 (*Bankr. D.C.* 1981); *In re Estate of Whiteside* 64 *Bankr.* 99 (*Bankr. E.D. Cal.* 1986). Only "persons" are eligible for liquidation bankruptcy: 11 U.S.C. 109(a) (1983). A decedent's estate is not a person.

41. 11 U.S.C. 362(a) (1983).

attachment of assets by American creditors.⁴² Equally important is the fact that most litigation concerning assets will be centralised in one court, eliminating the need for the foreign administrator to appear in a number of different courts.⁴³

At the same time, full bankruptcy proceedings have some disadvantages: they are complicated, time-consuming and costly. Furthermore, it can be difficult to co-ordinate the administration of American proceedings with foreign proceedings while, at the same time, conforming to the requirements of the Bankruptcy Code. Consider the facts of *Banque de Financement SA v. First National Bank of Boston*.⁴⁴ Like the Israel-British Bank, the debtor in this full American case was a foreign corporation with no business operations in the US. At the time of the American bankruptcy, it was also the subject of insolvency proceedings in Switzerland. American law required the debtor to file a complete list of creditors. To do so, however, would have violated Swiss law which prohibits disclosure of the identity of depositors. Normally, American proceedings will be dismissed for failure to provide this information. The Second Circuit refused to do so because the American proceedings were necessary to avoid some pre-bankruptcy transfers of assets located in the US and the court was convinced of the need for international co-operation. The court indicated that it was willing to consider substitutes for the normal scheduling procedures.⁴⁵ This was a reasonable response to the problem at hand. It might, however, have been better to transfer the American assets to Switzerland for a unified administration.⁴⁶

42. 11 U.S.C. 547(b) (1983).

43. For example, creditors who wish to obtain relief from stay pursuant to 11 U.S.C. 362(b) (1983) will generally apply to the bankruptcy judge in the judicial district where the proceeding was commenced. See Collier, *op. cit. supra* n.26, Vol.1, para.3.02[2][a].

44. 568 F.2d 911 (2nd Cir. 1977).

45. "Flexibility in the international context of course should not come at the expense of the orderly administration of the Act. Ordinarily the scheduling requirements must take precedence even if preferences thereby are allowed to survive. Otherwise the administrative and equitable purposes of the scheduling requirements themselves would be frustrated.

The instant case however is not an ordinary one. Aside from the policy considerations mentioned above, it differs in two material respects from those cases in which the requirement of a complete list of creditors has been strictly enforced. The debtors in those cases all sought relief from that requirement either without giving any compelling reason why they should be relieved from the statutory burden of producing the information or without offering any substitute means of satisfying the purpose of the requirement. At the evidentiary hearing on the remand which we order here, Finabank may be able to comply in both respects.

As for Finabank's reason for seeking relief from the creditors list requirement, its purpose is not to obtain some advantage over its creditors. It seeks to protect them. Nor is it attempting to pass on to a trustee the task of straightening out badly kept records. Finabank is constrained by the criminal law of its domicile . . ." *Idem*, p.919.

46. 11 U.S.C. 508(a) (1983) provides a distribution rule when there are competing bankruptcies in the US and a foreign jurisdiction.

IV. COMMENCEMENT OF AN ANCILLARY ADMINISTRATION

It is no easy task to synchronise the activities in two different bankruptcies even though the court favours international co-operation. Much effort will be duplicated if two full-scale proceedings are made to do the work of one. Congress recognised the wastefulness of this cumbersome practice when, in 1978, it authorised a new form of proceedings, less comprehensive in scope, as an alternative to a full bankruptcy.

Section 304 of the Bankruptcy Code authorises "a foreign representative", and no one else, to commence a "case ancillary to a foreign proceeding". The court to whom the section 304 petition has been addressed is permitted to:

- (1) enjoin the commencement or continuation of—
 - (A) any action against—
 - (i) a debtor with respect to property involved in such foreign proceeding; or
 - (ii) such property; or
 - (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceedings to create or enforce a lien against the property of such estate;
- (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
- (3) order other appropriate relief.

Thus the ancillary case can be a much less complex process, one whose main objective is to assist and complement the foreign proceedings. Some writers have hailed it as a substantial advance in the administration of cross-border insolvencies.⁴⁷ This may be too optimistic a view. The details of a section 304 administration have yet to be settled by judicial decisions. The new procedure will represent a significant advance only if uncertainties in practice and statutory language are resolved in a manner consistent with international co-operation.

Consider, for example, the matter of eligibility of debtors, an issue already discussed in the context of a full bankruptcy.⁴⁸ The same issue arose recently upon the filing of a section 304 petition on behalf of the estate of a deceased insolvent. In Germany decedents' estates are administered by insolvency courts. A contrary practice is followed in the US where a decedent's estate may not be the subject of either voluntary or involuntary proceedings.⁴⁹ Some heirs, whose claims had been rejected by the German court, would nevertheless be entitled to American assets if Georgia probate procedures were allowed to run their

47. See e.g. Unger, "United States Recognition of Foreign Bankruptcies" (1985) 19 *Int.L.* 1153, 1178-1183.

48. See text Part III *supra*.

49. See *supra* n.40.

course. Not surprisingly, they questioned the propriety of an ancillary administration. The court, in *In re Georg*,⁵⁰ although noting that "there are very strong grounds to exercise [bankruptcy jurisdiction] for the sake of comity", dismissed the section 304 petition.

The court has carefully considered the briefs submitted by the parties on this issue. From the facts before the court, there are very strong reasons to exercise jurisdiction for the sake of comity. Here we have German nationals, who have lost their appeals to assert their interests in Kaussen's estate in the courts of the Federal Republic of Germany, turning to the probate laws of the State of Georgia. In Georgia, they will receive what they could not from their own home courts.

On the other hand, the court must work within the Bankruptcy Code as it is written. A methodical examination of the definitions provided in the Code leads the court to the unavoidable conclusion that one must qualify to be a "debtor" under the Code before this court can exercise its jurisdiction pursuant to section 304. In the United States, each state has a system for liquidating and disposing of the estates of deceased persons. This includes those of United States citizens as well as those of foreign nationals. By not including probate estates as entities eligible for relief under the Bankruptcy Code, Congress deliberately chose these State systems for disposing of property in probate estates over the national bankruptcy system provided for in the Code. The court is unable to find any authority to demonstrate that Congress intended to make an exception for foreign probate estates . . .

In the instant proceeding, if comity was the only factor to be considered, this court would not hesitate to exercise its jurisdiction. As the facts now appear before the court, this is mainly a contest between the German bankruptcy trustee and Kaussen's heirs. The heirs have lost in their own home courts and are now pursuing their claims in a more favourable forum, to wit: the Probate Court of Fulton County, Georgia. It does seem to be a great affront to the principles of comity to allow this to occur. However, this court is convinced that it is unable to exercise its jurisdiction to enforce the orders of the German courts because the drafters of the Code intended that an entity must qualify to be a "debtor" under the Code before relief can be entered pursuant to section 304. It is an unfortunate result in this particular case under these particular circumstances, but, as a general policy, the court sees the wisdom in deferring to the State court probate systems in handling decedents' estates.⁵¹

This decision is clearly incorrect. The section 304 proceedings exist only as a procedural device to permit co-operation with another jurisdiction.

50. *In re Klaus Hubert Georg* 64 Bankr. 321 (Bankr. N.D. Ga. 1986). The holding in this case is anticipated in Klocker, "Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison" (1985) 20 Texas Int.L.J. 55, 90. *Angulo v. Kedzep Ltd* 29 Bankr. 417 (S.D. Tex. 1983) assumes that debtor eligibility is a prerequisite to relief under s.304 and holds that this requirement is satisfied. *Universal Casualty & Sur. Co. v. Gee* 53 Bankr. 891 (Bankr. S.D.N.Y. 1985) rejects this position, holding that the foreign representative need only show residence, domicile, place of business or assets in the US.

51. *In re Klaus Georg, idem*, pp.324-325.

There is no debtor, in the sense that the term is used in the American bankruptcy statute, and eligibility should not be a matter of concern. *Israel-British Bank*⁵² reached this conclusion in an analogous situation and should not be forgotten.⁵³

If the court had reached the opposite result, holding that the section 304 procedure was applicable to a foreign decedent's estate, it would then have had to rule on the disposition of the American assets. It is not certain that the German representative would have prevailed. Section 304(c) sets forth guidelines for granting whatever relief has been requested. Nevertheless, this ultimate issue should have been resolved in section 304 proceedings. The ruling in this case only transfers to another court the burden of choosing between the American and German distributional schemes.

Eligibility of debtors is not likely to be an issue in most section 304 proceedings. Hence, if only the facts of the *Georg* litigation are considered, the decision is not very significant. However, there is a more fundamental issue in this case, one whose resolution is profoundly important to the continuing development of co-operative attitudes toward the administration of cross-border insolvencies. To what extent will American courts be willing to co-operate in the administration of foreign proceedings conducted under statutes which are markedly different from the American Bankruptcy Code? Is complete conformity between the two legal systems to be required? Significant international co-operation is unlikely if American courts defer to foreign proceedings only when those bankruptcies are conducted in the same manner and on the same terms as American proceedings. What result can be anticipated when the foreign insolvency representative does not resemble its American counterpart? It is possible that some foreign administrators will be unable to convince American courts that they are entitled to the benefit of an ancillary administration. Section 304 proceedings can only be commenced by a "foreign representative".⁵⁴ Such a representative must be appointed in a "foreign proceeding"⁵⁵ which is, in turn, defined as:

. . . a proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an

52. 536 F.2d 509 (2nd Cir. 1976).

53. As Collier, *op. cit. supra* n.26, at para.304.01, points out, "[The] administration of foreign decedents' estates . . . [under s.304] would not give rise to the federalism concerns that prompted . . . [Congress] to leave domestic administration of decedents' estates to the states."

54. 11 U.S.C. 304(a) (1983).

55. 11 U.S.C. 101(23) (1983).

estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.⁵⁶

Petitions filed by administrators,⁵⁷ the official receiver,⁵⁸ trustees in bankruptcy⁵⁹ and liquidators⁶⁰ should create no special problems of definition. Although having different titles, these officials perform functions in their insolvency systems which are recognisable and comprehensible to American lawyers. The receiver appointed under a floating charge,⁶¹ on the other hand, can anticipate a less sympathetic reaction to a request for relief. The concept of a judicially appointed liquidator, acting in a fiduciary capacity in the interest of all unsecured creditors, is central to American bankruptcy law. It is predictable that some American judges will be reluctant to authorise co-operation with foreign proceedings when those proceedings, and the official in control of them, are not substantially similar⁶² to a domestic bankruptcy under the control of an American-style bankruptcy trustee. Indeed, Collier, the leading American authority on bankruptcy law, without considering the purpose of section 304 proceedings offers the opinion that: "The definition of a 'foreign representative' would not appear to be broad enough to include the private appointment of a receiver and manager upon crystallization of a floating charge under Canadian or English law."⁶³

Notwithstanding Collier's view, the better practice would be to permit a receiver appointed under a floating charge to commence section 304 proceedings. No American bankruptcy policy will be advanced by refusing to do so. Once this type of receiver has been appointed, liquidation will take place⁶⁴ and American courts, in one way or another, need to

56. 11 U.S.C. 101(22) (1983).

57. Insolvency Act 1986, s.8(2).

58. *Idem*, s.399(1).

59. *Idem*, s.305.

60. *Idem*, s.95.

61. See generally *Palmers Company Law* (1982), Vol.1, Chap.44.

62. This is not a uniquely American problem. The process of comparing legal systems will also have to be pursued when a court is asked to apply s.426 of the Insolvency Act 1986. See Woloniecki, *op. cit. supra* n.3, at pp.649-651 where the author urges application of the liberal approach of *Re A Debtor* [1981] Ch. 384. Nevertheless, he questions whether proceedings under 11 U.S.C. 1101-1174 (1983) are entitled to recognition under this provision. *Idem*, p.650 n.48. Anticipating this problem, it has been suggested that the appointment of an administrator should be tolerated or encouraged by the holder of a floating charge when assets are located in foreign jurisdictions: J. R. Lingard, *Corporate Rescues and Insolvencies*, (1986), para.10.31; Cork Gully, *Administrative Orders: A guide to the implications of the procedure*, (1986) p.8.

63. *Collier Bankruptcy Practice Guide* (1986), Vol.2, para.19.04[1]. Honsberger, *op. cit. supra* n.32, at p.652 agrees.

64. Two courts have been willing to regard the receiver appointed under a floating charge as a liquidator even though that official nominally acts to protect the interest of one creditor. *Clarkson Co. v. Rockwell Intl. Corp.* 441 F.Supp. 792 (N.D. Cal. 1977) allows the receiver to proceed as a plaintiff, rejecting the contention that American public policy requires that Canadian insolvency procedures mirror those existing in the United States.

"Defendant's only real policy objection is that some creditors—to the court's know-

consider whether comity will be extended to the foreign activity. Nothing is gained by narrowly construing the statute and denying the foreign receiver access to section 304 proceedings. Such a denial merely transfers the burden of determining the appropriate course of action to another forum.⁶⁵

V. RELIEF AVAILABLE IN SECTION 304 PROCEEDINGS

THE relief available in section 304 proceedings is not identical to that which can be obtained following the commencement of a full bankruptcy. The filing of a regular bankruptcy petition automatically imposes a moratorium on all creditors. However, no automatic stay exists when a petition is filed under section 304.⁶⁶ The foreign representative must take the initiative and obtain a court order enjoining a specific creditor or creditors. Such relief is clearly authorised by section 304(b)(1). The court is also authorised to "order other appropriate relief". It has been decided without discussion that a Canadian representative was entitled in section 304 proceedings to challenge a preference.⁶⁷ Another decision recently granted a request for discovery following the institution of liquidation proceedings in the Grand Cayman Islands.⁶⁸

ledge exclusively Canadians—may be prejudiced by the use of a method for dealing with insolvency which, though fully acceptable in Canada, may afford somewhat less protection for their interests than would be available pursuant to insolvency proceedings conducted in the United States. Such variances in the law do not justify a refusal to countenance an action on grounds of public policy unless enforcement of the foreign right would be prejudicial to recognized standards of morality or to the general interests of California citizens . . . Here, no effect on California citizens, except as discussed above, has been alleged. Nor are the Canadian procedures offensive to any abstract standard of morality or justice. Although not a fiduciary, Clarkson has an obligation to conduct the litigation in good faith and to take reasonable steps to obtain the best recovery possible . . . Moreover, a Clarkson Vice President has stated under oath that Clarkson will apply to a Canadian court for direction as to the proper disposition of any surplus recovery . . . Under these circumstances, the differences between United States and Canadian law are hardly sufficient to warrant a dismissal on any ground of public policy." *Idem*, pp.796-797.

Hammond Screw Machinery Co. v. Sullivan 580 F.Supp. 24 (N.D. Ill. 1984) analogises an English receiver to an assignee for the benefit of creditors and refuses to allow the set-off of claims acquired by the defendant after the appointment of the receiver.

Both these decisions are consistent with the view that a receiver appointed under a floating charge should be allowed to commence s.304 proceedings.

65. See also Huber, *op. cit. supra* n.26, at p.752, arguing, in a different context, that: "The drafters of the Code could not have intended foreign law to be a 'mirror image' of United States law because such a strict prerequisite would render s.304 ineffective."

66. 11 U.S.C. 362(a) (1983) only provides an automatic stay for petitions filed under s.301 (voluntary cases), s.302 (joint cases filed by husbands and wives) and s.303 (involuntary cases). The foreign representative who wishes to obtain the benefit of the automatic stay is, by the terms of s.303(b)(4), qualified to file an involuntary petition.

67. *In re Comstat Consulting Servs.* 10 Bankr. 134 (Bankr. S.D. Fla. 1981); *Universal Casualty & Sur. Co. v. Gee* 53 Bankr. 891 (Bankr. S.D.N.Y. 1985) (dictum).

68. *Universal Casualty ibid. Angulo v. Kedsep Ltd* 29 Bankr. 417 (S.D. Tex. 1983). agrees.

While the language of section 304 is clearly consistent with the result in each of these cases,⁶⁹ venue rules⁷⁰ may indirectly limit the availability of such relief. 28 U.S.C. 1410(c) establishes a link between venue rules and the relief sought in the ancillary proceedings. When the foreign representative seeks either to discover assets or avoid pre-bankruptcy transfers, the proceedings can be commenced “only in . . . the district in which is located the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of such case”. The statute apparently does not provide an appropriate venue for actions related to bankruptcies in which the debtor neither does business in the US nor has admitted assets there. Possibly, courts will permit discovery and authorise actions to recover preferences in the expectation that the correctness of the venue can be established retroactively.⁷¹

A different problem will exist if the object of the section 304 proceedings is to protect clearly identified American assets of a foreign debtor. The venue rules found in 28 U.S.C. 1410 operate to reduce the usefulness of ancillary administration when these assets are located in more than one judicial district. 28 U.S.C. 1410(b), for example, requires that when the foreign administrator attempts to enjoin the enforcement of a lien, the proceedings must be commenced in the “district in which such property is found”.

Let us assume that the foreign representative wishes to obtain control over assets located in Nevada and North Carolina. Two separate section 304 proceedings are initially required.⁷² It will be possible to attempt a subsequent consolidation in one district.⁷³ The cost and delay associated with motions to transfer proceedings may make consolidation impractical. Therefore, in insolvencies where assets are located in more than one state a foreign representative will wish to consider the alternative of a full American bankruptcy commenced where the debtor has its “principal assets in the United States”. Multiple proceedings will not then be necessary since the court where the original proceedings are commenced will be in a position to control the debtor’s American assets no matter where they are located.⁷⁴

69. Also *In re Egeria Societa Per Azioni di Navigazione* 26 Bankr. 494 (Bankr. E.D. Va. 1983). The view that avoidance powers can be asserted in s.304 proceedings is criticised in Gitlin and Flaschen, *op. cit. supra* n.3, at pp.318–319.

70. 23 U.S.C. 1410 (1983).

71. There is language in *Universal Casualty & Surety Co. v. Gee* 53 Bankr. 891 (Bankr. S.D.N.Y. 1985), suggesting that discovery may go forward in the hope that assets will be identified. Note, however, that the presence of other assets and a place of business in the US in that case satisfied the venue rule of 28 U.S.C. 1410(c) (1983).

72. Collier, *op. cit. supra* n.26, Vol.1, at para.3.02[3][b].

73. 28 U.S.C. 1412 (1983) authorises transfer of proceedings to another court “in the interest of justice or for the convenience of the parties”.

74. See *supra* n.43.

VI. TURNOVER OF ASSETS

THE ultimate test of willingness to co-operate occurs when the court is asked to authorise a transfer of American assets so that they can be integrated with other assets in foreign proceedings. At best this will inconvenience American creditors who must now advance their claims many miles from home. Some small claimants will find it uneconomical to do so. Those with larger claims may find that they do not enjoy as favourable a status as that provided by American law. This visible and immediate damage to American interests must be balanced against the less tangible and more long-range interest in moving toward greater integration of different insolvency systems. As already noted, section 304 lists the factors to be considered when ruling on the requests to transfer assets. While there are several reported decisions applying the statutory criteria, the results are conflicting and it is too early to conclude that the trend of decisions is firmly established.⁷⁵

*In re Toga Mfg. Co.*⁷⁶ represents the least co-operative position. Bankruptcy Judge Graves flatly refused the request of a Canadian bankruptcy trustee for the transfer of \$215,000 which had been seized under a writ of garnishment to satisfy the claim of a Michigan creditor. It was conceded that Hesse (the creditor):

would suffer no inconvenience if it were forced to litigate its claim in Canada. The courts of the Province of Ontario are readily available to Hesse in order that it may attempt to protect its interest there. Hesse would receive just treatment of its claim against Toga in the Canadian courts. Upon distribution of the proceeds of the estate under Canadian bankruptcy law, however, Hesse's claim will *not* receive the priority recognition "substantially in accordance with the order prescribed by this title" as required by section 304(c)(4) [emphasis in original].⁷⁷

Accordingly, the request for transfer was denied because:

This court must protect United States citizens' claims against foreign judgments inconsistent with this country's well-defined and accepted policies. Trustee Peat Marwick Ltd conceded that Hesse's secured status as it exists under this country's laws would not receive the same or substantially similar treatment under Canadian law. In fact, we have found in our examination of Canadian bankruptcy law that Hesse would receive substantially unequal treatment.⁷⁸

75. Eventually, however, there will be a uniform federal approach to the comity decision. At a minimum, s.304 should produce a federal choice of law rule which will replace the inconsistent attitude toward comity made possible by the *Disconto* decision, *supra* n.14 and text accompanying. See Given and Vilaplana, "Comity Revisited: Multi-national Bankruptcy Cases Under Section 304 of the Bankruptcy Code" (1983) *Ariz. St.L.J.* 325, 331.

76. 28 Bankr. 165 (Bankr. E.D. Mich. 1983). The *Toga* decision is supported in Gitlin and Flaschen, *op. cit. supra* n.3, at p.321.

77. *In re Toga Mfg. Co.* 28 Bankr. 165 (Bankr. E.D. Mich. 1983).

78. *Idem*, p.170.

The *Toga* decision can be criticised for giving undue emphasis to only one of the factors listed in section 304(c). Nevertheless, the same emphasis on protection of American interests, articulated more subtly, appears in litigation—*In re Lineas Areas de Nicaragua SA*⁷⁹—involving a financially troubled Nicaraguan airline. The foreign trustee initially sought the transfer of all property located in the US and injunctive relief against proceedings commenced, or to be commenced, against the debtor. There were tangible assets worth approximately \$200,000 plus a valuable certificate authorising the debtor to operate flight services in the US. This certificate was due to expire several months later. The foreign trustee undertook that, although a transfer of assets was sought, none of them would be removed from the US and they would be applied primarily to satisfy American claims. The court ordered transfer of the property to the Nicaraguan trustee on the basis of this undertaking and on the further condition that the trustee be prohibited from encumbering, assigning or abandoning assets located in the US. Subsequently, corporate creditors moved for the appointment of an independent trustee in the section 304 proceedings. The debtor's certificate of authority had been extended for a few months. However, the Nicaraguan government had indicated that it planned to cease supporting the existing service and would attempt to replace the debtor with two other corporate carriers. The reason for this action was that a potential financier of the two new carriers preferred not to assume existing liabilities. Because of this, the Nicaraguan trustee had no interest in preserving the debtor's authorisation to operate air services in the US and, as the court noted, planned to "do all he can to accomplish his government's wish to replace the debtor by another carrier that has no obligation to US creditors". The court therefore appointed a co-trustee to deal with this matter because it felt that the major American creditor was entitled to a disinterested evaluation and presentation of its position before the American licensing authority. This co-trustee was appointed solely to accomplish this task and was given no responsibility or authority for the debtor's assets other than as stated.⁸⁰

*In re Culmer*⁸¹ stands in apparent contrast to these decisions. The court there approved the request of liquidators to transfer American assets to the Bahamas over the strenuous objections of some creditors. When the facts of this case are considered, however, the result from an international perspective is only mildly encouraging. There was a close

79. 10 Bankr. 709 (Bankr. S.D. Fla. 1981).

80. *In re Lineas Areas de Nicaragua, SA* 13 Bankr. 779 (Bankr. S.D. Fla. 1981). These two decisions are criticised for converting s.304 proceedings into a full American bankruptcy. See Gallagher and Hartje, "The Effectiveness of s.304 in Achieving Efficient and Economic Equity in Transnational Insolvency" (1983) Ann. Surv. Bankr. L. 1, 17, 19.

81. 25 Bankr. 624 (Bankr. S.D.N.Y. 1982).

substantive similarity between the two bankruptcy statutes. In addition, the objecting creditors held liens which were avoidable under both American and Bahamian law. Hence, the impairment of otherwise valid domestic interests, a controlling consideration in *Toga*, was not present in this case. Furthermore, the two major creditors in the US, each with a claim greater than those held by all the creditors objecting to the transfer, supported the position of the foreign representative.

There is also the *Cunard*⁸² decision which authorised the transfer of assets for administration in a Swedish bankruptcy. Even here, nonetheless, there is still need for caution in interpreting the opinion. *Cunard*, in opposing the transfer, was attempting to protect a lien that would have been vulnerable in a normal American bankruptcy. As the court noted:

The guiding premise of the Bankruptcy Code, like its predecessor, the Bankruptcy Act, is the equality of the distribution of assets among creditors . . . *Cunard* is not a secured creditor of *Salen*, but a general creditor. *Cunard* initiated this action and obtained the attachment after *Salen* had filed its petition for bankruptcy . . .

In attaching these funds, *Cunard* has attempted to maintain a captive fund to secure any . . . award it may receive. There is, however, no compelling policy reason for a general creditor . . . to receive a preference over other creditors. In the words of Judge Gurfein, writing for this court: "The road to equity is not a race course for the swiftest" . . . It may be added that, although *Cunard* does business and has a presence in the United States, it is incorporated and based in England. Furthermore, the contract [which gave rise to *Cunard's* claim] . . . has no connection with the United States and *Salen* is a Swedish business entity.⁸³

Only one conclusion can be drawn from all these decisions. There is little reason to hope for co-operation from American courts in any but the most routine and non-controversial situation. Optimism is not yet justified.

VII. ABSTENTION AND RELATED JURISDICTIONAL MATTERS

PROCEEDINGS under section 304 have been available to foreign liquidators for less than ten years. Courts have recently been asked to consider whether use of this procedure is mandatory or, at least, preferable to other courses of action. For example, in the *Cunard* litigation American creditors argued that the foreign trustee could not assert a claim to comity unless he first commenced section 304 proceedings. This delaying tactic was unsuccessful. Even though the court believed that section 304 proceedings "would have been eminently proper" and "would have

82. Discussed *supra* at text accompanying nn.10-12. *Cunard* looked to the factors enumerated in s.304(c) even though no s.304 proceedings had been commenced.

83. *Cunard* 773 F.2d 452, 459 (2nd Cir. 1985).

been a preferred remedy" it was willing to consider the request for comity without such a formality.

We do not find in the statute or in the legislative history a clear congressional mandate, either express or implied, that section 304 was to be the exclusive remedy for a foreign bankrupt. The statute is not phrased in mandatory or exclusive terms, and the language of the accompanying House and Senate Reports is permissive . . .

The ancillary proceeding was conceived as a more efficient and less costly alternative to commencing a plenary proceeding which would be duplicative of a foreign proceeding. Congress retained the option of commencing a full bankruptcy case if the estate in the United States is substantial or complicated enough to *require* a full case for proper administration [emphasis added].⁸⁴

*In re Gee*⁸⁵ answers a related question: Does the filing of a petition requesting a full American bankruptcy take precedence over a previously filed section 304 petition? The foreign representative in *Gee* had chosen to proceed under section 304 following the commencement of liquidation proceedings in the Grand Cayman Islands. He then sought discovery and an injunction against the transfer of American assets. Shortly before the hearing on his request for a preliminary injunction, an official of the debtor, anxious to avoid discovery, filed a voluntary petition on its behalf. He then argued that the full bankruptcy took precedence over the section 304 proceedings. This strategy, in what the court termed "an international chess game", did not succeed. Section 305(a)(2) authorises dismissal or suspension of a normal bankruptcy if "(A) there is pending a foreign proceeding; and (B) the factors specified in 304(c) . . . warrant such dismissal or suspension". The court, convinced that the relief requested in the section 304 petition should be granted, found that dismissal of the competing full bankruptcy was proper.

Continuation of the Chapter 11 case is clearly not in keeping with the spirit of section 305 which is designed in part to avoid duplication of effort by the courts and creditors . . . This court holds not that an existing foreign liquidation precludes the filing of a Chapter 11 petition but rather that where, as here, the court is recognizing a case filed ancillary to that foreign proceeding as a means to effectively deal with the American assets and creditors, if any, a competing Chapter 11 petition should be dismissed under section 305.⁸⁶

It should also be noted that section 306 of the Bankruptcy Code pro-

84. *Idem*, pp.455-456; *Banca Emiliana v. Farinacci* 812 F.2d 1469 (4th Cir. 1987) agreed. *Contra RBS Fabrics Ltd v. Beckers & La Hanne* 24 Bankr. 198 (S.D.N.Y. 1982). This aspect of *Cunard* is criticised in Sheehan, "Bankruptcy" (1986) 17 J. Mar. L. & Com. 445 and Case Comment, "Bankruptcy" (1986) 19 Vand.J.Transn.L. 911, 927-928.

85. *Universal Casualty & Sur. Co. v. Gee* 53 Bankr. 891 (Bankr. S.D.N.Y. 1985).

86. *Idem*, p.905.

fects the foreign representative from one possible adverse consequence of requesting judicial assistance in the US. An appearance in a bankruptcy court for the purpose of requesting relief in either a full bankruptcy or ancillary proceedings "does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose".⁸⁷ During the Herstatt bankruptcy in 1974-75, the German liquidator failed to appear in the involuntary case which had been commenced by American creditors, apparently fearing that this appearance would prejudice the interests of the German estate.⁸⁸ Section 306 responds to this fear.

The protection is necessary to allow the foreign representative to present his case and the case of the foreign estate, without waiving the normal jurisdictional rules of the foreign country. That is, creditors in this country will still have to seek redress against the foreign estate according to the host country's jurisdictional rules. Any other result would permit local creditors to obtain unfair advantage by filing an involuntary case, thus requiring the foreign representative to appear, and then obtaining local jurisdiction over the representative in connection with his appearance in this country. That kind of bankruptcy law would legalize an ambush technique that has frequently been rejected by the common law in other contexts.⁸⁹

To the extent that this fear is well founded,⁹⁰ section 306 increases the relative attraction of using the bankruptcy process instead of pursuing remedies provided by non-bankruptcy law.

VIII. CONCLUSION

There are few areas of the law in which international comity has made as little progress as in bankruptcy. The call for an international bankruptcy system based upon notions of comity and equality of creditors was first voiced by nineteenth-century commentators . . . Subsequent efforts to achieve those ends have been notably unsuccessful. If anything, the United States has been less parochial and more accommodating than most other countries (developed and developing), but even in this country principles of international bankruptcy administration remain nascent and primitive.⁹¹

Does this bleak assessment of past achievements accurately predict future development? One hopes not.⁹² The enactment of section 304

87. 11 U.S.C. 506 (1983).

88. Becker, "International Insolvency: The Case of Herstatt" (1976) 62 A.B.A.J. 1292, 1294.

89. S.Rep. 95-989, 95th Cong., 2d Sess. 36 (1978).

90. See Nadelmann, *op. cit. supra* n.26, at pp.7-8 n.37.

91. Warren and Westbrook, *The Law of Debtors and Creditors* (1986), p.721.

92. For a recent English decision, similarly unwilling to promote international co-operation when this would prejudice local interests, see *Felixstowe Dock and Railway Co. v. US Lines Inc.* (1987) LEXIS (Q.B.D., Commercial Court).

provides an opportunity to move toward a more international orientation in the administration of cross-border insolvencies. Various levels of co-operation are possible, not all involving the same degree of conflict between domestic and foreign interests. At a minimum, use of section 304 should be possible whenever a liquidation or reorganisation is taking place outside the US. Foreign proceedings will go forward in any event. The presence of parallel section 304 proceedings in the US will facilitate the development of a uniform federal policy relating to the recognition of rights arising under foreign bankruptcy statutes.

It can also be hoped that American judges will be flexible in responding to requests for relief in pending section 304 proceedings. While there may possibly be situations in which the commencement of a full American case is the preferred procedure, courts should not routinely deny requests for relief (e.g. recovery of preferences) simply on the ground that the section 304 proceedings are not the equivalent of a normal bankruptcy.

Requests for the transfer of assets abroad will present the most direct and substantial conflict between interests of American and foreign creditors. Judges are not yet ready to relinquish control over American assets in any but the most routine cases. It is unlikely that this attitude will change dramatically in the immediate future.