Denver Journal of International Law & Policy

Volume 32
Number 2 *Spring*

Article 5

April 2020

Choice of Law in United States Cross-Border Insolvencies

Richard E. Coulson

CHOICE OF LAW IN UNITED STATES CROSS-BORDER INSOLVENCIES

RICHARD E. COULSON

I. INTRODUCTION

In a period marked by the development of numerous treaties, conventions, and statutes designed to regulate international business, the field of international bankruptcy remains disturbingly resistant to reform. Most of the major initiatives proposed in past decades have failed completely; others, though adopted, have had only moderate impact. As a result, the bankruptcy of a multinational enterprise typically triggers diverse and uncoordinated legal proceedings in various countries connected to the affairs of that enterprise. For instance, this lack of coordination imposes substantial costs both on the bankruptcy process itself, by multiplying administrative expenses, and on international commerce generally, by preventing lenders from predicting accurately the consequences of debtor insolvency The need for a method of addressing international insolvencies that is fair, predictable, and consistent therefore remains pronounced.

The movement to reform international bankruptcy law has been cast largely as a struggle between two opposing camps: universality and territoriality For the past few decades, universalists who argue that international bankruptcies should be administered by a single forum, have been winning the battle. Universalists argue that the centralized administration of cross-border bankruptcies will provide: (1) equality of treatment for all creditors; (2) maximization of the value of the bankruptcy estate; (3) expeditious and efficient administration of the estate; and (4) predictability of outcome. Universalist principles have shaped the discourse as well as the goals of the bankruptcy reform movement.

In the year 2000, however, the consensus that had long favored universality seemed to be weakening. Territoriality, which favors the simultaneous administration of multiple local bankruptcies, is gaining currency among commentators. On the legislative front, the international bankruptcy provisions of the proposed Bankruptcy Reform Act of 1999[1] while purporting to foster universality, instead reveals only a partial commitment to the universality approach. Finally, recent cases evidence the increasing tendency of courts to abandon the battlefield altogether by handling cross-border bankruptcies in an

Professor of Law, Oklahoma City University School of Law,

1. For current version, see Bankruptcy Abuse and Consumer Protection Act of 2003, H.R. 975, 108th Cong. (2003).

extra-regulatory fashion.[2]

Many recent large bankruptcies, including Swissair, WorldCom, Enron, and United Airlines, necessarily have multi-jurisdictional problems. But smaller enterprises also operate across international borders. What law to apply is traditionally a conflict of laws problem. Nevertheless, as Professor Buxbaum and others point out,[3] cross-border insolvencies have not generally been analyzed in terms of choice of law methodology

First, we need to identify the terminology used in this area of law Professor Buxbaum mentioned "Universality" and "Territoriality"[4] Although neither describes the exact situation in the United States today, both are active elements in efforts to describe courts' efforts to apply the limited legislative guidance. "Universality maintains that a single forum should administer the bankruptcy of an insolvent corporation. The bankruptcy proceeding would reach all assets of the debtor, wherever located, and would distribute those assets to all creditors, wherever located."[5] Generally, it is assumed that this distribution of assets and determination of claims would be done according to the forum's own laws.

Territoriality, in contrast, is the familiar state law collection technique of grabbing the local assets and distributing them to the local creditors according to its own laws.[6] The United States has a long history of trying to reconcile the needs and interests of local creditors in and to local assets (the race to the court house) and the desire for equitable distribution of an insolvent debtor's assets.[7] Naturally, if the debtor is not insolvent, a local creditor may be inconvenienced and taxed with added costs by participating in a foreign proceeding, in theory, however, that creditor will eventually be paid. It is where the assets are insufficient that equality of distribution and other bankruptcy protective tools are needed—such is the international conflict.

As noted, the United States has seldom been purely one or the other. Indeed, the current regime under Bankruptcy Code section 304 has been characterized as "modified universality"[8] This characterization is accurate but a little odd. It would appear that the United States is truer to Universality than any other nation.

In this piece I do not attempt to set out what choice of law principles should govern cross-border insolvencies in the United States. Rather I attempt to trace federal choice of law rules and show how those rules, such as they are, have had limited use thus far in bankruptcy cases. In Part II I discuss choice of law rules and identify what federal choice of law rules are in various contexts. In Part III I

2. Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23, 23-24 (2000) (footnotes omitted) (hereinafter Buxbaum).

3. *Id.* at 25; *see also* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AMER. BANKR. L. J. 457, 462 (1991).

4. Buxbaum, supra note 2, at 24-27.

5. Buxbaum, *supra* note 2, at 26.

6. *Id.*

7. *Id.* at 27.

8. *See* 11 U.S.C. § 304. *See also* Buxbaum, *supra* note 2, at 27

discuss the trend, if it can be called a trend, in cases decided prior to the Bankruptcy Reform Act of 1979 ("BRA" herein). Part IV examines the structure of the BRA dealing with cross-border issues and discusses selected cross-border cases decided under the BRA showing the limited application of federal choice of law analysis. In Part V I leave with a brief restatement of the problem facing courts in cross-border insolvency cases rather than a solution, other than to suggest that developed choice of law principles are designed to inform the choice and should not be overlooked in deciding whether to apply United States bankruptcy law.

II. WHOSE CHOICE OF LAW RULES?

A. Choice of Choice of Law Rules

For some time it has been settled that a federal court sitting in diversity jurisdiction shall apply the choice of law rules of the state in which it sits.[9] *Klaxon* was based on *Erie Railroad Co. v. Tompkins*[10] which relied in part on the Rules of Decision Act.[11] This Act provides that "[t]he laws of the several states shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply "[12] Thus the "laws of the several states" includes the forum state's choice of law rules.[13] Does this apply in Bankruptcy?

The answer is curiously clouded. *Vanston Bondholders Protective Committee v. Green* [14] is a starting point. In *Vanston*, the issue was whether interest on interest should be paid in a Chapter 11 bankruptcy proceeding.[15] If it was payable, the first mortgage bondholders would be paid in full, but subordinate creditors would have a reduced share.[16] The Court said:

> What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling federal law, is to be determined by reference to state law. Determination [of which state's law applies where, as here, other states have significant contacts] requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.[17]

This quote was *dicta,* because the Court held that regardless of whether interest on

9. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
10. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
11. 28 U.S.C. § 1652 (2000).
12. 28 U.S.C. §1652 (2000).
13. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938).
14. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946).
15. *Id.* at 158.
16. *Id.*
17. *Id.* at 161-162.

interest was allowable under any or all of the potentially interested states' laws, the issue was determinable by reference to the policy of the Bankruptcy Act;[18] that is, there was "overruling federal law."[19] Nevertheless, this case has been the point of jumping off for much analysis. However, this analysis has not pointed in a clear direct line.

It is to be noted that the *Vanston* Court, albeit in *dicta,* used a phrase to state the essential choice of law relation that has similarly become basic in the *Restatement (Second) Conflict of Law* ("Restatement of Conflicts"); they referred to the "states with the most significant contacts,"[20] whereas the core concept of the Restatement of Conflicts is the "most significant relationship."[21] Because the latter, in some version, appears in most states, and because the federal courts have adopted the Restatement of Conflicts as the basis of federal common law choice of law,[22] it often happens that there is no essential difference in the choice of choice of law· thus, the issue is left unresolved. This result was reached by the Fifth Circuit in *Woods Tucker Leasing Corporation v. Hutcheson-Ingram Development Co.*,[23] where it held that Texas and Mississippi would apply the choice of law provision of the Uniform Commercial Code, as would the federal court, in making its own choice to recognize a contractual choice of law provision.[24]

The Second Circuit reached a finer judgment in *In re Gaston & Snow.*[25] The case was a bankruptcy adversary proceeding on an oral contract between a Chapter 11 law firm and its former clients.[26] At issue was the applicable statute of limitations.[27] The court, after noting the division in the courts of appeals, held that because federal choice of law rules are a creature of federal common law, and that because federal common law was only available where there was a significant federal interest, that where state law was the underlying dispositive law, the bankruptcy courts should apply the choice of law rules of the forum and not federal law.[28]

Reaching a directly contrary view is *In re Vortex Fishing Systems, Inc.*[29] That case also involved a statute of limitations which lay at the basis of a claim on which a creditor predicated its standing as an involuntary bankruptcy petitioner.[30]

---

18. *Green*, 329 U.S. at 161.

19. *Id.*

20. *Id.* at 162.

21. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. c. (1971).

22. *See, e.g., In re* Vortex Fishing Sys., Inc., 262 F.3d 985, 994 (9th Cir. 2001).

23. Woods Tucker Leasing Corp. v. Hutchison-Ingram Dev. Co., 642 F.2d 744, 748-49 (5th Cir. 1981).

24. *Id.* at 753-54.

25. *In re* Gaston & Snow, 243 F.3d 599 (2d. Cir. 2001).

26. *Id.* at 601-02.

27. *Id.* at 604.

28. *Id.* at 605-07· *see also* Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953) (discussing that because *Erie* was partially based on the Rules of Decision Act, *Erie* also applied in bankruptcy).

29. *Vortex Fishing*, 262 F.3d at 985.

30. *Id.* at 994-95.

The case does not carefully discuss our issue but, following earlier circuit law,[31] held that "[i]n a bankruptcy case, the court must apply federal choice of law rules."[32]

Since most substantive rights in bankruptcy are based on state or non-bankruptcy law, and since those state issues are respected in bankruptcy absent federal bankruptcy statutes or strong, clear policies indicating otherwise,[33] it would seem that where state law prescribes the dispositive rule that *Erie* and the Rules of Decision Act are controlling on the choice of law issue, then the forum's choice of law rules would apply Otherwise, federal common law choice of law rules would apply That is the position this article takes. I now turn to a brief discussion of federal choice of law rules as applied when federal law is the dispositive rule. At the end of the article I will briefly consider the choices made in some international bankruptcy related state law issues.

B. Federal Choice of Law Brief History

The question addressed here is how to select between conflicting foreign and federal bankruptcy law. In theory, the United States has the constitutional authority to extend its legislation to the world. Thus, Bankruptcy Code section 541 expressly provides that the estate created by filing a petition extends to all the described property "wherever located and by whomever held."[34] There are, of course, practical limits to this reach—the effect of American law on property located in another country depends entirely on the willingness of the courts of that country to recognize our claims or judgments.[35]

Partially in recognition of this practical limit, and partially as a matter of conflict of laws policy, early on, the Supreme Court adopted the rule that:

> [A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.[36]

Chief Justice Marshall's language implicitly admits that the law of nations does not limit the powers of Congress as set out in the U.S. Constitution as a matter of law cognizable before U.S. courts, but rather is a matter of construction in the face of general language.

Justice Joseph Story, a founder of American conflicts law, expressed this same idea with a little more force in *The Apollon*,[37] where he said: "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its

31. *In re* Lindsay, 59 F.3d 942, 948 (9th Cir. 1995).
32. *Vortex Fishing*, 262 F.3d at 994.
33. *Cf.* Butner v. United States, 440 U.S. 48 (1979).
34. 11 U.S.C. § 541 (2000).
35. *See e.g., In re* Int'l Admin. Serv., Inc., 211 B.R. 80 (Bankr. M.D. Fla. 1997).
36. Alexander Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804).
37 The Apollon, 22 U.S. 362, 370 (1824).

own citizens."[38] Justice Story, in stating such, seemingly suggests that there were real limits on a state's power under international law. The Marshall language has prevailed.

In a case involving a Canadian insolvency, the Court held the American creditors to the Canadian proceedings, saying: "[t]hat the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country."[39]

The *Charming Betsy* case is generally looked at as a beginning since it at least makes clear that courts are to use its guidance not as a limit on power where Congress is clear, but as a rule of construction where Congress uses broad boilerplate terms like "any" or "all."[40]

Perhaps the leading modern case is *Lauritzen v. Larsen*.[41] *Lauritzen* was a federal Jones Act[42] case, the facts of which center around a Danish seaman, who signed on a Danish ship while the ship was in New York, and was later injured in Cuba.[43] He sought to assert his claim under the Jones Act, which facially allows "any seaman who shall suffer personal injury in the course of his employment at his election, [to] maintain an action for damages ..."[44] While the Court noted the reach of the actual language, it said: "[b]y usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[45] But this holding does not bind U.S. law:

> On the contrary, we are simply dealing with a problem of statutory construction rather commonplace in a federal system by which courts often have to decide whether 'any' or 'every' reaches to the limits of the enacting authority's usual scope or is to be applied to foreign events or transactions.[46]

The Court concluded that Congress could not have intended to apply the Jones Act remedies to a foreign sailor aboard a foreign ship, injured in a foreign port.[47]

Some question about the presumption against extraterritoriality as a basis of statutory construction was raised in the close 5-4 decision in *Hartford Fire Insurance Co. v. California*.[48] In that case, the Court, with two separate 5-4 majorities, applied the Sherman Act[49] to activities by English reinsurers in

38. *Id.*
39. Canadian Southern Ry. Co. v. Gebhard, 109 U.S. 527, 536 (1883).
40. *Id.*
41. Lauritzen v. Larsen, 345 U.S. 571 (1953).
42. 46 U.S.C. § 688 (2000).
43. *Lauritzen*, 345 U.S. at 573.
44. *Id.* at 573 n. 1.
45. *Id.* at 577.
46. *Id.* at 577-79.
47. *Id.* at 592-93.
48. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).
49. 15 U.S.C. § 1 (2000).

England.[50] The majority on our issue simply held that since compliance with U.S. law did not require the London reinsurers to violate English law, that is, compliance would be legal in England, so there was no conflict of laws and U.S. law could be applied.[51] Justice Scalia, who wrote the dissent on this issue,[52] used the analysis followed here. The case does not really suggest there is any qualification of this analysis, but the majority essentially ignored the real conflicts issue presented: whether English law can be construed not to merely permit the conduct prescribed by U.S. law, but to encourage the freedom of its insurance companies to make such choices, at least while in England. This situation classically calls for a conflicts analysis; Scalia does not offer a real conflict analysis, but arguably his discussion is far superior to the simplistic analysis of the majority.

Scalia, following the rules of statutory construction mentioned above, argued that: (1) unless Congress indicates otherwise, federal legislation is only meant to apply within the U.S. and (2) federal statutes should be construed, again where possible, not to violate international law.[53] As a guide to these two canons of construction, he mentioned that many lower courts in Antitrust cases had relied on the doctrine of comity of nations and the rules outlined in the *Restatement (Third) Foreign Relations Law of the United States* ("Restatement of Foreign Relations").[54]

Comity is an older concept still viable in conflicts analysis, especially in international cases. The classic statement associated with the concept of comity is from *Hilton v. Guyot*,[55] where the Court, in considering the enforceability of a French judgment in federal courts, said:

> 'Comity, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[56]

Obviously, the concept of comity is not a test or standard, but a guiding principle of international cooperation. Moreover, it does not expressly, or to my mind implicitly, give any guidance to a choice of law analysis. It addresses a style of thinking which guides a court's attitude when offered the possibility that foreign law should, by some choice of law principles, be applied. As vague as comity is, it has continued to guide much of the thinking about foreign law in U.S. courts,

---

50. *Hartford Fire Ins. Co.*, 509 U.S. at 798-99.

51. *Id.* at 800.

52. *Id.* (Scalia also wrote for the majority on different issue).

53. *Id.* at 814-15.

54. *See* Suzanne Harrison, *The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?* 12 BANKR. DEV. J. 809 (1996).

55. Hilton v. Guyot, 159 U.S. 113, 122-23 (1895).

56. *Id.*

including in bankruptcy proceedings, and plays a prominent role in determining whether to grant relief in an ancillary proceeding.[57]

Courts have found further guidance for the exercise of comity in the provisions of the Restatement of Foreign Relations sections 402 and 403.[58] Foreign relations law in the Restatement includes "international law as it applies to the United States."[59] As we have seen, this international law is not binding in the sense that it overrides applicable federal statutes but serves as a canon of prudent construction. Under section 402, a state has the jurisdiction to apply its law if it chooses to do so, against:

> (1) (a)conduct that, wholly or in substantial part, takes place within its territory;
>
> (b) the status of persons, or interests in things, present within its territory;
>
> (c) conduct outside its territory that has or is intended
>
> to have substantial effect within its territory; [and]
>
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory.[60]

But even where jurisdiction to prescribe is permitted under section 402, "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[61] Section 403(2) offers a nonexclusive list of relevant factors to be applied where appropriate. These factors are:

> (a) the link of the activity to the territory of the regulating state, *i.e.* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

---

57 11 U.S.C. § 304(c)(5).
58. RESTATMENT (THIRD) FOR. REL. §§ 402, 403 (1987).
59 RESTATEMENT (THIRD) FOR. REL. § 1(a). (1987).
60. *Id.* at § 403.
61. *Id.* at §403(1) (1987).

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.[62]

As a non-exclusive list of factors, this list is necessarily consistent with the alternative approach of many courts, which simply state that "[t]he federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation."[63] Notice that the Restatement of Foreign Relations factors do not directly focus on choice of law, but rather determine the reasonableness of the extension of federal law to a transaction or person having foreign connections. If the U.S. prescriptive jurisdiction would be unreasonable, federal law should not be applied, but a court need not chose the application of the other state's law; indeed, this determination of unreasonableness logically results in dismissal of the action.

Thus, while the Restatement factors are often treated as principles for implementing comity, they actually focus on different questions. Comity (whatever it means) focuses on whether to apply or defer to the foreign law, while the Restatement delineates when American federal law should be limited or not applied. Neither actually focuses on how to make the decision. This role is also played, albeit vaguely by the greatest interest, or closest connection, or most significant contact standard. But the courts have not developed this degree of coherence, for the most part, in international insolvency A little history might help.

62. RESTATMENT (THIRD) FOR. REL. § 403(2) (1987).

63. *In re* Koreag, Controlle et Revision S.A., 961 F.2d 341, 350 (2d Cir. 1992) (not choosing between federal common law choice of law and the forum (N.Y.) choice of law since they were essentially the same); *In re* Maxwell Communication Corp., 170 B.R. 800, 816 (Bankr. S.D.N.Y 1994), *aff'd* 186 B.R. 807 (S.D.N.Y 1995) and 93 F.3d 1036 (2d Cir. 1996) (on these important cases see below).

III. PRE-1979 INTERNATIONAL INSOLVENCY CASES[64]

Charles Booth describes a movement in international insolvency law in the United States that shifts from territoriality to universality, back to territoriality, and again to universality, prior to the Bankruptcy Reform Act of 1978.[65] The early cases basically ignore all conflict of laws analysis, and concentrate on the question of the status of claims under a foreign insolvency proceeding.[66] This status inquiry includes recognition of a foreign representative of an estate (more modern cases)[67] and whether the claims of a foreign assignee in a bankruptcy commission can be recognized.

The earliest federal case was *Harrison v. Sterry*.[68] This case involved a British partnership which also did business under a firm name in South Carolina.[69] The contesting parties were the United States; attaching American and British creditors; an assignee for the benefit of creditors, assignees in bankruptcy under a British commission; and an American commission.[70] The issue was the equitable division of property.[71] The Court merely set a scheme for distribution. In so doing, Chief Justice Marshall stated:

> As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two thirds of the fund are liable to the attaching creditors, according to the legal preference obtained by their attachments [thus subordinating the claims of the British bankruptcy assignees].[72]

But having adopted this clear territorialist view, the Court went on to state that any surplus left after the United States and the attaching creditors were paid "ought to be divided equally among all the creditors, so as to place them on an equal footing with each other."[73] In doing so, the British and American bankruptcy distributions should be taken into consideration.[74] While not a pure universality approach, the notion of equality of creditors is part of the rationale for universality

Perhaps a clearer case of subordination of foreign creditors, versus refusal to

---

64. This brief section is largely based on Charles D. Booth, *A History of the Transnational Aspects of United States Bankruptcy Law Prior to the Bankruptcy Reform Act of 1978*, B. U. INT'L L. J. 1 (1991).

65. The Bankruptcy Reform Act of 1978 is codified in sections of 11 U.S.C.

66. See text and cases in Part IV B below.

67 This issue is directly addressed as to ancillary proceedings in § 304 of the Bankruptcy Reform Act of 1978. See below.

68. Harrison v. Sterry, 9 U.S. 289 (1809).

69. *Id.* at 291-92.

70. *Id.*

71. *Id.* at 290.

72. *Harrison*, 9 U.S. at 302.

73. *Id.*

74. *Id.*

recognize, is *In re Accounting of Waite*.[75] In *Waite*, the court recognized the claim of a British trustee to property located in New York where no prejudice would be done to local creditors by the transfer of the assets to England for administration.[76] Judge Lowell recognized the developments as not involving conflict of laws analysis:

> We have no law of the *situs* giving preference to our creditors, but simply refuse to interfere and aid the foreign trustee against the legal diligence of our creditors who may have the good fortune to be able to attach or take in execution the effects here before the trustee has removed them.[77]

Thus, the notion of comity raised its head. It was not a choice of law problem—which law should be applied—but a simple policy, which I have referred to as subordination of the claims of the foreign trustee or estate representative, to the claims of local U.S. creditors to assets located in the United States (a version of territoriality).

A big step in the direction of the universality principle, which argues there should be a single proceeding with equal treatment of the same class of creditors, was taken in *Canada Southern Railway Co. v. Gebhard*.[78] In *Gebhard*, secured bondholders of a Canadian railway company were subject to a Canadian scheme of arrangement whereby the old bonds were to be exchanged for new bonds with a longer maturity and lower interest rate.[79] The scheme was approved by three-quarters of the bondholders and the Canadian Parliament.[80] Two dissenting New York bondholders brought suit on their old bonds in the federal circuit court, which held that the bondholders could recover on the old bonds.[81] The Supreme Court reversed.[82] It reached several issues, but for our purposes it should be quoted for its extensive endorsement of the essence of universality·

> Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.[83]

---

75. *In re* Accounting of Waite, 99 N.Y 433 (1885). The reader is reminded that during the Nineteenth Century we had federal bankruptcy system for only about 17 years. Richard E. Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge*, 62 Alb. L. Rev. 467, 471-477 (1998). During this period, most bankruptcies were state based where inter-state bankruptcy issues were considered international, except where the federal Full Faith and Credit Clause applied. Cf. John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 Harv. L. Rev. 259 260 (1888)).

76. *In re* Accounting of Waite, 99 N.Y 433,499-50 (1885).

77 Lowell, *supra* note 75, at 261.

78. Canada S. Ry. Co. v. Gebhard, 109 U.S. 527 (1883).

79. *Id.* at 528-29.

80. *Id.* at 530.

81. *Id.* at 531.

82. *Id.* at 540.

83. *Id.* at 539.

Implicitly this statement approved the application of Canadian law. Thus, like many such cases involving the tension between territoriality and universality, the choice of law is made by selecting a jurisdiction through the favorable application of international comity Of course, international comity towards the law of a similar common law nation is the easiest case. I will present that the similarity of legal regimes has become a factor under Bankruptcy Code section 304.

The next case in this selective history is *Hilton v. Guyot,*[84] which has already been mentioned in connection with its classic statement of comity.[85] In *Hilton,* the Court faced the question of the enforceability of a French judgment, by a French liquidator, against two U.S. citizens on debts they owed to the liquidating firm.[86] In addition to the statement of comity quoted above, the Court regressed to the doctrine of territoriality when it said:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory by judicial decree, shall by allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."[87]

Using their understanding of the comity of nations, the Court adopted a rule of reciprocity, where the French judgment would not be enforceable in the United States because a U.S. judgment would not be enforceable in France.[88]

Skipping ahead to just before the Bankruptcy Reform Act of 1978[89] the period described above and the intervening period were well characterized by Booth when he wrote that "courts throughout the United States responded inconsistently over the years to issues involving the recognition of foreign insolvency proceedings and the claims of foreign representatives."[90] I would add that they paid little attention to developing any coherent choice of law framework for the solution in foreign insolvency matters. In the 1970s, there were a number of big international cases which presaged many of the looming globalized insolvencies, which we have and yet may see.

I will briefly mention two of these cases, only to illustrate the inadequacy of the then existing Bankruptcy Act. The first of these cases was the insolvency of

---

84. Hilton v. Guyot, 159 U.S. 113 (1895).

85. *See supra* notes 55-59, and accompanying text.

86. *Hilton*, 159 U.S. at 114-21.

87. *Id.* at 163.

88. Most states do not require reciprocity concerning foreign judgments, and some authorities think that federal courts must follow state law on this issue where the basis of jurisdiction is diversity including alienage. *See* Eugene F Scoles, et. al, *Conflict of Laws* at 1187ff (3d Ed. 2000). The Restatement of Conflicts also does not require reciprocity. RESTATEMENT (SECOND) CONFLICT OF LAWS § 98 and cmt. e. Many states accord foreign money judgments the essence of full faith and credit via the Uniform Foreign Money-Judgments Recognition Act. *Id.* at cmt. e, and 13 Uniform Laws Anno. Pt. II p. 43 ff.

89. The Bankruptcy Reform Act of 1978 is codified in sections of 11 U.S.C.

90. Booth, *supra* note 64, at 27.

Bankhaus I.D. Herstatt K.G. a. A. ("Herstatt").[91] Its story is fascinatingly told in an American Bar Association article by Joseph D. Becker.[92] It is a tale of weaknesses and doubts that fortunately led to a settlement (as confusion often does) and avoided difficult decisions. Herstatt was a large West German private bank.[93] It had incurred large currency exchange losses as a result of the inflation generated by the 1973 oil embargo.[94] On June 26, 1974, the West German authorities ordered the closing and liquidation of the bank.[95] Herstatt did not conduct any banking business in the United States, but held accounts for clearing purposes in Chase Manhattan Bank, N.A.[96] Chase froze the Herstatt account which had about $150 million, even though Chase's claims were only about $5 million.[97] Attachments against the Herstatt account with Chase began, and by mid-August, aggregated about $200 million from American and foreign banks.[98] Chase filed a federal interpleader action interpleading the Herstatt account.[99] Citibank, a nonattaching creditor, then filed, on August 6, an involuntary bankruptcy petition designed to wipe out the attachments as preferences.[100] Numerous legal issues were then raised, including whether a foreign bank, which did not do banking business in the United States, was excluded from coverage as an eligible debtor by the Bankruptcy Act.[101] In such a case, the attachments could not be voidable preferences on the assumption that U.S. preference law would apply, or whether it was an eligible debtor, in which case the attachments were likely voidable.[102] On November 4, 1974, a bankruptcy judge heard this issue and others.[103] As Booth puts it, "[g]iven the novelty and complexity of this issue, the inadequacy of the legal rules, as well as the almost certain likelihood of appeal, the parties attempted to settle the matter instead."[104] Settlement was shortly accomplished and the bankruptcy case was dismissed.[105]

During the same period, an English bank called the Israel-British Bank (London) Ltd. ("IBB"), had substantially identical problems.[106] On August 2, 1974, it voluntarily commenced winding-up proceedings according to English law.[107] It had bank accounts in U.S. banks, and attachments were levied against these

91. *See* Joesph D. Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A. J. 1290 (1976).
92. *Id.*
93. *Id.* at 1291.
94. *Id.*
95. *Id.*
96. *Id.*.
97. *Id.*
98. *Id.* at 1292.
99. *Id.*
100. *Id.* at 1292-93.
101. *Id.*.
102. *See id.* at 1291-93.
103. *Id.* at 1293
104. Booth, *supra* note 64, at 29.
105. Becker, *supra* note 91, at 1293-94.
106. *Id.*
107 Israel-British Bank (London), Ltd. v. Fed. Deposit Ins. Corp., 536 F.2d 509, 511 (2d Cir. 1976); *see also* Becker, *supra* note 91, at 1293.

accounts.[108] Attempting to avoid these attachments, IBB voluntarily filed a bankruptcy petition on September 23, 1974.[109] Addressing the issue as to whether a foreign bank not doing banking business in the United States was an eligible debtor under the Bankruptcy Act,[110] the bankruptcy court refused to dismiss, and was reversed by the district court; the district court was in turn reversed by the Second Circuit.[111] While the Second Circuit decided the question about a foreign bank being an eligible debtor,[112] it did not need to use any choice of law analysis because the case simply concerned a federal bankruptcy issue.

This broad survey of the pre-1979 state of the law leaves one in agreement with Judge Lowell who wrote in 1888:

> [I]n the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.[113]

Judge Lowell's statement does not reflect the even greater complexity of business that exists today as compared to 1888, nor does it recognize the growing need for reasonable, predictable rules of jurisdiction, recognition of foreign proceedings, and choice of what law to apply to what issues. I will now briefly outline the structural setting of the Bankruptcy Reform Act of 1978 and some of its limited choice of law implications, by looking at a few illustrative cases.

IV THE BANKRUPTCY REFORM ACT OF 1978[114]

A. The Structure of Bankruptcy Code Section 304

The Bankruptcy Reform Act of 1978 ("BRA 1978") as amended, constitutes the present Bankruptcy Code.[115] In light of the history briefly mentioned above, and other factors raised in the legislative history, the BRA 1978 made an approach to what has come to be called "modified universality This concept means that while the law leans towards the concept of a single plenary proceeding where all creditors from all nations are treated somewhat equally (after all no system truly treats all creditors equally—secured creditors, unsecured priority creditors, and general unsecured creditors are not treated alike), the U.S. bankruptcy courts are cautioned by the law to be careful in the recognition of foreign proceedings and to

108. Becker, *supra* note 91, at 1293.
109. *Israel-British Bank*, 536 F.2d at 511.
110. *Id.* at 511-12.
111. *Id.*
112. *Id.* at 513.
113. Lowell, *supra* note 75, at 264.
114. The Bankruptcy Reform Act of 1978 is codified in sections of 11 U.S.C.
115. The present Code is codified in sections of 11 U.S.C.

give some protection to U.S. creditors.[116]

Under the BRA 1978, as Arnold M. Quittner has noted,[117] a foreign debtor has essentially four options for pursuing assets located in the United States.[118] First, it may voluntarily begin a chapter 7 or chapter 11 proceeding, provided it is an eligible debtor under Bankruptcy Code section 109(a), which usually requires that the debtor has a place of business or property in the U.S.[119] Second, if the foreign debtor is in a foreign insolvency proceeding outside the United States,[120] its foreign representative[121] may file an involuntary proceeding under Bankruptcy Code section 303(b)(4).[122] Third, the foreign representative may also file an ancillary proceeding subject to the conditions stated in Bankruptcy Code section 304.[123] Finally under general standards of international comity, the foreign representative or the foreign debtor may seek the assistance of U.S. state or federal courts to claim its property and transfer it to another country [124] Indeed, in the absence of creditors pursuing such property locally, the debtor could just see to the transfer, while a foreign representative would seem to need judicial assistance. Judicial assistance is likely to be expensive if the foreign debtor has property located in more than one U.S. jurisdiction.[125]

This section briefly outlines the variety of U.S. proceedings where foreign claims concerning an international debtor's estate can face a U.S. court. I am going to deal primarily with situations where there are either: (1) two plenary bankruptcy proceedings pending, one abroad and one in the U.S., or (2) a plenary bankruptcy proceeding pending abroad and an ancillary proceeding pending in the U.S. Analytically there is no choice of law difference, except to the extent that the Bankruptcy Code section 304 factors implicate choice of law considerations.

Bankruptcy Code section 304 applies to ancillary proceedings,[126] but its factors have been applied more generally where two plenary proceedings are

---

116. *Id.*

117 Arnold M. Quittner, *Introduction to and Overview of Cross-Border Insolvency Issues*, p.2 (2003) (unpublished article on file with the author and the editors).

118. *Id.*

119. *Id.*

120. A "foreign proceeding" is 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 estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization. 11 U.S.C. § 101(23) (2000).

121. A "foreign representative" is defined as a "duly selected trustee, administrator, or other representative of an estate in foreign proceeding. *Id.* at § 101(24).

122. 11 U.S.C. § 303(b)(4) (2000).

123. 11 U.S.C. § 304 (2000)

124. Quittner *supra* note 117, at 29 ff.

125. In addition to Quittner *id.*, *see also* Lynn P Harrison, III, *Ancillary Proceedings Under the United States Bankruptcy Code: A Primer in* 2 23rd Annual Current Developments in Bankruptcy and Reorganization p. 175, 185 (P.L.I. 2001). *Cf.* Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A., 44 F.3d 187 (3d Cir. 1994) (where Court of Appeals ordered the District Court to consider whether international comity called for deference to Mexican suspension proceedings).

126. 11 U.S.C. § 304(b) (2000).

pending. For my purposes, section 304 is interesting for its choice of law implications; it is about the only legislative guidance available showing where Congress has chosen to articulate factors involved in a choice of whether to grant relief. Thus, I will first outline the structure and factors of choice in section 304.

A "case ancillary to a foreign proceeding" is begun by a foreign representative filing a petition.[127] Subsection (b) specifically authorizes the bankruptcy court to enjoin "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 proceeding to create or enforce a lien against *the property of such estate.*"[128] The territorial nature of this assistance is clear, as it authorizes a stay against actions concerning "the property involved in such foreign proceeding[s]" "such property, or "the property of such estate."[129] The subsection goes on to authorize an order requiring the turnover "of the property of such estate, or the proceeds of such property" to the foreign representative.[130] Notice that the property is treated as property of an estate, but this estate cannot be an estate created by federal bankruptcy law because that estate under Bankruptcy Code section 541 (a) is only created by filing a petition under sections 301, 302, or 303, not 304.[131] Also note that in an ancillary case, there is no automatic stay· instead, it is only triggered by a petition under the same three sections.[132] The subsection finally authorizes the court to "order other appropriate relief."[133] This provision clearly provides far reaching authority which, when coupled with section 105(a),[134] allows the court to be most accommodating where the factors to be considered under section 304(c) warrant.

Code section 304(c) says that "[i]n determining whether to grant relief under subsection (b) the court shall be guided by what will best assure an economical and expeditious administration of such estate" consistent with six factors listed therein.[135] Notice again that the estate with which the court should concern itself must be the foreign estate, because no domestic estate exists in an ancillary proceeding.[136] The factors, not explicitly exclusive, in statutory order are:

(1) "just treatment of all holders of claims against or interests in such estate;"
(2) "protection of claims holders in the United States against prejudice and inconvenience;"
(3) "prevention of preferential or fraudulent dispositions of property·"

127. 11 U.S.C. § 304(a) (2000).
128. *Id.* at § 304(b)(1)(emphasis added).
129. *Id.* at § 304(b)(2).
130. *Id.* at § 362(a).
131. *Id.* at § 304(b)(3).
132. *Id.* at §362(a).
133. *Id.* at § 304(b)(3) and text at note 131.
134. "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the *provisions of this title* (emphasis added).
135. *Id.*
136. *Id.*

(4) "distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;"
(5) "comity" and
(6) "if appropriate, the provision of an opportunity for a fresh start for [an] individual."137

It is noteworthy that comity merely appears as the fifth of six factors, which are not arranged in any discernable order. It is as if comity was an afterthought, or is merely one of several equal considerations. Some courts have so treated it, but other courts have considered comity the paramount factor, with the other five factors designated to carry it out.[138] As I have demonstrated, comity is largely a matter of political sensitivity in international relations with no particular structure. Perhaps, in the future, it is sufficient if courts develop a federal common law of comity, with content similar to developed choice of law principles.

The other factors, seen as attempting to guide the choice of relief to be accorded, may be an advance. The problem is that it is unclear as to the goal of factorial inquiry We are told that the court is to seek the economical and expeditious administration of the foreign estate. This goal must be achieved consistent with comity and the other factors. Is the court to apply foreign law or domestic law? How do you balance "just treatment of *all* holders"[139] of claims or interests against the protection of U.S. claim holders against prejudice and inconvenience? And, what does it mean to require distribution of the foreign estate "substantially in accordance with the *order* prescribed by this title?"[140] As Professor Buxbaum has put it:

> Unfortunately, section 304 does not incorporate a principled choice-of-law approach. There are two distinct areas in which the absence of a conflicts method is apparent. First, Section 304 does not instruct courts to consider the interests, relative or absolute, of the United States and any foreign jurisdiction in the application of their respective laws to the bankruptcy proceeding. In other words, a local proceeding initiated by a small local creditor when the debtor and all other creditors are located in a single foreign jurisdiction is not distinguished from a local proceeding brought by a large group of U.S. creditors when the debtor has major local operations and other substantial contacts with the United States.[141]

Indeed, the 304 factors do not consider the foreign interests at all, except to the extent they are considered via the single word "comity

My purpose is not, however, to review the courts struggle to apply the factors. As is often the case with legislation, which does not fully address a problem, the courts are occasionally very creative in dealing with these often complex questions, but are also sometimes very parochial in a biased application of U.S. law. I will now turn to a few selected cases to illustrate the law in action.

---

137 11 U.S.C. § 304(c).
138. *See* Harrison, *supra* note 125, at 10-13.
139. 11 U.S.C. § 304(c)(1).
140. *Id.* at § 304(c)(4).
141. Buxbaum, *supra* note 2, at 32.

B. Selected Cases

An early case under BRA 1978 was *In re Toga Manufacturing Ltd.*[142] In a back handed manner, this case essentially decided that Canadian bankruptcy law would not be applied to a garnishment lien claimed in a fund then in the clerk's office of a Michigan state court.[143] There is no conflicts analysis, little discussion of Bankruptcy Code section 304 factors, and a rigid application of section 304(c)(4).[144] Here, an American creditor had contracts with the debtor as an exclusive sales representative for auto parts from three major automobile manufacturers.[145] Alleging withheld commissions, the creditor sought arbitration and eventually secured two arbitration awards.[146] Meanwhile, Toga's major secured creditor took control of its business and assets and appointed a receiver.[147] The arbitration awards were confirmed by order of a Michigan state court, and writs of garnishment were served on the three automobile manufacturers.[148] The secured creditor intervened in the garnishment proceedings, claiming that the funds, eventually ordered paid into the court, were subject to its prior perfected security interest in Toga's accounts receivable.[149] The state court found the secured party's security interest was superior to the garnishment liens, and directed the funds be paid to the Canadian receiver.[150] The American creditor appealed and was granted a stay [151] A few months later, an unsecured creditor filed an involuntary bankruptcy petition in Canada.[152] The Canadian receiver was appointed trustee in Canada, and brought an ancillary proceeding under section 304 in the Eastern District of Michigan, seeking a stay and the turnover of the garnished funds.[153]

Applying Canadian law, the court found the fund was property of the Canadian bankruptcy estate.[154] It then addressed the question of what effect should be given to claims based on Canadian law to property located in the United States.[155] The court simply starts on the wrong foot.

Citing *Harrison v. Sterry*[156] and *Odgen v. Saunders*,[157] the court opined that "[h]istorically, the bankruptcy laws of our country have been hostile toward claims asserted by foreign trustees in bankruptcy against alleged property located in the

142. *In* re Toga Mfg. Ltd., 28 B.R. 165 (Bankr. E.D. Mich. 1983).
143. *Id.* at 170-71.
144. *See id.*
145. *Id.* at 165-66.
146. *Id.* at 166.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 166-67.
152. *Id.* at 166.
153. *Id.* at 166-67.
154. *Id.* at 167
155. *Id.* at 166.
156. Harrison v. Sterry, 9 U.S. 289 (1809).
157 Odgen v. Saunders, 25 U.S. 213 (1827) (not dealing with an international insolvency but with an interstate matter).

United States."[158] Not cited, and hence ignored, was *Gebhard*,[159] which bound domestic bondholders to a Canadian proceeding on the clear universalist attitude of more recent law.[160] Of course, the court was not without support in other uncited cases. But, the court seemed to ignore the universalist factors in section 304. When it turned to section 304 it listed the subsection (c) factors and discussed some of them.[161] Although holding that the American creditor "would receive just treatment of its claim against Toga in the Canadian courts,"[162] it did not discuss the balance for which this factor calls. Section 304(c) does not merely call for just treatment of the American creditor,[163] but for the "just treatment of all holders of claims against such estate."[164] This treatment is the universalist notion of a single proceeding with equality of treatment of all creditors. The court's mistake appears when it concludes that the American creditor will not receive distribution "substantially in accordance with the order prescribed by this title."[165] It reaches this conclusion because the American creditor, held by the Michigan state trial court to be a subordinated secured creditor, would be considered unsecured under Canadian law [166] Thus, the court construes section 304(c)(4) as requiring treatment for an American creditor by the foreign law very similar to that accorded by U.S. law.[167] I submit that is not what this subsection requires.

In the first place, if section 304(c)(4) requires substantially identical treatment of individual creditors under both laws, there is never a role for conflict of laws. This approach is the forum law approach, where the forum always applies its own law. Secondly, the language of the rule requires the distribution of estate proceeds be in accord "with the *order* prescribed by"[168] title 11—not that each creditor be treated in the same class that it would be under U.S. law. Whether a creditor is secured or not depends upon the applicable law; applicable law is a choice of law issue. For example, while in the United States most states follow the Uniform Commercial Code on the attachment and perfection of consensual security interests and its choice of law rules,[169] the broader rule of the Restatement of Conflicts provides that for chattels, the law of the state with the most significant relationship applies, and that is generally, in the absence of an effective choice, the law of the "location of the chattel at the time that the security interest attached."[170] The "order" of distribution is a matter of bankruptcy law. I think, *Toga* reflects

158. Toga, 28 B.R. at 167.

159. Canada S. Ry. Co. v. Gebhard, 109 U.S. 527 (1883).

160. *Id.*

161. *Toga*, 28 B.R. at 166.

162. *Id.*

163. It does call for the American court to protect against "prejudice and inconvenience. 11 U.S.C. § 304(c) (2000).

164. *Id.*

165. *Toga*, 28 B.R. at 169.

166. *Id.* at 168-69.

167. *Id.*

168. 11 U.S.C. § 304(c)(4) (2000).

169. *See id.* § 9-301(1) (1998) (which generally adopts the law of the debtor's location to issues of perfection and priority).

170. RESTATEMENT (SECOND) OF CONFLICTS § 251 (1971).

inattention to the issue actually presented, whether turning the money over to the Canadian trustee would lead to the economical and expeditious administration consistent with a distribution of proceeds, not substantially dissimilar to the order provided in the U.S. Bankruptcy Code.[171] It does not call for every creditor to fall within the distribution order that U.S. law provides.

Another case with a territorial bias is *Interpool Ltd. v. Certain Freights of the M/V Venture Star*.[172] This case has more of a choice of law aspect. KKL Kangaroo Lines (KKL) was an Australian shipping company.[173] Wah Kwong owned ship leasing companies in Hong Kong, which leased ships to KKL.[174] Involuntary liquidation proceedings were initiated by Wah Kwong in Australia.[175] At the time, KKL had property in the United States, including certain freight monies and the proceeds of a pending arbitration between KKL and Weyerhauser Company.[176] A Liquidator was appointed by the Australian courts.[177] In pre-liquidation transactions, KKL assumed the business of another company and agreed to pay its creditors.[178] The other company transferred the arbitration claim to KKL, and KKL received a $6 million loan from a Wah Kwong subsidiary secured by an assignment of the arbitration rights.[179] The relationship of the parties was complex and the repayment terms unclear.[180] The KKL's business deteriorated and it subsequently ceased doing business.[181] Wah Kwong went into receivership.[182] Two agreements were entered into between various parties, including the KKL Liquidator and certain Wah Kwong subsidiaries.[183] The agreements essentially provided that the proceeds of the arbitration would be paid to the Liquidator, who would then pay a Wah Kwong subsidiary the first $6 million, while the rest would be held for the Australian bankruptcy.[184] These agreements were approved by the Australian court apparently without notice to the U.S. creditors.[185]

The Liquidator petitioned for ancillary proceedings under section 304 in the District of New Jersey Bankruptcy Court.[186] Then, various petitioning creditors filed an involuntary chapter 7 petition in the Central District of California.[187] The District Court for New Jersey entered an order which stayed all actions against the

171. The order provided in the Bankruptcy Code is: secured creditors, priority creditors, unsecured creditors, and equity owners.

172. Interpool Ltd. v. Certain Freights of M/V Venture Star, 102 B.R. 373, 374 (D.N.J. 1988).

173. *Id.* at 374.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 375.

179. *Id.*

180. *Id.*

181. *Id.* at 376.

182. *Id.*

183. *Id.*

184. *Id.* at 375.

185. *Id.* at 376.

186. *Id.* at 375.

187. *Interpool Ltd.*, 102 B. R. at 375.

debtor, withdrew to the District Court the reference of the 304 petition, consolidated all actions in that court, and appointed a receiver to collect the outstanding freights and pay them to the Court Registry.[188] Shortly thereafter, the bankruptcy court in California transferred the chapter proceeding to the New Jersey district court.[189] The reported decision involved the Liquidator's motion to dismiss the chapter 7 proceeding.[190]

The court says that "[t]here is no requirement that Australian law and United States law be identical."[191] As I will show, it is hard not to agree with Charles Booth. In discussing *Interpool* on this point Booth says, "[t]his assertion to the contrary, the *Interpool* opinion, in effect, sets forth the requirement that for section 304 relief to be granted, the foreign law *must* be identical to the U.S. law."[192]

The court starts out reviewing Australian liquidation law and concludes that "access to Australian courts relating to actions of the Liquidator is not restricted."[193] But, the court noted that briefs, affidavits, and testimony indicated that creditors could not seek to set aside the Liquidator's agreements concerning the arbitration proceeds.[194] The court then said that "[p]rotection of United States creditors is of utmost importance to this Court. Actions taken by a foreign court in a foreign bankruptcy are to be given deference *if, and only if,* there would be no substantial violation of the law that would be applied in the United States."[195]

Looking at section 304, the court ordered the petition granted: "this Court must be convinced that the foreign Court has or will abide by fundamental standards of procedural fairness."[196] Then, referring to the Federal Rules of Bankruptcy Procedure, the court noted that they required notice to creditors "prior to the institutionalization of agreements between the trustee and any of the creditors, and that the "trustee and creditors hold a series of meetings."[197] The court finally concluded:

> Since, in this case, the creditors were not notified prior to the date the Court ratified the agreement between the Liquidator and Wah Kwong, this Court finds that the procedural protections available to creditors in the United States were not given to the United States creditors in Australia. This is a serious omission.[198]

Of perhaps more importance, the court found that the doctrine of equitable

188. *Id.*

189. *Id.* at 375, fn. 3.

190. 11 U.S.C. § 305(a)(2)(B) (2000).

191. *Interpool Ltd.*, 102 B.R. at 378.

192. Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AMER. BANKR. L. J. 135, 204 (1992) (emphasis in original).

193. *Interpool Ltd.*, 102 B.R. at 378.

194. *Id.*

195. *Id.* (emphasis added).

subordination was not available in Australia and might be implicated in the Liquidator's agreement with Wah Kwong.[199] Therefore, the court concluded that "[b]oth the laws and the public policy of the United States will be violated if the case is permitted to proceed under Australian law Foreign trustees will be able to enter into any type of agreements as long as United States law, notions of due process, and equitable treatment of creditors are followed in a similar fashion in foreign jurisdictions."[200]

Consequently, the court denied the section 304 petition and granted the chapter 7 petition.[201] Again, there is a total failure to undertake anything but a territorial analysis. There is no serious conflict analysis, nor is the statutory injunction concerning economical and expeditious administration discussed. The court fails to note the inherent conflict left where U.S. law claims the worldwide assets of KKL are property of the U.S. bankruptcy estate in the chapter 7 proceeding. Indeed, the court mistakenly says that "[a]ll of the assets located in the United States, including, but not limited to the proceeds of the [arbitration] claims, shall be considered part of the bankrupt estate. "[202] Why the arbitration claims are considered located within the U.S. is not mentioned, nor are conflict of laws issues concerning the validity of the various foreign claims to the arbitration proceeds. Booth points out a number of Australian protections for creditors which, while different, would be weighed in any choice of law analysis considering the interests of the various states.[203] Finally, there is no recognition that there remains a choice of law question—whether Bankruptcy Code section 510 on equitable subordination is the proper law to apply to a transaction between a foreign liquidator, an alleged insider, a foreign debtor with property in the United States, which was entered into abroad. It seems that while the district court reached a decision, the rationale had little to do with principles capable of reaching a predictable, fair, and economical result in an international insolvency.

The next case I survey demonstrates a far better use of section 304 and includes a little choice of law analysis. In *In re Culmer* [204] Judge Lifland dealt with a petition under section 304 by Bahamian liquidators of a Bahamian bank ("BAOL").[205] BAOL's banking license was suspended in the Bahamas on July 16, 1982.[206] On August 16, a stockholder's resolution called for the winding-up of the firm, and a court-supervised liquidation was commenced in the Bahamas on that day [207] On September 8, the section 304 petition for ancillary relief was filed.[208] In addition, the bankruptcy court issued two temporary restraining orders on that day and on the 10th, which stayed actions against BAOL or its property in the United

199. *Id.*.
200. *Id.* at 380.
201. *Id.*
202. *Id.*
203. Charles D. Booth, *supra* note 192, at 206-07
204. *In* re Culmer, 25 B.R. 621 (Bankr. S.D. N.Y 1982).
205. *Id.* at 622.
206. *Id.* at 623.
207. *Id.*
208. *Id.*

States[209] This property was in various forms, but centered on accounts in various U.S. financial institutions.[210] The U.S. creditors were largely claiming under ex *parte* attachments or setoffs,[211] and some opposed granting the prayed for relief.[212] The relief requested was to stay the commencement or continuation of all actions against BAOL's property in the United States, and require the turnover of all property to the Bahamian proceedings.[213]

The court discussed the progress of the Bahamian proceedings and found them to be "inherently fair and regular."[214] The issues were largely discussed on the implicit assumption that the choice was to defer to the Bahamian proceedings and the assumed application of Bahamian law to all issues, or to dismiss the section 304 proceeding and let the American courts apply American law.[215] The court does not really address this issue, which detracts from an otherwise fine opinion.

The court seriously addressed the section 304(c) factors essentially treating them as aspects of international comity.[216] The court recognized the universalist direction of section 304 by stating: "[i]t is this Court's opinion based upon the wording and legislative history of section 304 that the central examination which it must undertake in order to comply with Section 304(c) is whether the relief petitioners seek will afford equality of distribution of the available assets."[217] In addressing comity, the court not only quoted the oft-quoted definition in *Hilton v. Guyot*,[218] but quoted New York cases, which state the exceptions to comity more narrowly: "foreign-based rights should be enforced unless the judicial enforcement of such a [right] would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[219]

Applying this strong notion of comity, the court examined Bahamian insolvency law and found it generally in accord with U.S. concepts, even though the Bahamian notion of priority claimants is not the same as that in the United States.[220] Thus, in some cases, American creditors would not be given the same distribution they would receive if U.S. laws were applied. The court did a factor by

---

209. *Id.*.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 627.

215. *Id.* at 627-29

216. *Id.* at 629 ("All of the factors listed in Section 304(c) have historically been considered within a court's determination whether to afford comity to proceeding in a foreign nation ").

217. *Id.* at 628.

218. *Hilton*, 159 U.S. at 164.

219. *Culmer* 25 B.R. at 629 (quoting from Int'l Hotels Corp. v. Golden, 203 N.E.2d 210, 212 (N.Y 1964) *as quoted in* Cornfeld v. Investors Overseas Serv., Ltd., 471 F.Supp. 1255 (S.D.N.Y 1979)). Interestingly, Golden was case dealing with a foreign gambling contract and the actual word used by the New York court where Culmer shows "[right]" was "contract" which was changed to "[right]" by the district court in Cornfeld. *Cornfeld*, 471 F Supp. at 1259. It is possible that international comity owes less respect to foreign law than to a foreign contract.

220. *Culmer*, 25 B.R. at 628-29.

factor analysis under section 304(c) and concluded "that affording comity would not violate American law or public policy Whether or not Bahamian law is identical in application to American law, there is nothing inherently vicious, wicked, immoral or shocking to the prevailing moral sense in the Bahamian laws outlined above."[221]

Finally and most important to the themes of this article, the court briefly addressed the reason that the Bahamian law should be applied to the instant transactions.[222] The court said:

> Moreover, the Bahamas has by far the greatest interest in BAOL's liquidation since neither the United States nor the State of New York has any governmental or public interest in BAOL's liquidation. In contrast, only a handful of creditors who have purported to obtain preferences in this district have opposed transferring all of BAOL's assets for distribution in the Bahamian liquidation. This court is thus not obliged to protect the positions of fast-moving American and foreign attachment creditors over the policy favoring uniform administration in a foreign court.[223]

This analysis is not a detailed choice of law analysis, but it is an improvement on the apparent dichotomy between deferring or dismissing. It adds measurably to the section 304(c) factors, which call for weighing some of the relevant factors, but ignores the weighing of the competing legal interests, which seek to choose the law of the nation with the greater interest. Admittedly, choice of law analysis has not reached anything approaching a litmus test; however, neither has most law. The choice of law analysis would also suggest using the distinction between jurisdiction, which section 304 primarily addresses, albeit with substantive concerns, and applicable law. For instance, nothing in the law of nations requires American courts to insist on leaving assets in the United States for administration in order to get to consider the American notion of equitable subordination.[224] Is the lack of such a doctrine inherently vicious, wicked, immoral, or shocking? More importantly might the Australian court in *Interpool* [225]consider applying the American doctrine in the case before it? This question is the type of choice of law done daily in domestic and other international areas of law Why not international insolvency? In fact, it is done in international insolvency cases by a properly focused court, albeit not always with the clearest approach. To focus more directly I now turn to a grand case.

In early 1996, before the Second Circuit's decision in *In re Maxwell Communication Corporation*,[226] but after the district court's affirmance[227] of the bankruptcy court's granting a motion to dismiss for failure to state a claim,[228] Jay

221. *Id.* at 631.
222. *Id.* at 629.
223. *Id.* at 629.
224. *See* Interpool Ltd. V Certain Freights of the M/V Venture Star, 102 B.R. 373 (D.N.J. 1988).
225. *Id.*
226. *In re* Maxwell Communication Corp., 93 F.3d 788 (2d Cir. 1996).
227. *In re* Maxwell Communication Corp., 186 B.R. 807 (S.D.N.Y 1995) (Judge Scheindlin).
228. *In re* Maxwell Communication Corporation, 170 B.R. 800 (Bankr. S.D.N.Y 1994) (Judge

Lawrence Westbrook wrote: "[t]he *Maxwell* case as a whole is one of the most important transnational insolvencies of modern times."[229] This judgment has not needed to change with the passage of seven years—at least in reported cases. The very interesting facts are well presented in the three opinions. I will only lightly sketch the facts important to my use of the case for choice of law purposes. In so doing, I follow the Second Circuit's factual presentation.

Robert Maxwell was a media magnate with his activities centered in England, but with international holdings.[230] His death led to the bankruptcy of the Maxwell Communication Corporation plc, an English corporation ("Maxwell").[231] While most of Maxwell's debt was incurred in England, eighty percent of its assets were located in the United States.[232] These assets included Macmillan, Inc. and other entities.[233] On December 16, 1991, Maxwell filed a chapter 11 petition.[234] The next day, it petitioned the High Court of Justice in London for an administration order, the closest equivalent in British law to Chapter 11 relief.[235] With two large multiparty proceedings pending in England and the United States,[236] the two courts did a remarkable thing—they cooperated in a sophisticated manner. Judge Brozman appointed an examiner:

> [The examiner was] to investigate the debtor's financial condition, to function as a mediator among the various parties, and to 'act to harmonize, for the benefit of all of [Maxwell's] creditors and stockholders and other parties in interest, [Maxwell's] United States chapter 11 case and [Maxwell's] United Kingdom administration case so as to maximize [the] prospects for rehabilitation and reorganization.'[237]

More remarkably, the two courts approved a protocol between the Examiner and the Administrators.[238] In light of the protocol, Judge Brozman recognized the Administrators as the corporate governance of the debtor-in-possession in the United States, and the English judge granted the Examiner leave to appear in the English proceedings.[239] The parties worked together to develop a plan for reorganization and a scheme of arrangement (hereinafter, collectively referred to as the "Plan") as interdependent documents which were filed for approval in both countries.[240] The Plan treats all of the world-wide assets as a pool under the control

---

Brozman)

229. Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV 2531, 2534 (1996); *In* re Maxwell Communications Corp.,93 F.3d 1036, 1041 (2d Cir. 1996).

230. *In re* Maxwell Communications Corp., 93 F.3d 1036, 1041 (2d Cir. 1996).

231. *Id.* at 1040.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 1041-42.

237. *Id.* at 1042.

238. *Id.*

239. *Id.*

240. *Id.*

of Maxwell for distribution.[241] It basically pays the secured creditors and holders of priority claims in full.[242]

Three banks, subjects of the instant preference actions, filed claims with the Administrators.[243] One of these banks had sought an anti-litigation injunction in England.[244] After receiving an *ex parte* order, the injunction was vacated by the English court.[245] In the U.S. case, the Administrators then commenced adversary proceedings against the three banks for the recovery of allegedly preferential transfers.[246]

As might be expected in large international transactions, the transfers were complex. The three banks were: Barclays Bank plc, and National Westminster Bank plc, both headquartered in London with branches in New York, and Societe Generale, a French bank with headquarters in Paris and offices in London and New York.[247] Barclays and National Westminster had separately negotiated overdraft facilities in London.[248] When an extension on the overdraft became past due, Barclays pressured Maxwell into making a $30 million payment from proceeds of the sale of a Macmillan subsidiary.[249] These proceeds, on deposit in a Maxwell account at the New York branch of National Westminster, were transferred to Maxwell's dollar account with National Westminster in London, and from there, to Barclays New York branch, and then credited to Maxwell's overdraft account in London.[250] Other similar transfers were also alleged.[251]

In National Westminster's case, Maxwell had sold another Macmillan subsidiary for $145 million.[252] These dollars had been deposited with Citibank in New York, from which they were transferred to a Maxwell account with Citibank in London.[253] Maxwell then purchased British pounds and used some of these to deposit in an account it had at National Westminster's London branch.[254] The deposit was then used to pay down the overdraft facility [255] Another similar set of transfers were made to National Westminster.[256]

Societe Generale had negotiated a loan in London with Maxwell.[257] Maxwell made a payment of $10 million in pounds by transferring the pounds from another

241. *Id.*
242. *See* E. Bruce Leonard, *Breakthroughs in Court-to-court Communications in Cross-border Cases*, A.B.I. J. vol. 20 no. 7, 18 (Sept. 2001)(for more on the use of cooperation).
243. *In re* Maxwell Communications Corp., 93 F.3d 1036, 1043 (2d Cir. 1996).
244. *Id.* at 1042-43.
245. *Id.*
246. *Id.* at 1043.
247. *Id.* at 1040.
248. *Id.*.
249. *Id.*
250. *Id.* at 1040-41.
251. *Id.*
252. *Id.* at 1041.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*

account maintained in London to Societe's branch in London.[258] Although the details of this transaction were unclear, the district court assumed these funds had also come from the sale of one of the Macmillan subsidiaries.[259]

All of the actual transfers to the banks had been made within ninety days preceding the chapter 11 filing.[260] Despite the close cooperation and judicial approval of the plan and scheme, neither court addressed the question of what law would be applied in any avoidance actions. While there are many similarities between U.S. and English preference rules, there was one large difference that apparently would decide the instant actions.[261] Under the English Insolvency Act of 1986,[262] preference avoidance requires that the debtor intends the transfers to place the transferee in a better position.[263] Of course, this subjective element is absent from present U.S. preference law. A classic choice of law issue was presented and so treated by Judge Brozman of the bankruptcy court through the circuit court. They are to be commended.

What did they decide? They decided the English preference law was the applicable law after seriously engaging in a proper choice of law analysis.[264] This case was not an ancillary proceeding case, so the section 304 factors were not directly applicable.[265] Instead, the Second Circuit started with international comity, citing the usual cases, but adding from *Hilton*:

> [I]nternational law, including questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation, is part of our law.[266]

The court noted that comity does not limit sovereignty, but aids construction of the law.[267] Essentially, in the absence of a clear congressional command, conflict of laws rules guide the determination of what law to apply [268] As always, the conflict of laws of the forum is determinative.

The court considered section 403 of the Restatement of Foreign Relations discussed above. While these are textual rules limiting the state's jurisdiction to prescribe, the Court said that the "factors enumerated in the *Restatement* correspond to familiar choice-of-law principles,"[269] and specifically referred by parenthetical quotation from another Second Circuit case that the "rule is to apply

258. *Id.*
259. *Id.*
260. *See id.* at 1040-41.
261. *See id.* at 1051.
262. *Id.* at 1043.
263. *Id.*
264. *Id. at* 1041-47
265. *Id.*
266. *Id.* at 1047, *quoted* in Hilton v. Guyot, 159 U.S. 113 (1895).
267. *Id.* at 1046-47
268. *Id.* at 1047
269. *Id.* at 1048.

the law of the jurisdiction having the greatest interest in the litigation."[270] Thus, they rapidly developed comity into consideration of the Restatement of Foreign Relations and equated that in essence to the "greatest interest" rubric.[271]

The court then rejected a number of tenuous, but plausible, textual arguments for the proposition that Congress had expressed itself.[272] The court specifically rejected the notion, implicit in many lower court cases—that "the Bankruptcy Code always applies, comity notwithstanding, when a bankruptcy case has been properly commenced, and that choice-of-law analysis is never appropriate in a bankruptcy case."[273] The court rejected this notion because it could find no code-based language supporting that broad proposition and rejected the interpretation proffered by two older cases.[274]

It next considered the "false conflict" analysis suggested by the Supreme Court in its narrow decision applying American anti-trust law to activities in England, on the basis that the conduct prescribed by American anti-trust law was not illegal in England in *Hartford Fire Insurance*,[275] discussed above. It did so by closely analyzing the scope and purposes of avoidance rules.[276] Essentially, the court properly recognized that the purpose of preference rules is to try to more closely assure that the estate of an insolvent debtor is equitably distributed by avoiding certain transactions shortly before bankruptcy, and sharing the avoided transfers with creditors as a whole.[277] As such, "a conflict between two avoidance rules exists if it is impossible to distribute the debtor's assets in a manner consistent with both rules."[278] Thus, it avoided the snare of "false conflicts" that often confuses courts in ordinary cases, both where a conflict is not real, and where it is real (if you look closely at related rules like distribution to creditors).

Finally the court undertook a careful weighing of interests in traditional conflict of laws fashion.[279] It noted that the debtor, and most creditors, were British.[280] While the funds had a transient location briefly in the United States (if today monies in deposit accounts are located anywhere other than via an artificial legal rule[281]), and may have been proceeds of sales of U.S. assets, these factors did

---

270. *Id.* Second quotation is from *In re* Koreag, Controle et Revision S.A. v. Refco F/X Assocs., 961 F.2d 341, 350 (2d Cir. 1992).

271. *See* Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 Va. J. Int'l L. 571 (1999) (for more on the globalization of the greatest interest or most significant relation including contacts and policies at least in contract choice of law cases).

272. *In re* Maxwell Communications Corp., 93 F.3d 1036, 1048 (2d Cir. 1996).

273. *Id.* at 1049.

274. *See id.* at 1048-49.

275. *Id.* at 1049-50.

276. *Id.*

277. *Id.*

278. *Id.* at 1050.

279. *Id.* at 1051.

280. *Id.*

281. *Cf.* Rev. U.C.C. § 9-304 (local law of bank's jurisdiction governs perfection of security interest in a deposit account).

not particularly weigh in favor of applying U.S. avoidance law.[282] The court emphasized that not applying U.S. law was, in part, affected by the fact that these assets had been sold as going concerns with no discernable effects on local economies.[283] The court stated:

> The principal policies underlying the Code's avoidance provisions are equal distribution to creditors and preserving the value of the estate through the discouragement of aggressive pre-petition tactics causing dismemberment of the debtor. These policies are effectuated, although in a somewhat different way, by the provisions' [§ 547] British counterpart.[284]

The decisions (including those of the district and bankruptcy courts) are a refreshing approach to the choice of law dilemma; they recognized that the decision was properly analyzed based on choice of law principles, sought guidance in the policies of the Code, and sought to follow the paltry prior guidance of the Supreme Court. Jay Westbrook disagrees somewhat arguing for the application of the home country's avoidance rules. Westbrook admits that, in *Maxwell,* the home country was arguable and that a particularized application of choice of law analysis might have been the only way out.[285] I am not averse to a true universalist regime where the proper forum would be selected by some rule, and that state's law applied; however, I am more sympathetic to the notion that traditional choice of law principles seek to allocate interests and policies as they best fit a particularized case. Perhaps, the actual conflict is between principles of treating creditors alike, and treating an individual creditor justly, a substantive accommodation will be needed and found. I tend to believe, for now, that the common law choice of law approach will better inform our eventual collective judgment.

Not discussed by the Second Circuit is whether New York or federal choice of law rule should be applied. Maybe there was no salient difference, or maybe, as seems the case, federal rules were assumed to apply.[286] The bankruptcy court applied federal common law.[287] This issue was better considered by the Second Circuit in the next case.

In *Koreag, Controle Et Revision S.A. v. Refco F/XAssociates, Inc.*,[288] the court faced the question of how to decide whether property located in the United States is property of the foreign bankruptcy estate.[289] Koreag was the official liquidator of Mebco Bank S.A., a Swiss bank.[290] Refco was a New York commodity and currency corporation.[291] Prior to Mebco being placed into liquidation by Swiss authorities on April 27 1989, Mebco and Refco engaged in extensive currency

282. *See In re* Maxwell Communications Corp., 93 F.3d 1036, 1051 (2d Cir. 1996).
283. *Id.*
284. *Id.* at 1052.
285. Westbrook, *supra* note 229, at 2541.
286. *In re* Maxwell Communications Corp., 93 F.3d 1036 (2d Cir. 1996).
287. *Id.* at 1042-43
288. *See In re* Koreag, Controle et Revisone S.A., 961 F.2d 341 (2d Cir. 1992).
289. *Id.* at 344.
290. *Id.*
291. *Id.*

transactions.[292] Typically, and especially in the instant dispute, the parties used an account in the Swiss Bank-NY (the "Account") through which currency transactions cleared.[293] Both Mebco and Refco were buyers and sellers of various currencies.[294] In essence, the disputed fund (U.S. dollars) had been wire transferred into the Account on the afternoon of April 28th, the day after Mebco was placed into liquidation, Koreag appointed, and before Refco had notice of the Swiss proceedings.[295] Mebco was then expected to transfer to Refco bank accounts abroad foreign currencies of the same amount.[296] Also, without notice of the liquidation proceedings, Refco transferred foreign currencies to Mebco's European accounts for which Mebco was to transfer dollars of an equal amount to the Account.[297] "The net result of these aborted currency exchanges is that Refco transferred approximately $6.9 million into the Account, and approximately $4.1 million worth of foreign currency to overseas Mebco accounts, for which Mebco failed to make reciprocating transfers [the "Disputed Funds"]."[298] Upon learning of the liquidation proceedings, Refco obtained an *ex parte* attachment of the Account and moved for confirmation of the attachment.[299] Koreag then intervened, seeking comity to the Swiss proceedings and the dismissal of the attachment proceedings.[300] The district judge suggested that a section 304 petition was the better way to proceed, which Koreag promptly filed.[301] In its petition, it sought an injunction against further efforts by Refco to reach the Account and an order to turn the Account over to Koreag for administration in Switzerland.[302] The bankruptcy court granted Koreag summary judgment and the district court affirmed.[303] The Second Circuit vacated and remanded.[304]

On appeal, Refco argued that the Disputed Funds were not property of the foreign estate, and that even if they were, the lower courts had improperly applied the section 304(c) factors.[305]

Section 304(b)(2) authorizes the bankruptcy court in an ancillary proceeding to "order turnover of the property of *such estate, or the proceeds of such property,* to such foreign representative."[306] The court resolved this question principally on the ground that Collier's on Bankruptcy clearly read the statute to provide that "[f]or purposes of section 304, the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending, *with other*

292. *Id.*
293. *Id.* at 344-45.
294. *Id.*
295. *Id.* at 345.
296. *Id.* at 344-45.
297. *Id.*
298. *Id.* at 345.
299. *Id.* at 346.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* at 346-47 (2d Cir. 1992).
304. *Id.* at 347.
305. *Id.*
306. 11 U.S.C. § 304(b)(2) (2000)(emphasis added).

applicable law serving to define the estate s interest in particular property."[307] The court found this analogically supported by reference to domestic cases where the actual interest of the debtor is defined by state law, even though section 541(a) takes a broad approach to property of the estate[308] Thus, the court determined that a prerequisite to turnover under section 304(b)(2) is a determination by the U.S. bankruptcy court that the property sought to be turned over is property of the foreign debtor.[309]

Should Swiss or New York law apply? The court noted that there was some dispute in the cases as to what choice of law rules should apply—federal common law or state law.[310] Finding both applied an interest analysis, there was no need to resolve the issue.[311] Applying interest analysis, the court found that both New York and Switzerland were interested in the dispute.[312] Refco was located in New York, Refco performed in New York, the disputed funds were in New York,[313] and "New York as a world financial center has a special concern with transactions such as occurred here."[314] While Switzerland was interested in the administration of Mebco's estate, its interest did not especially implicate the property issue at stake.[315] Thus, New York law was to be applied in determining the competing claims to the Disputed Funds.[316]

Refco asserted two claims: one for a constructive trust over the Disputed Funds, and the other for the right to reclaim by a seller under former Uniform Commercial Code (herein "UCC") section 2-207(2).[317] The court found that a plausible case for constructive trust had been made under New York law and remanded with the "practical burden" on Koreag to show why a constructive trust should not be imposed.[318] Turning to the reclamation issue, the court rejected Koreag's claim that Refco had to comply with Bankruptcy Code section 546(c) because an ancillary proceeding under section 304 was not a full bankruptcy, section 546 authorized the trustee or debtor-in-possession to proceed, and the foreign representative was neither.[319] However, the court concluded the UCC did not prevent the foreign currencies transfer from being property of Mebco's estate and were therefore subject to turnover under section 304(b)(2).[320] The court

307. *Koreag*, 961 F.2d at 348 (quoting 2 Collier on Bankruptcy ¶ 304.01, at 304-3 (15th Ed. 1992)(emphasis added).

308. *Id.* at 348-49.

309. *Id.* at 349.

310. *Id.* at 350.

311. *Id.*

312. *Id.* at 351.

313. Actually, this is unclear. The Disputed Funds included by definition of the court both the dollars Refco transferred into the Account and the foreign currencies transferred into foreign bank accounts of Mebco.

314. *Koreag*, 961 F.2d at 351.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 352-55.

319. *Id.* at 356.

320. *Id.* at 356-57.

concluded:

> If Refco prevails on the constructive trust issue upon remand, none of the Disputed Funds will be subject to turnover. If Koreag prevails on that issue, only the portion of the Disputed Funds involved in the [foreign currencies transfer] will be subject to turnover. Under any view of the relative weight to be accorded the pertinent § 304(c) factors, turnover would be a permissible exercise of discretion as to those funds.[321]

In my judgment, *Koreag* is a good example of conflicts analysis in an international insolvency case. I cannot be as complimentary to the next decision, at least as to its analysis.

The Tenth Circuit recently decided *In re Grandote Country Club Company, Ltd.*[322] Like so many international insolvencies, the facts are relatively complex. A golf course located in Colorado was originally owned by a U.S. group known as "Grandote Colorado, who failed to pay certain Colorado taxes in 1990. [323] A member of the group sold the property to a person who then sold it subject to tax liens to Grandote Country Club, Ltd. ("Grandote Japan"-the debtor in Japanese bankruptcy proceedings) in February 1993.[324] In May 1994, Grandote Japan conveyed the property back to Grandote Colorado (the "Japan to Colorado transfer").[325] Another party purchased tax certificates, who then conveyed them to still another, who then brought a successful forcible entry and detainer action against the property [326] Grandote Japan declared bankruptcy in July 1994 and its trustee filed a section 304 ancillary petition and received recognition sufficient to bring the instant action, contending that the Japan to Colorado transfer was avoidable under Japanese law and seeking to avoid the Tax Deeds under Colorado's Uniform Fraudulent Transfer Act.[327] The district court granted summary judgment in favor of the defendants.[328]

The Tenth Circuit, in a confusing opinion on this issue, perhaps reached a correct result, by discussing section 304(c), and noting the goal of providing relief in an ancillary proceeding is to "assure an economical and expeditious administration."[329] It then turned to "two competing values principles of comity, which favor application of Japanese law, [and] the interests of the locality where the property is located, which favor application of United States/Colorado law."[330] The court noted that the bankruptcy court in the section 304 proceeding had found Japanese bankruptcy law consistent with the principle features of U.S.

---

321. *Id.* at 358-59.
322. *In re* Grandote Country Club Co., 252 F.3d 1146 (10th Cir. 2001).
323. *Id.* at 1148.
324. *Id.*
325. *Id.* at 1149.
326. *Id.*
327. *Id.*.
328. *Id.*
329. *Id.* at 1150.
330. *Id.*

law.[331] Citing *Koreag,* but hardly following it, the court drew on its statement that "local law [should] determine whether the debtor has a valid ownership interest in that property when the issue is properly posed by an adverse claimant."[332] It cites *Koreag*, and Colorado law, for the proposition that the law of the state with the greatest interest should be applied.[333] It then concludes that "Colorado has the greatest interest" because of the property's location, the tax proceedings, and the execution of most of the documents.[334] Nowhere does the court consider, or even mention, the Japanese interest in recovering the debtor's property for the benefit of creditors. It may be that seriously considering the Japanese interest would leave the decision with Colorado law. But, it is not possible to determine which state has the greatest interest without looking at the interests of both states and the competing policies. Moreover, while it mentions it does not consider the federal policy seeking to further the "economical and expeditious administration" of the debtor's estate.[335] The court, unlike the Second Circuit in *Koreag,* simply fails to engage the applicable law. It then concludes that the tax deeds were not avoidable under the Colorado Uniform Fraudulent Transfer Act.[336]

Another interesting decision is *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon.*[337] This majority opinion in *Simon* is arguably a little confused, but it reaches the right result and is not actually a choice of law case. The debtor Simon was a Hong Kong resident and businessman when he personally guaranteed a corporation's large debt, for which, he was the major shareholder.[338] The debt was guaranteed to the Hong Kong Shanghai Banking Corp., Ltd. ("HKSB") and was part of a Hong Kong transaction.[339] Hong Kong law was the law chosen in the guarantee.[340] Greatly in debt, Simon moved to the United States and eventually filed for personal chapter 7 [341] The HKSB guarantee was listed in the schedules, but HKSB did not file a proof of claim on that claim, but on a different one.[342] HKSB is an international bank incorporated in Hong Kong, with offices in New York and California.[343] The bankruptcy court granted Simon a discharge and issued an injunction in accord with the discharge injunction of Bankruptcy Code section 524(a)(2).[344] Two weeks later, HKSB filed a complaint seeking a declaratory judgment, that the discharge injunction did not reach its efforts to pursue Simon personally abroad on his guarantee, or to claim against non-estate

331. *Id.*
332. *Koreag*, 961 F.2d at 349 (as *quoted* in *Grandote Country Club*, 252 F.3d at 1151).
333. *Grandote Country Club*, 252 F.3d at 1151.
334. *Id.*
335. *Id.* at 1150-51.
336. *Id.* at 1151-52.
337. *In re* Simon, 153 F.3d 991 (9th Cir. 1998).
338. *Id.* at 994.
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*

property abroad on the guarantee.[345] The bankruptcy court held against HKSB, and was affirmed by the district court.[346]

The court had some difficulty in the first part of the opinion, to which there was a dissent by Judge Hall.[347] The court first determined whether Congress had acted clearly to overcome the presumption against extraterritoriality.[348] In an extended discussion, it concluded that via section 541 (a) Congress had in fact intended to assert the bankruptcy court's jurisdiction *in rem* over the property of the debtor wherever it is located.[349] The case law relied on is largely domestic, and not international.[350]

Judge Hall reasoned that section 541(a)'s generality did not in fact reach everywhere, and that the Supreme Court had adopted rules of construction to avoid possible clashes with international law.[351] More importantly, that was not the issue in *Simon.* The court did not need to reach property in Hong Kong. It needed to bind HKSB which had offices in California, had filed a proof of claim with the bankruptcy court and over whom the bankruptcy court had personal jurisdiction.[352] That is clearly enough to bind HKSB to the injunction. The majority finally turned to this issue and concluded similarly.[353] Before finishing, however, it considered international comity.[354]

The discussion on comity is quite good, even though this case is not a case of choice of law. American law in final form and without appeal had enjoined HKSB.[355] The issue was whether this injunction, with extraterritorial effects, violated the international comity between courts.[356] This case was not an attempt to enjoin a foreign court. Here the court cited, but did not discuss, the Restatement of Foreign Relations section 403(1),[357] and instead followed *Maxwell* for the proposition that this case did not deal with the question of deference to a foreign proceeding, but was rather a case where the United States was unquestionably the situs of a plenary bankruptcy proceeding, to which Hong Kong might need to defer.[358] The court stated:

> The Bankruptcy Code does not codify either of the theories proffered by the parties [territoriality or universalism]. Rather, the Code provides for a flexible approach to international insolvencies dependent upon the circumstances of the particular case. If any philosophy can be attributed to the structure of the Code it

345. *Id.*
346. *Id.* at 994-95.
347. *Id.* at 999.
348. *Id.* at 996
349. *Id.*
350. *See id.*
351. *Id.* at 999-1000.
352. *Id.* at 994.
353. *Id.* at 999.
354. *Id.* at 997-99.
355. *Id.* at 999.
356. *Id.* at 998.
357. *Id.*
358. *Id.* at 998-99.

> is that of deference to the country where the primary insolvency proceeding is located, including the United States if the plenary proceeding is located here.[359]

While this quote can be presented as the question of what law to apply to the question of discharge, U.S. law or foreign law (unlikely where the debtor is an individual domiciled in the U.S.), it is better seen as a reflection of the fact that the bankruptcy discharge actually operates as an injunction against a broad range of enforcement activities.[360] Thus, the discharge issue is predominantly one of personal jurisdiction. The harder question in *Simon* would have been the application of the discharge injunction to a non-resident of the United States, who had no property in the United States, and who did not file a proof of claim. In such a case, personal jurisdiction would be dubious and, in any event, extraterritorial enforceability is practically impossible.

In the next case, the Court of Appeals for the Second Circuit did not address the choice of law issue and seemingly took a step back toward the territoriality view of section 304 by emphasizing one of the subsections over the others, rather than balancing the factors.[361] The court also implicitly assumes, which may be correct in context, that forum law will govern many of the legal issues.[362]

In *The Bank of New York v. Treco*,[363] the court faced a typically complex case of an insolvent Bahamian bank.[364] The bank, Meridien International Bank Limited ("MIBL"), controlled a number of banks primarily located in Africa.[365] It had a relationship with the Bank of New York and JCPL Leasing Corp, a subsidiary of The Bank of New York Company, Inc. and affiliates ("BNY").[366] MIBL pledged its accounts with BNY in the June 1993 MIBL Pledge Agreement.[367] Later, MIBL arranged an overdraft relation with BNY in the ultimate amount of $15.15 million.[368] This overdraft account was secured by funds deposited with BNY by a MIBL subsidiary, Meridien BIAO Bank Tanzania ("Meridien Tanzania"), and pursuant to an agreement (the "Meridien Tanzania Agreement").[369] When MIBL defaulted on the overdraft obligation, BNY liquidated the Meridien Tanzania pledged account.[370] This liquidation occurred in March 1995.[371]

In April 1995, the Central Bank of Tanzania appointed a manager to operate Meridien Tanzania, who challenged the Meridien Tanzania Agreement and demanded the return of the $15.15 million.[372] On April 25, 1995, MIBL was placed

359. *Id.* at 998.
360. 11 U.S.C. § 524 (2000).
361. *See In re* Treco, 240 F.3d 148 (2d Cir. 2001).
362. *Id.*
363. *Id.* at 148.
364. *Id.* at 151-52.
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.* at 152.
371. *Id.* at 151-52.
372. *Id.*

into involuntary liquidation in the Bahamas and Liquidators were appointed.[373] In June 1995, BNY filed an action in the Southern District of New York against MIBL, Meridien Tanzania, and several other subsidiaries (the "District Court Action").[374] This action sought a declaratory judgment that BNY had the right to retain the Meridien Tanzania liquidated account, or in the alternative, an order allowing BNY to essentially setoff the $600,000 remaining in MIBL's BNY accounts.[375]

In September 1995, the Bahamian Liquidators filed an ancillary proceeding under section 304, seeking a stay of all actions against MIBL and the turnover of all of MIBL's U.S. assets.[376] The Bankruptcy Court issued a preliminary injunction in March 1996, and the District Court action proceeded against the remaining defendants.[377] That action was settled, BNY agreed to pay $4 million to Meridien Tanzania's assignee, and BNY was assigned all Meridien Tanzania's rights of subrogation against the MIBL accounts.[378]

In the meantime, the Liquidators' right to the turnover of the $600,000, BNY's claims against the $600,000 for its payment of the $4 million to Meridien Tanzania's assignee, and BNY's subrogation rights acquired from Meridien Tanzania, came to a head in the Liquidators' motion for partial summary judgment.[379] The bankruptcy court granted the Liquidators' motion on January 22, 1999 [380] On appeal, this decision was affirmed by the district court on September 10, 1999 [381]

The Courts' decisions were reversed by the Second Circuit.[382] Both Bahamian and U.S. law recognized the status of a secured creditor.[383] Under Bahamian law, however, numerous administrative claims have priority over the claims of secured creditors.[384] On the facts of the case, the supremacy of administrative claims over secured creditors was problematic for BNY Here, the Liquidators had recovered approximately $10 million and incurred administrative expenses of almost $8 million, leaving $1 75 million in the estate.[385] The administrative claims were routinely paid without notice to creditors.[386] Thus, there was a substantial likelihood that BNY would recover only a small portion of its $600,000 secured

373. *Id.*
374. *Id.*
375. *Id. at* 152.
376. *Id.*
377. *Id.*
378. *Id.* at 152-53.
379. *Id.* at 153.
380. *Id., see also In re* Treco, 229 B.R. 280 (Bankr. S.D. N.Y 1999) (Judge Garrity) (the bankruptcy court's opinion covers many issues not decided on appeal and is worthy of careful study).
381. *In re* Treco, 239 B.R. 36 (S.D.N.Y 1999).
382. *See In re* Treco, 240 F.3d 148 (2d Cir. 2001); *In re* Treco, 239 B.R. 36 (S.D.N.Y 1999).
383. *See In re* Treco, 240 F.3d at 152-53.
384. *Id.* at 155
385. *Id.* at 159.
386. *Id.*

claim, if ultimately recognized as secured, in the Bahamian proceeding.[387]

The court recognized that section 304 "was a step toward the universality approach."[388] It described the approach as "a primary insolvency proceeding instituted in the debtor's domiciliary country, [with] ancillary courts in other jurisdictions [deferring] to the foreign proceeding and in effect [collaborating] to facilitate *the centralized liquidation of the debtor s estate according to the rules of the debtor s home country.*"[389] But, the court also stated that "[s]ection 304 does not implement pure universality "[390] Rather, the court notes, the statute endorses the five factors of analysis in section 304(c) noted above.[391]

In dealing with the structure of section 304(c), the court noted that while "comity is the ultimate consideration in determining whether to provide relief," that "comity does not automatically override the other specified factors."[392] Thus, section 304(c) "calls for a case-specific exercise of discretion in light of all of the circumstances."[393] Unfortunately, this statement inherently means that no precedent provides clear guidance for the future, unless the facts are very similar. This statement also means that settlement, or the avoidance of litigation, is not aided by reasonably clear case law For the Second Circuit, the structure of section 304(c) requires a court to "determine whether comity should be extended to the foreign proceeding in light of the other factors."[394] This quote of course adds nothing to the language of the statute.

The court thus rejected the Liquidators' argument that the case called for a straightforward comity analysis (whatever that would be!). In doing so, the court in my mind amazingly said:

> [w]e think the proper question to ask is whether § 304(c)(4) [whether the foreign distribution priority is 'substantially in accordance with the order' prescribed by U.S. law], along with the other factors, requires the court to deny turnover in the circumstances of this particular case, despite its goal of assuring an economical and expeditious administration of foreign estates.'[395]

This statement seems hard to square with the basic structure and language of section 304(c). It seems to interpret this subsection to say that the goal in providing relief, or turnover, of the economical and expeditious administration of the estate, is limited by the five factors. Indeed, the case as a whole, with its fact specific analysis, seems to raise the order of distribution in the U.S. Bankruptcy Code to the status of a trump in ancillary cases.

The Court concedes that "the first three factors present no bar to affording

387. *Id.* at 159.
388. *Id.* at 154.
389. *Id.* at 153 (emphasis added).
390. *Id.* at 154.
391. *Id.* at 154-55, 158-60.
392. *Id.* at 156.
393. *Id.*
394. *Id.*
395. *Id.* at 157.

comity to the proceedings in the Bahamas."[396] Again, notice the use of the factors, not as a basis of analysis for the exercise of the discretion for which comity calls, but as limits on the deference adopted as the general rule in international insolvency cases. Thus, the Court, like the lower courts, was quite satisfied with the procedures, non-discrimination, and prevention of preferences available in the Bahamas.[397] While conceding that the priority rules need not be identical in both countries in order for deference to attach, that is nevertheless the sole basis here for refusing to defer. The court noted the high risk that the administrative costs would eat up the estate and leave nothing for even a secured creditor.[398]

The court assumed BNY's claims were secured for purposes of the section 304 analysis.[399] It now noted that that decision had not been made below and that the case needed to be remanded for that determination.[400] It also noted that because a right to a setoff resulted in a secured claim under U.S. bankruptcy law,[401] the lower court would also have to determine that issue apparently under U.S. law.[402] Since the Bankruptcy Code does not create any setoff rights,[403] but only recognizes those that exist under other law,[404] the court should have left open the question of whose law determined the right of any setoff. Moreover, it is not obvious that if a setoff right exists, its status as secured must be determined by U.S. law. After all, the status of a claim under the Bankruptcy Code is for the purposes of the Bankruptcy Code, and not necessarily for the purposes of the economical and expeditious administration of a foreign estate in an ancillary proceeding.[405] The court simply used section 304 as the exclusive statement of all factors to be considered in ancillary cases.[406] That was not the approach in *Maxwell*,[407] but then *Maxwell* was a plenary chapter 11, and not an ancillary proceeding governed by section 304.[408]

---

396. *Id.* at 158.

397. *Id.* at 158-61.

398. One reading of § 304(c)(4)'s reference to the order of distribution is that the class order must be substantially the same not that an individual creditor would receive the same or substantially similar distribution. Courts have not focused on this distinction but it seems necessarily implied. Otherwise, § 304(c)(4) collapses all foreign insolvency cases to cases where U.S. courts would defer only when the foreign distribution to the U.S. creditor is both procedurally fair by U.S. standards, *i.e.* like U.S. standards, and that creditor would receive substantially the same distribution. This is not much of a step towards universality or comity.

399. *See In re* Treco, 240 F.3d at 161.

400. *Id.*

401. 11 U.S.C. §506(a) (2000).

402. *See In re* Treco, 240 F.3d at 161.

403. *See* 11 U.S.C. § 553 (2000).

404. *Id.* at §553.

405. Cf. *id.* § 304(c).

406. *In re* Treco, 240 F.3d at 153-61.

407. *In re* Maxwell Communications Corp., 93 F.3d 1036 (2d Cir. 1996).

408. *Id.*

V CHOICE OF LAW OR JURISDICTION SELECTION PRINCIPLES?

The Model Law on Cross-Border Insolvency was adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on May 30, 1997 [409] The Model Act has been the basis of the proposed Title 15 of the United States Code in various bankruptcy bills.[410] It basically calls for greater cooperation in cross-border insolvencies, strengthens the express tools of the U.S. bankruptcy courts, and adopts a number of procedures to make the process more predictable.[411] It has little to do with choice of law issues. In this sense, I am critical, but not surprised. Conflicts scholars for some time have noted the paucity of legislation for domestic conflict of laws cases with little success.[412] Statutory choice of law rules are rare in the United States,[413] although they are becoming more frequent and more coherent in Europe.[414] As the global economy grows and becomes ever more constant in the lives of many businesses and their attorneys, the problems briefly mentioned in this article will become more regular, and the courts will be forced to seek more coherent and predictable rules. The construction of these rules will require the efforts of many.

Some versions of Universality call for the selection of a single forum for insolvency proceedings. Implicitly and explicitly, the law would be that of the forum, but this rule does not necessarily follow Applying a single state's law in a conflicts setting would make matters somewhat less complex; however, it would also merely force parties to do battle over the forum selection process. With so much Territorialism in the world, this solution would not solve much. The traditional conflicts of laws approach divides the work of issues into jurisdiction, effect of foreign judgments, and choice of laws.[415] In the insolvency setting, I believe that this scheme is in use, but only in the background because it is not clearly acknowledged. An insolvency proceeding conceptually has four aspects: (1) collection of the estate; (2) determination of claims against the estate; (3) some system of priority of distribution of the limited assets; and (4) procedures for handling these matters. The procedures have traditionally been those of the forum.[416] It would seem that there should be a single scheme for the distribution of the limited assets of an insolvent estate hence, the strength of the universalist appeal. The nature of the estate's interests in property, and the legitimacy and

409. *See* 36 Int'l Law Materials 1386 (1997) *(*for text of Model Act).

410. *See* 36 Int'l Law Materials 1386 (1997); Current version is Title VIII, H.R. 975, 108th Cong. (2003).

411. 36 Int'l Law Materials 1386 (1997).

412. Roger C. Cramton, David P Currie, Herman Hill Kay, and Larry Kramer, CONFLICT OF LAWS, 90 (5th Ed. 1993) and Robert A. Leflar, 44 Tenn. L. Rev. 951, 951 (1977).

413. Cf. Revised U.C.C. § 9-301(2) adopting the location of collateral for the perfection, effects of perfection, and priorities for certain transactions.

414. Reiman, *supra* note 271.

415. RESTATEMENT (SECOND) CONFLICT OF LAWS p. XI-XXVII.

416. *Id.* at § 122.

value of creditor claims seem to be matters on which substantive law varies throughout the world and, hence, calls for a choice of law analysis. As noted above, the basic choice of law guidelines for (1) and (2) exist in state and federal law Items (3) and (4) are at least somewhat covered by section 304.[417]

In this article I have tried to show that federal choice of law principles have had limited impact in cross-border insolvency cases. Too many courts have become embroiled in trying to work out the factorial elements of Bankruptcy Code § 304(c) in order to determine whether to grant the relief allowed in ancillary cases by § 304(b), and the insoluble question whether § 304(c)(1), (2), (3), (4), and (6) are independent of or examples of (5)(comity). In doing so the principle goal of "an economical and expeditious administration of such estate" in § 304(c) is diminished. As statutory law, of course, § 304 prevails where it is intended to do so. But it is too much to assume from the text that § 304 is intended to be complete and to exclude choice of law principles whose function is to decide what law determines what issues.

In conclusion, I only can hope that focusing on the absence of and utility of choice of law principles will inform future judicial and academic consideration of cross-border issues.

417 11 U.S.C. § 304(b)(3) (2000).