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Recent Developments of Insolvency Laws and Cross−Border Practices in the United States and Japan

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Introduction

This article introduces the regime of the Japanese insolvency laws, especially newly established the "Civil Rehabilitation Law" and the "Guideline for Multi−Creditor Out of Court Workouts," and then examines the cross−border bankruptcy cases in the United States and Japan.

I. The Japanese Insolvency Laws and Out−of–Court Workouts Procedure

A. Five Types of Japanese Insolvency Laws

There are five types of bankruptcy laws in Japan. The current straight bankruptcy system was established by the enactment of the Bankruptcy Law (*hasan ho*) in 1922, which was formulated with reference to German law. It is a liquidation procedure for individuals, business corporations, and decedents' estates. Corporate Arrangement (*kaisha seiri*) was introduced in 1938 in order for courts to formulate private workout of corporations. The Commercial Code was amended to set up this provision and it required all creditors approve the Corporate Arrangement plan. The extraordinary winding−up procedure (*tokubetu seisan*) was also introduced at the same time in the Commercial Code, which is a special liquidation procedure. The Corporate Reorganization Law (*kaisha kosei ho*) was enacted in 1952 providing for large corporations. A trustee is always appointed. The Civil Rehabilitation Law (*minji saisei ho*) is a new type insolvency procedure introduced in 1999 and has become effective since April 1, 2000. This is a debtor in possession type procedure under the supervision of a court. The purpose of the enactment of the new Civil Rehabilitation Law is to promote small and middle size corporations to rehabilitate in spite of the continuing depression in Japan. The former Composition Act (*wagi ho*), which dealt with rehabilitation of small corporations, criticized for many short falls, was ousted and replaced by the new law. These five proceedings are not necessarily harmonious with each other and an insolvent company can choose and file a specific petition among them.

B. The Civil Rehabilitation Law

Although the Civil Rehabilitation Law (the "Law") has passed its second anniversary on April 1, 2002, the proceeding under the Law has become popular among Japanese debtors. While only 212 cases were filed under the Composition Law from April 1, 1999 to March 31, 2000, 906 cases were filed under the Law during its first year. It is said that the number of filings under the Law has grown by about four times in all the Japanese district courts and by about six times in the Tokyo District Court.

The reason for this increase is that the Law eliminates the shortcomings of the repealed Composition Law. Contrary to the Composition Law, the Law creates a system for the preservation of the debtor's assets prior to the commencement of a rehabilitation proceeding, relaxes the requirements for commencing a proceeding, provides both a simple and rationalized method to investigate and determine claims and a procedure to formulate the rehabilitation plan, and establishes various methods to guarantee performance of the plan.

1. The Requirements to Commence a Proceeding

It is important that the debtor files a petition for commencement of the case and obtains the order for relief, which is an order to commence the case, before its economic situation has deteriorated beyond repair. The court may enter the order for relief upon a petition by the board of directors of the corporation if (1) a cause of bankruptcy exists or (2) the corporation shows an inability to pay debts as they become due without seriously impeding the continuation of its business. [2] The first standard for bankruptcy under the Law is exactly the same as that of the Composition Law: that a corporation is unable to pay debts as they become due or that the sum of the debtor's debts exceed the value of the debtor's assets. [3] The second requirement to commence a proceeding mirrors the requirement to commence a proceeding under the Corporate Reorganization Law. [4] The Law actually relaxes the requirements compared to those of the repealed Composition law.

The Law does not require a debtor to submit a rehabilitation plan at the same time it files a petition for the commencement of a proceeding. According to the so called "Standard Schedule for a Proceeding," which was drafted by the Tokyo District Court as a model schedule to facilitate a proceeding under the Law, a plan may be submitted up until three months after the filing of a petition.

2. Methods to Supervise the Proceeding and Enforce the Performance of the Plan

One of the main shortcomings of the Composition Law was the uncertainty of the performance of the plan and its weak supervisory system. Each of the following methods adopted by the Law is expected to encourage creditors to trust this new proceeding.

a. Who is in Charge of the Proceeding Under the Law?

i. The Debtor in Possession

Like the Composition Law, the debtor will remain a debtor in possession with the right to manage and dispose of assets. [5] In Japan, management would usually be the owner of the debtor if the debtor is a small or medium−sized corporation. A debtor−in−possession type procedure under the Law facilitates management, or the owner, to file earlier than under the previous laws.

ii. Supervisor

The court may appoint a supervisor prior to the commencement of the proceeding either on its own motion or upon a petition by an interested party. [6] The supervisor may be a juridical person, but is usually a qualified lawyer. [7] The supervisor has the authority to give his assent for a debtor's actions designated by the court, [8] to request the debtor's auditors, directors etc., to report on the company business and its assets, to inspect any documents and accounts [9] and to exercise rights of avoidance by the grant of the court. [10] If the supervisor is appointed, he keeps his position either for three years after the confirmation of the plan when the proceeding shall be closed, or until the debtor has performed its obligations. [11]

The Tokyo District Court has ruled that a supervisor will be appointed in every case that comes before it. One of the advantages to appointing a supervisor is that the court can appoint skilled bankruptcy lawyers to facilitate and supervise the proceedings. As a result, it is not unusual for a supervisor, to advise and even instruct the debtor on the nature of the proceeding in order to facilitate the procedure. Additionally, the presence of a skilled bankruptcy lawyer lends credibility to the process and facilitates creditors' trust of the system.

iii. Investigator

The court may also appoint an investigator. [12] Because of many similarities between a supervisor and an investigator, all of the district courts but one appoint a supervisor instead of an investigator. A supervisor is preferred over an investigator, because an investigator does not have authority to give his assent to some debtor's actions and to exercise rights of avoidance. However, when a creditor files a petition for the commencement of the case [13] and the debtor is opposed to this, it is useful to appoint an investigator to examine the documents and review whether the debtor meets the requirement to commence the case. [14]

iv. Other Players

The court also may appoint a trustee or an interim trustee and allow a creditors' committee. An appointment of a trustee and/or an interim trustee occurs only when either (1) the debtor (which may be only a corporation in this case), cannot be trusted to manage and dispose of its assets properly or (2) a special necessity for rehabilitating the debtor's business exists. [15] The Tokyo District Court did not appoint any trustees during the first year of the Law. The Law provides for the creation of a creditors' committee. However, the creation of a creditors' committee is not automatic, so concerned creditors may either receive the court's approval to participate in a proceeding on their own or receive permission to form a formal committee. [16]

b. Claw−Back Provisions (Rights of Avoidance)

The Law has incorporated "claw back" provisions (rights of avoidance) from both the Bankruptcy Law and the Corporate Rehabilitation Law into the Law. [17] A "claw back provision" allows transactions by a debtor to be avoided and the assets that were subject of the transaction to be returned to the debtor. The court may authorize a supervisor to exercise this power. [18] However, the court may not authorize a debtor in possession to exercise such "claw back" provisions.

c. Effect of a Registry of Creditors' Claims

The modified creditors' claims that are confirmed by the plan and entered into a registry have the same effect as a final judgment against the debtor. [19] Creditors may enforce their claims when a debtor refuses payment under the plan. [20]

d. Effect of the Temporary Restraining Order

A debtor who files a petition for the commencement of the case may withdraw such petition before the court issues the order for relief, which is similar to the order for relief found in the U.S. Bankruptcy Code. However, after obtaining the temporary restraining order, the debtor should receive a court's permission to withdraw its petition to commence a bankruptcy proceeding. [21] This provision is intended to prohibit debtors from unilaterally withdrawing petitions after they have taken advantage of the breathing space afforded them by the Law.

3. The Requirements to Confirm the Plan

In order for the plan to be confirmed, terms amending the rights of creditors must be designated in the plan, and the time period for establishing and postponing the obligations of the debtor must be within 10 years after the confirmation. [22] To adopt a draft of the plan, the Law requires (1) the approval of holders of more than half of the total unsecured claims and (2) a majority of the unsecured creditors at the confirmation meeting, which constitutes a quorum. [23] These requirements under the Law make it easier for the debtor to get the court's approval of the plan than it did under the Composition Law. The Law provides an option that the court may allow a vote in writing instead of holding a meeting, but, as of last year, no court in Japan has allowed this method. [24]

4. Some Methods to Preserve the Debtor's Assets Between Filing the Petition and Obtaining the Order for Relief by the Court

The usual gap period between filing of the petition and obtaining the order for relief is 15 days.

There are various kinds of the temporary restraining orders under the Law. Some orders protect the debtor from creditors' attempts to dissipate debtor's assets and some afford the debtor time to make an appropriate rehabilitation plan and to negotiate with creditors prior to the commencement of the case.

a. The Comprehensive Injunction

Since there is no automatic stay under the Law, the comprehensive injunction was conceived by legislators to prevent abuse of the bankruptcy system. The comprehensive injunction prohibits creditors from attempting to seize any of the

debtor's assets during the period from filing a petition for the commencement of the case until the entry by the court of the order for relief. [25] The comprehensive injunction functions similarly to the automatic stay in the U.S. Bankruptcy Code section 362 and relieves the debtor of the burden of having to seek individual injunctions in various courts within Japan. The comprehensive injunction does not, however, prevent a creditor from continuing with a lawsuit that was filed before the commencement of the case, nor does it prevent a creditor from commencing a post−petition legal action against the debtor.

b. Other Methods

There are various kinds of other temporary restraining orders: the prohibition order to prohibit the debtor to pay debts which become due; the prohibition order to prohibit the debtor from disposing of its assets; the prohibition order to prevent the debtor from making a loan during the proceeding; the suspension order to prevent official auction proceedings to implement security interest; the suspension and/or prohibition order to prevent creditors from enforcing their claims by various kinds of implemental proceedings pursuant to the Japanese Civil Procedure. [26]

5. Demand of the Extinguishment of Security Interests

While the Composition law contained no restrictions on the rights of secured creditors, in practice, the debtor negotiated with those creditors not to enforce their rights. This is also the case under the Law. However, secured creditors, such as banks and insurance companies, are reluctant to give this concession, given the existing economic recession in Japan. The debtor may demand that secured creditors extinguish their security interests by paying them an amount of money equal to the value of the secured assets, not an amount equal to the secured creditors' claim. [27] This is especially effective when the value of the asset declines. The court allows the extinguishment of security interests if the debtor's assets are indispensable to the continuation of the debtor's business.

6. Assignment of Business

The court may permit an assignment of the business only if it is necessary to the debtor's rehabilitation. [28] An assignment of the business usually requires a special consent of stockholders pursuant to the Commercial Code, but the Law permits a sale by management, pursuant to court approval but without stockholder consent, if the debtor is balance sheet insolvent. [29] The court may permit an assignment of business after the entry of the order for relief and prior to confirming a plan. Any such assignment of the debtor company requires prior notice to the creditors' committee, if one has been organized, and to any labor unions and/or employee representatives. [30] The main advantages of assigning the business are that (1) the debtor may receive a substantial amount of money, which will give creditors confidence in the debtor's ability to repay its debts, and (2) the debtor can protect the business and the employment of its workers.

The combination of the assignment of the business with the ability to extinguish security interests should contribute to merger and acquisition activity in the near future.

7. Summary Rehabilitation and Consensual Rehabilitation

Small or medium−sized corporations may elect a summary rehabilitation if creditors holding more than sixty percent of the total amount of claims agree to summary proceedings. [31] A summary rehabilitation is where the debtor may avoid the time−consuming process of examining and certifying creditors' claims, speed up the confirmation of the plan and expedite the plan's enforcement. However, creditors do not have all of the same rights under summary proceedings as they have under the full rehabilitation proceedings.

A consensual rehabilitation is the process to avoid the time−consuming process of full rehabilitation and to even avoid the meeting to vote on and confirm the plan. A consensual rehabilitation is quicker and simpler than a summary rehabilitation. If all creditors agree to the proceedings of a consensual rehabilitation, the plan is deemed to have been approved and is confirmed at the same time as when the Court confirms the commencement of a consensual rehabilitation. [32]

8. International Insolvencies

The Law has abolished the notion of strict territorialism in the Japanese insolvency laws. Foreigners and foreign corporations have the same status as Japanese and Japanese corporations under the Law. [33] In an international jurisdiction, the corporate debtor is able to file a petition for the commencement of the case if it has an office in Japan or if it has assets inside Japan. [34] After the commencement of the proceeding, the debtor may maintain its authority to manage and dispose of its assets, including assets located outside Japan. [35] The law also provides the "Hotch pot rule," which requires equal divisions among creditors. [36] Although creditors who are paid partly from debtor's assets overseas after the order for relief of the case may participate in the proceeding under the law, they may not receive a distribution from the proceeding until other creditors receive distributions that equal the same percentage of repayment that the creditors have received overseas.

The Law provides provisions for co−operation between the debtor and a foreign trustee, including a debtor in possession. [37] For example, the debtor may request and/or provide necessary co−operation and information to rehabilitate the debtor. [38] The debtor shall be presumed to have cause for commencement under the Law if it has commenced a foreign insolvency proceeding. [39] A foreign trustee may also file a petition for the commencement of the case under the Law after a showing of cause. [40] Cross−filing of proofs of claim may be allowed. A foreign trustee may represent non−filing creditors who are participating in the foreign proceeding, and may file proofs of claim in the proceeding in Japan, provided he has authority to do so and vice versa for Japanese debtors. [41]

B. Recent Workouts Guideline in Japan

1. Background Establishing the New Workouts Procedure

The representatives of financial institutions and other industries, associated with Financial Supervisory Agency, Minister of Finance, Minister of Economic and Industry, and Nippon Bank, prepared "Guideline to a Multi−Creditor Out−of−Court Workouts" ("guideline") on September 19, 2001. The purpose of the guideline is to restructure financially distressed companies through composition and/or extension of financial debts, based on agreements between creditors and debtors. Procedures under the Corporate Reorganization Law or the Civil Rehabilitation Law sometimes erode the enterprise values of companies and hinder its restructuring. The guideline limits its range to cases where a number of financial institutions are involved and out−of –court workout is considered economically reasonable for both the creditors and the debtor.

2. The Eligibility for a Debtor

The debtor under the guideline should be: (1) the company in operational difficulty mainly due to excessive debt, which is unable to restructure by itself, (2) the company which has the possibility for restructure with the support of creditors, (3) the company of which credibility and the enterprise value would be deteriorated under the procedure of the Corporate Reorganization Law or the Civil Rehabilitation Law, and (4) the company, the restructure of which under the guideline is considered more economically reasonable for creditors in recovering their credits than the restructure under the liquidation procedures or the reorganization procedures.

3. Proceedings

The debtor requests its major creditors, usually several banks, for a multi−creditor out−of–court workouts under the guideline. Major creditors examine and have the debtor explain its information and proposed reorganization plan, then consider both the feasibility of the plan and the possibility of unanimous approval, which is required at the creditors' meeting, by all the relevant creditors. The relevant creditors (the "creditors") are the creditors of the debtor, including major creditors, whose rights against the debtor are expected to change after the approval of the plan. If the major creditors decide it reasonable to issue a "Standstill Notice," the notice should be issued to all the creditors under the name of both major creditors and the debtor. During the standstill period, the debtor should not dispose of its assets, assume new liabilities, perform any act of extinguishing its debts such as the repayment of debts or setoff, and provide any credit enhancement such as collateral and guarantee. On the other hand, the creditors should maintain the outstanding credit exposure as of the issuance date during the period. The creditors should not improve its position

against the debtor with relation to the other creditors, receive the repayment, exercise the right of setoff, request the debtor to provide additional collateral or guarantee, exercise its security right, file a request for compulsory execution, provisional attachment, provisional injunction, or statutory bankruptcy and reorganization procedures.

The debtor and major creditors should convene the first meeting of creditors within two weeks from the issuance date. After the debtor explains its financial condition and the proposed reorganization plan, the creditors decide following matters at the meeting: (1) whether to retain professionals such as a certified public accountant, an attorney, or a real estate appraiser, (2) the duration of the standstill period, (3) whether to establish a creditors' committee, (4) date and place for the second meeting, and (4) other necessary matters. Unanimous consent should be made at the meeting.

With respect to the contents of reorganization plan, a debtor whose net worth is virtually negative (liabilities exceed its assets) is required to become balance sheet positive within approximately three years from the beginning date of the first fiscal year after approval of the plan under the guideline. For a debtor who has incurred net loss, the plan should indicate that such loss turns to profit within approximately three years from the beginning date of the first fiscal year after approval of the plan. If the plan includes the disclamation of the creditors' claims, in principle, the interests of the controlling shareholder of the debtor should be divested through a capital reduction and the management of the debtor should retire.

At the second meeting, the major creditors (or the creditors' committee if such is established) report the appropriateness and feasibility of the proposed plan, then creditors discuss the plan in detail and decide the deadline for expressing their approval. The plan becomes effective after all of the creditors submit their written consents until the deadline.

II. Cross−Border Cases and Issues Under the United States Bankruptcy Code

A. Ancillary Proceeding

Bankruptcy Code section 304 provides such ancillary insolvency proceedings in the United States:

(a) A case ancillary to a foreign proceeding is commenced by the filing with bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest dose not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of –

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with –

(1) just treatment of all holders of claim against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(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 the individual that such foreign proceeding concerns. [42]

1. Overview

a. Procedure

Section 304 case is ancillary to a foreign liquidation, composition, extension, reorganization or discharge proceeding. All of the commentary on section 304 has focused on the collapse of multinational business companies. This section allows a foreign representative [43] appointed in an insolvency proceeding in the debtor's domiciliary foreign country the power to seek various relief in the United States bankruptcy court. For a case to be commenced under section 304, there must first exist a foreign proceeding but reciprocity is not required.

b. Goal

It provides an alternative to the commencement of a plenary case under the Bankruptcy Code. A petition under this section does not commence a full and conventional bankruptcy case. The principal goal of a proceeding under this section is to permit foreign debtors "to prevent the piecemeal distribution of assets in the United States by means of legal proceedings initiated in domestic courts by local creditors." [44] Essentially, it serves as a jurisdictional aid for a foreign representative to facilitate the administration of a bankruptcy or similar proceeding pending abroad. It allows a foreign representative to marshal United States assets and eventually repatriate them, to obtain discovery and to otherwise protect and facilitate the administration of the foreign proceeding.

c. Function

It is a liberal provision, which encourages the United States Bankruptcy Courts to look closely at all the circumstances of each individual case before making a decision rather than having to fellow inflexible rules. But all relief under this section is discretionary and the Bankruptcy Court may consider prejudice and inconvenience to the United States creditors in deciding whether to grant such relief. Indeed this section "allows flexibility by authorizing the United States Court the freedom to fashion any 'other appropriate relief' on behalf of the foreign representative" [45]

d. Fact pattern

In the most common fact pattern, an insolvency proceeding is commenced in foreign Nation A. The insolvency representative then attempts to repatriate assets located in the United States. Other common interactions include a request for protection or discovery of assets, a stay of all litigation in the United States or individual creditor action, avoidance of transfers, suspension or dismissal of a pending legal proceeding, and recognition in the United States of a discharge granted by a court in Nation A. United States creditors would be required to claim in Nation A according to Nation A procedure under this situation. Distribution would be according to Nation A priorities. A bankruptcy court is given broad latitude in fashioning appropriate remedy in a section 304 proceeding. [46] Although a section 304 does not provide for the automatic stay of section 362, it is now common for the foreign representative instituting the ancillary proceeding to seek "first day orders," which include "generic preliminary injunction" to stay all actions in any court in the United States, whether state or federal, against the foreign debtor or its assets in the United States. [47]

2. Legislative History of Section 304 [48]

This section embraces "a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors." [49]

This theme of "modified universalism" with discretion firmly placed in the Bankruptcy Courts to fashion appropriate relief, is clearly evident from the legislative history's explanation of the policy underlying section 304; [section 304(c)] requires the court to consider several factors in determining what relief, if any, to grant. These guidelines are designed to give the court the maximum flexibility in handling ancillary cases. The original draft of section 304(c) did not contain any preference to comity, but it was modified to include comity immediately prior to enactment of the Bankruptcy Code section 304 (c). [50] Principles of international comity and respect for the judgment and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules. [51] The report also noted that the policy behind the new section was to provide for "an economical and expeditious administration of the estate," [52] and Congress repeated this language in the text of the statute.

3. Specification of Section 304 (c)

Section 304(c) specifies that the determination whether to grant relief under section 304(b) should "be guided by what will best assure an economical and expeditious administration" of the estate, consistent with six enumerated considerations ((1) just treatment of all holders of claims against or interests in such estate; (2) protection of claimholders in the United States against prejudice and inconvenience in the proceeding of claims in such foreign proceeding; (3) prevention of preferential or fraudulent disposition of property of such estate; (4) distribution of proceeds of such estate substantially in accordance with order prescribed by this title; (5) comity; and (6) the provision of an opportunity for a fresh start for the individual). [53] Bankruptcy courts have the needed discretion to address the tensions between foreign (universalism) and local creditors (territorialism) and legal interests inherent in every multinational bankruptcy case. The considerations set forth in section 304(c) reflect these tensions: "(1) just treatment of all holders of claims" and "(3) prevention of preferential or fraudulent dispositions" militate in favor of unitary administration in the foreign proceeding; they are in tension with "(2) protection of claim holders in the United States against prejudice and inconvenience." [54] Furthermore, "(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title" and " (6) the provision of an opportunity for a fresh start" reflect the United States' interest in applying legal rules similar to its own; they are in tension with "(5) comity," a doctrine that accommodates jurisdictional conflicts by encouraging deference to foreign laws and judgments. [55]

4. Comity

The leading case on "comity" is *Hilton v. Guyot*. [56] The court defined comity as fellows:

'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its law. [57]

Occasionally the foreign representative does not invoke either ancillary proceedings or a full chapter 7 or 11, but, rather, invokes 'comity' and asks a United States court to enjoin United States creditors from bringing any action on their claims, except in the foreign proceeding. *New Line International Releasing v. Ivex Films* is an example. [58] New line brought a diversity action in a United States court against a Spanish distributor, Ivex for breach of a film distribution agreement. Ivex was then a debtor in insolvency proceedings in Spain. Ivex moved for dismissal of the complaint based on the doctrine of international comity and sought an injunction staying New Line from suing Ivex in any court other than the Spanish court which had jurisdiction over the Ivex insolvency proceedings. The court, quoting from *Hilton v. Guyot*, stated:

The purpose of extending comity to foreign bankruptcy proceedings is to enable the assets of a debtor to be disbursed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities. The modern view rejects parochial protection of local creditors in the absence of a demonstration that their rights are unprotected in a foreign forum. [59]

The court held that dismissal under the doctrine of international comity was appropriate, but Ivex failed to establish the irreparable harm required for the requested injunction. [60]

5. Case law (Universal Approach)

In *Cunard Steamship Co. v. Salen Reefer Services,* [61] the court emphasized the positive aspects of recognizing foreign proceedings, noting that "[t]he granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." [62]

In *In re Koreag,* [63] Switzerland's Federal Banking Commission placed Mebco Bank into liquidation and appointed a liquidator. Mebco filed a section 304 petition with the Bankruptcy Court in order to compel the turnover to the Swiss liquidator of certain funds deposited in a New York bank account. The Bankruptcy Court and the District Court granted summary judgment in favor of the liquidator. The Bankruptcy Court decided to follow several cases in several districts that view comity as the most significant factor, rejecting the view of courts affording equal weight to comity. The court found that "[c]omity is inevitably the more significant since the other factors are inherently taken into account when considering comity" [64] The court noted that the purpose behind section 304, an orderly distribution of the debtor's estate, can best be served by United States bankruptcy courts' granting recognition to foreign proceedings. Because comity is the most significant factor, a court will ordinarily grant recognition of the foreign proceeding unless the law of the foreign country is "vicious, wicked or immoral, and shocking to the prevailing moral sense." [65] "[T]he test is whether the proceedings in Switzerland comport with fundamental notions of fairness… not that the foreign bankruptcy laws are a mirror image of our own." [66] The court concluded that it should grant comity to the proceedings in Switzerland because "[t]he laws of Switzerland are not repugnant and violative of our fundamental notions of fairness." [67]

In *In re Axona International Credit and Commerce, Ltd.,* [68] Axona, a Hong Kong wholesale bank, did not engage in the banking business in the United States and had no office in the United States, but it had assets in the US in the foam of bank deposits, entered a winding−up procedure in a Hong Kong court. The court in Hong Kong appointed liquidators to control Axona's assets and to satisfy its creditors. These liquidators discovered that just prior to Axona's close of operation, the company made what might have been fraudulent or preferential transfer of property under section 547 of the Bankruptcy Code. Because the liquidators were uncertain of their ability to avoid the transfers in a section 304 ancillary proceeding, they believed they could benefit Axona's creditors by initiating an American bankruptcy case. The liquidators filed an involuntary chapter 7 petition against Axona, and a court−appointed American trustee reached a settlement with Chemical Bank to recover most of the transfers. After reaching the settlement, the American trustee and the Hong Kong liquidators filed a petition requesting suspension of the chapter 7 case under section 305. The court set the tone for its analysis by stating that "[c]omity is a guiding factor in this determination." [69] Because Hong Kong is a sister common law jurisdiction to the United States, the court noted that Hong Kong law met the requirement of mere similarity to American law. By stressing the necessity of employing a flexible approach when considering comity, the court loosened the standards of the section 304(c) factors. [70]

In *In re Treco,* [71] the Bahamian liquidators commenced an ancillary proceeding under section 304 and demanded turnover of the amounts on deposit with the Bank of New York. BNY, as a secured creditor, contend that it could not be compelled to turn over its collateral (the deposit) to a foreign liquidator and that it was entitled to adequate protection for its interest in the collateral. But the court held that BNY could be required to turn over the funds and that section 304 does not condition turnover upon providing adequate protection to the secured creditor. The court held that the bank's claim against the funds on deposit were properly characterized as a right of setoff and not recoupment and, accordingly were subject to turn over, the court having found that the Bahamian liquidation proceeding was not fundamentally unfair or that United States claimholders would be prejudiced by being required to

assert their claims in the Bahamian court. On appeal to the district court, the court noted that it was unlikely that the bank would recover the value of its collateral in the Bahamian proceedings because under Bahamian law, as opposed to United States law, the bank's collateral would be subordinated to the administrative costs of the liquidation, taxes, pre−petition wages and claims arising out of personal injuries to workmen, and that the trend among the United States Courts is to grant deference to foreign proceedings and that it further the purpose of Code 304 "in promoting efficiency in international bankruptcies and encouraging other countries to defer similarly to US proceedings." [72] The court agreed with the Bankruptcy Court that Code 304(c)(4)does not require the foreign distribution scheme be the same as US scheme of priority, but only that it be "fundamentally fair." [73] The district court concluded that where the bank's secured claim would be recognized as secured, but "merely be subordinated to administrative expenses, the turnover order issued by the bankruptcy court was not an abuse of that court's discretion." [74]

6. Case law (Territorial Approach)

Disconto Gesellschaft v. Umbreit

, [75] decided in 1908. The court restated the *Hilton* definition of comity but refused to apply it so far as it prejudiced United States creditors.

In *In re Toga Manufacturing*, [76] Bankruptcy trustee of Canadian debtor petitioned for injunction against all debtor's creditors from commencing action against, or continuing to take action against, debtor or its assets. The court denied comity because the creditor's secured claim under the United States law would be deemed unsecured under Canadian law. The court commented that "[h]istorically, the bankruptcy laws of our country have been hostile towards claims asserted by foreign trustees in bankruptcy against alleged estate property located in the United States." [77]

In *Interpool Ltd. v. Certain Freights of the M/V Venture Star*, [78] A major creditor of Kangaroo Lines (KKL), an Australian company with substantial assets in the United States, forced the company into involuntary liquidation in Australia. The KKL liquidator filed a section 304 petition in the United States requesting turnover of KKL's American assets. In response, the American creditors filed an involuntary chapter 7 petition in order to bring the American assets under the control of an American bankruptcy court. The liquidator modified its section 304 petition to request the court to enjoin the continuation of the involuntary bankruptcy proceedings. The court did not propose to grant equal weight to comity as a factor to be considered. Instead, it looked at the other factors of section 304 to decide whether to grant comity to the Australian proceeding. The court determined that Australian law did not provide adequate protection to United States creditors because, under Australian law, the liquidator was not required to give notice of the liquidation proceedings to the creditors and granted the American creditors' motion for a chapter 7 petition, thus all of the assets located in the United States would be administered under the law of the United States. The decision seems to suggest that United States courts will never recognize Australian law, as the notice procedure is a basic part of Australian law that will affect every liquidation proceeding. [79]

In *In re Koreag*, [80] the Court of Appeals vacated the district court's order and remanded. The court distinguished between the legal policy of fair and efficient distribution as distinct from the policy of how various property rights are determined. Switzerland's primary interest is in the administration of the insolvency estate, while New York's primary interest is in defining and protecting the property interests of its citizen and those who do business in New York.

In *In re Treco*, [81] the Court of Appeals held that:

[W]hile comity is ultimate consideration when deciding whether to provide relief in cases ancillary to foreign proceedings, comity does not automatically override other statutory factors; differences in priority provisions of the United States and Bahamian law would preclude turnover, to extent that creditor was in fact secured; and case had to be remanded to bankruptcy court for determination of secured status. [82]

7. Analysis

In deciding whether to assist the foreign representative, the United States Bankruptcy Court evaluates the bankruptcy system of the main forum. Comity does not require reciprocity, nor that the foreign insolvency laws be the same as the

United States Bankruptcy Code, but does test the fairness of the foreign procedures. After determining whether the foreign procedures meet the section 304 (c) criteria other than comity, the Bankruptcy Court decides what weight comity has in relation to the other section 304(c) factors. *Hilton v. Guyot* failed to specific which factors of its definition carried the heaviest weight. Should "international duty and convenience," or "the rights of [a nation's] own citizens," be the guiding force in a court's decision whether to grant comity? [83] This uncertainty resulted in the above two main approaches to cases involving foreign bankruptcy proceedings. Cases favored territorialism stressed the need to guard against the prejudice that American creditors may encounter in foreign proceedings, while cases favored universalism viewed the granting of comity as a policy that dictates recognition of the foreign proceeding, paying little regard to the background and circumstances of the case. Courts base their decision on what they believe to be most important issue, either comity or creditor's rights. Courts employing universalism believe that, when comity is justified, a strong presumption in favor of deference to the foreign proceeding is warranted like the Bankruptcy Court *In re Koreag*; courts look to comity as a chief or controlling factor under section 304(c). [84] Courts employing this line of reasoning more readily grant recognition to foreign proceedings. American courts, however, should protect American citizens. The universality approach ignores this concern and disregards the effects on American creditors. In this respect, it is probable that courts like *In re Axona* and *In re Treco* emphasized whether the foreign bankruptcy law is similar to that of the United States. [85] Many courts, which favored territorialism, rely almost entirely on possible prejudice to the United States creditors when deciding whether to grant relief to a representative. They conclude that the remaining factors in section 304(c) may justify denial of deference to the foreign proceeding in certain circumstances, even when the foreign proceeding is conducted under a legal regime that would otherwise meet the standards for application of the doctrine of comity. For example, the Bankruptcy Court's narrow reading of section 304(c)(4) in *Toga* suggests that almost any deviation from the Bankruptcy Code will lead to nonrecognition. [86] Extended to section 304(c)(2), this interpretation mandates that United States secured creditors receive treatment in a foreign proceeding virtually identical to the treatment that they would receive under the Bankruptcy Code in order for the United States Courts to recognize the foreign proceeding. Under such a narrow reading, American courts would seldom, if ever, recognize foreign proceedings. [87]

Courts that relied on section 304(c)(2) to protect American creditors completely ignored section 304(c)(1), which requires "just treatment to all holders of claims against or interests in such estate." [88] Although section 304(c)(2) does require courts to protect American creditors, section 304(c)(1) dictates that courts consider the best interests of all claim holders. The phrase "all holders of claims" does not limit the court to consider only the best interests of American creditors. [89] When a court fails to recognize a foreign proceeding due to its potentially harmful effects on only American creditors, it may cause irreparable harm to foreign creditors, in contravention of the express language of section 304(c)(1). These holdings seize upon almost any deviation from American law as an excuse to refuse recognition to a foreign proceeding. In this respect, if foreign proceedings would distribute the assets "substantial[ly] in accordance with the order prescribed by [the United States Bankruptcy Code]," [90] the United States Bankruptcy Court can order the surrender of United States assets to the foreign representative, If not, the United States Bankruptcy Court can either refuse cooperation and allow the struggle over the United States assets to proceed under United States law, or it can offer to surrender the assets to the foreign representative in return for assurances that the representative will make a special distribution of those assets that protects the rights of the United States creditors under United States law.

One commentator makes a procedural analysis:

non−bankruptcy code cases in the United States tend to apply a two step analysis in determining whether the doctrine of comity compels deference to a foreign bankruptcy or insolvency proceeding. First, the court determines whether the foreign proceeding is located in a jurisdiction that incorporates "fundamental standards of procedural fairness" and is otherwise not inimical to the policies inherent in the applicable United States federal or state laws. Once the foreign proceeding is determined to satisfy these tests, courts applying the doctrine of comity exercise broad discretion in determining whether to defer to the foreign proceeding or allow the United States case to proceed. [91]

Applying this criteria, none of these cases mentioned above (territorialism) meets first step of this analysis; *In re Toga* and *In re Treco*, the courts emphasized the protection of secured claims against the foreign procedure where the secured claim would be deemed unsecured or priority was different. [92] In *Interpool Ltd.*, the court saw insufficiency of the creditor's protection in the non−notice requirement of Australian law. [93] *In re Koreag*, the court held that local law

determines the defining property interest. [94] All of these cases are concerned about the protection of fundamental rights of creditors under the Bankruptcy Code.

There seems to be three exceptions for priority creditors as the case law evolves; first, the United States Bankruptcy Court will require the United States assets to pay the expenses of the United States proceeding itself. [95] Second, secured creditors may be allowed to liquidate their secured claims prior to turnover of these assets. Third, the United States will likely not recognize any discharge or settlement concerning United States tax claims in a foreign proceeding. [96]

This article considers the legislative history of section 304(c) again. It indicates that Congress included comity very deliberately in this section so that the legitimate interests of a foreign proceeding would be given due consideration. But Congress did not give priority to comity so we should construe these factors, as a matter of statutory construction, to have equal weight. This article suggests that construction of section 304(c) is determined both by legislative history and statutory words and arrangements. The reflection of territorialism and universalism would be developed if this main method does not work well. In this respect, because Congress adopted not only a territorial approach but also a (modified)universal approach by including "comity" in section 304 (c) and indicated all the factors to be considered equally, we should not modify the Congressional arrangements that give them equal weight. It also applies the construction of section 305(a)(2)(B). But it is unrealistic to believe that all of the factors of section 304(c) could be completely satisfied.

Courts may not merely choose one factor on which to base a decision; all must be considered and weighed before the court renders a decision. After the court gives full attention to each factor and examines the surrounding issues, it can decide whether granting or denying recognition to the foreign proceedings will best serve the interests of section 304. Courts have to develop an ad hoc approach which balances each factor, instead of dogmatic assumption, either universalism or territorialism, as evidenced in the following cases. [97]

In *In re Gercke*, [98] the court applied this balancing approach test. In *In re Gercke*, York Associates, Inc., an American company, commenced a breach of contract action against Dominion International Group in the Superior Court of the District of Colombia on August 28,1989. On January 22, 1990, before the scheduled court date for the breach of contract action, creditors of Dominion, with the support of Dominion's directors, filed under the United Kingdom's Insolvency Act of 1986. The British court agreed not to liquidate Dominion immediately. On April 26,1990, Dominion filed a section 304 petition to enjoin further proceedings in the breach of contract action, claiming that the administrator should be allowed to keep the estate together to preserve its going concern value until a liquidator could be appointed. The court separately considered each section 304(c) factor and determined to what extent each factor would influence the recognition decision. The court implied that courts should usually grant comity, noting that "[f]ederal courts generally accord comity to a foreign court when the court is of competent jurisdiction and [when] according comity dose not prejudices the rights of United States citizens or violate domestic foreign policy." [99] "The obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." [100] Furthermore,

"[A] foreign debtor ought not [to] be allowed to toy with American state federal system of courts by first seeking a favorable ruling in a state court and, only upon losing that effort, then turning to the federal bankruptcy court to enjoin the state court ruling. That conduct is inequitable and prejudicial to the administration of justice and ought not be tolerated." [101]

Using this standard, the court held that it would not enjoin the superior court's order for document production because Dominion filed the section 304 petition after it received the unfavorable ruling. However, the policy of comity compelled the court to grant Dominion's request to enjoin further proceedings in the American court."[O]n balance, the application of 304 warrants an injunction as to the superior court litigation except for the enforcement of the production order." [102]

In *In re Simon*, [103] Simon had guaranteed the debt of a corporation incorporated in the British Virgin Islands, but which maintained offices in Hong Kong. At the time that the guarantee was executed, Simon, lived in Hong Kong, traveled to the United States and filed a petition under chapter 7 in United States. The Bank which lent money to the

corporation filed a claim under this procedure. The Bank had an opportunity to object to the granting of a discharge in favor of Simon and to object to the dischargeability of the particular debt, but the Bank did not take either step.

The Bankruptcy Court entered an order granting Simon a discharge of all of his debts and issued an injunction enjoining all creditors from instituting, or continuing, any action or employing any process, in any attempt to collect the discharged debt. Then the Bank filed a complaint for declaratory judgment asking that the Bankruptcy Court determine that Simon's discharge and injunction against the Bank were effective only within the U.S., but were enforceable outside of the United States. The Bank would like to enforcing the Simon guarantee in Hong Kong and not be subject to sanctions in the United States. The Bankruptcy Court granted Simon's motion to dismiss for failure to state a claim upon which relief could be granted and noted that the discharge and injunction could be enforceable in a United States district court by imposing sanctions against the bank because the bank did business in the United States, had property located in the United States, and such enforcement did not amount to extraterritorial application of the United States statute. The Court of Appeals held that the presumption against extra−territoriality is generally not applied where "the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States," [104] and, secondly, the presumption is not applicable when the regulated conduct is "intended to, and results in, substantial effects within the United States." [105] The court held that as to actions against the bankruptcy estate, Congress clearly intended extra−territorial application of the Bankruptcy Code. The Bankruptcy estate consisted of all the debtor's legal or equitable interest, wherever located and by whomever held.

With regard to international comity, the Court held that comity does not require the court to vacate the Bankruptcy Court's injunction. The court distinguished *In re Maxwell Communication* [106] because it was clear that the major situs of *Maxwell* case was in the U.K. and the alleged voidable payments occurred only in the U.K. and not in the United States, but in the Simon case, there was no competing bankruptcy proceeding and, indeed, no case at all pending in Hong Kong. The court of appeals rejected the view that the United States Code supports either the territorial theory of international bankruptcy law, or the "universalist philosophy," which contemplates one transnational proceeding completely governing the administration of assets worldwide, but rather the Bankruptcy Code provides a flexible approach to international insolvency.

The Court stated:

Thus, under the Bankruptcy Code, the bankruptcy court must consider the status and progress of other nations' insolvency proceedings in determining how to manage domestic bankruptcies. In most cases, the court will defer to where the "center of gravity" of multiple proceedings exists, if one can be ascertained. However, courts may also proceed jointly with a foreign court, or may choose to exercise its power to the full extent of its jurisdiction in an appropriate case. [107]

This case does not involve competing bankruptcy proceedings; indeed, there is no proceeding pending in Hong Kong. Section 524 discharge injunction dose not apply to the Hong Kong courts at all, but only to the creditor who enjoyed the benefits of participating in the United States bankruptcy.

8. Supplement (Case Law Relating to Japan)

Unfortunately, there are only two cases in which Japanese trustees request for injunction orders pursuant to section 304 procedures to commence cases ancillary to foreign proceedings. In *Sanko Kisen Co. Ltd.*, [108] which involved a Japanese shipping company which sometimes harbored its ships in the United States, the reorganization trustee of the debtor obtained the injunction orders at the United States Bankruptcy Court Southern District of New York in 1986. The purpose of this petition was to prevent the commencement or continuation of (1) any action against the debtor with respect to property involved in the Japanese Proceeding or such property (2) the enforcement of any lien against property of the debtor located within the United States, and (3) any judicial proceeding to create or enforce a judgment against the debtor with respect to such property. In the *Taisei Fire and Marine Insurance Co. Ltd.*, [109] the reorganization trustees commenced an ancillary proceeding and obtained the preliminary injunction order from the above bankruptcy court on December 19, 2001. The trustee of the debtor mainly demanded of enjoining the holders of the debtor property from relinquishing or disposing of that property to third parties, compelling turnover of all the property, and authorizing the trustees to take any discovery that they deem appropriate and to compel the production

of all documents and other information relating to the debtor's business and financial affairs. The author made a declaration as an expert on Japanese law on this case, and came to the bankruptcy court as a candidate of an expert witness. One of the debtor's main concern was whether the court adequately recognized the just treatment and adequate protection to United States creditors under the Japanese Corporate Reorganization Law. Judge Lifland, however, had already recognized well concerning the cooperative features of recent Japanese insolvency laws and did not need to appoint an expert witness on Japanese law anymore. While the Bankruptcy Court did not mention any specific factor in section 304 in this case, the author thinks that all the sequential reforms and revisions of Japanese insolvency laws to be able to deal with multinational bankruptcy reflect to the decision of the court.

B. Second Plenary Bankruptcy Proceeding

1. Overview

Secondary or parallel proceedings are those proceedings where two separate bankruptcy proceedings have been filed in two separate states simultaneously with resulting conflicts of legal rules, procedures, and interests. Contrary to the ancillary proceedings of section 304, which merely aid main proceedings, the secondary bankruptcies are the same proceedings that would be filed even if no foreign proceedings were pending. Nothing in section 109 of the Bankruptcy Code requires that there be a proceeding pending in the principal place of business of the foreign corporation. The Bankruptcy Code permits a person that resides, has a domicile, a place of business or property in a jurisdiction outside the United States, to be both (1) the subject of a plenary insolvency, liquidation or reorganization case in a jurisdiction outside the United States and (2) a debtor in a case pending simultaneously under the Bankruptcy Code, if such person qualifies to be a debtor under section 109. Also section 303(b)(4) authorizes the filing of an involuntary bankruptcy case by a foreign representative of the estate in a foreign proceeding. [110] If the foreign representative commences a voluntary or involuntary petition under chapter 11, it will probably be able to retain control of the case as debtor in possession, unless an examiner or trustee is appointed. If, however, a chapter 7 liquidating case is commenced, either by voluntary or involuntary petition, then the foreign representative is going to be displaced by a trustee appointed by the Office of the United States Trustee.

There will always be issues of how to overcome the conflicts of rules and coordinate between countries. In theory, the secondary bankruptcy has a territorial focus. A Bankruptcy Court reorganizes or liquidates the debtor's local assets and makes distributions necessary to protect creditors entitled to priority under local law. The court then transfers the balance of the proceeds to the estate of the main case for distribution according to the priority rules of the home country. In this respect, it is said that the secondary bankruptcy system is a hybrid of universalism and territoriality; part of the assets is distributed according to local priorities, but the balance is distributed according to home countries priorities. [111] But in practice, no doubt, the limited pool of assets comprising the available estate in the secondary bankruptcy will, in many cases, be exhausted when payment has been made to those creditors whose claims enjoy preferential status according to local insolvency law. [112] So the balance distributed to the home countries would be only nominal. This apparently unfair result comes from choice of law which leads to the wide difference of priority rules and avoiding powers among countries. There seems to be three general approaches to solve these problems and address the coordination of cross− border cases; tacit cooperation guided by comity; use of protocols and similar agreements; and coordination of plenary cross−border insolvencies by treaty. This article focuses on the former two approaches referring mainly to the *In re Maxwell Communication* case and *Maruko Inc.* case.

2. In re Maxwell Communication Corporation [113]

The Maxwell

case was a choice of law decision that considered whether the doctrine of comity and the presumption against extraterritoriality would prevent invoking United States bankruptcy avoiding powers, where two parallel concurrent bankruptcy proceedings had been filed, and where the transaction was deemed to have occurred outside of the United States.

Maxwell, a U.K. company headquartered in London, first filed a petition under chapter 11 of the Bankruptcy Code and the next day filed for an administration order in the High Court in England. Administration, introduced by the

Insolvency Act 1986, is the closest equivalent in British law to chapter 11 relief. Maxwell had subsidiaries in the United States and assets, such as bank accounts, in the United States. The United States Bankruptcy Court then appointed an examiner who negotiated an agreement with U.K. administrators. The problems concerning the division of jurisdiction were handled through a "Protocol " adopted by both the United States Bankruptcy Court and the English court supervising the *Maxwell* case in England. This is "perhaps the first world−wide plan of ordinary liquidation ever achieved." [114] Here was a reorganization plan in the United States and a scheme of arrangement in England, which are interdependent documents, providing the distribution mechanism allowed the debtor's assets to be pooled together and sold as going concerns, the balance distributed to claimants who could submit a claim to either the English High Court or the United States Bankruptcy Court with the same effect. The reorganization plan and scheme of arrangement resolve many of the inefficiencies usually attend in multi−jurisdiction proceedings. Despite these intensive cooperation and reconciliation between the two sets of laws, these documents did neither specify which substantive law would govern the resolution of disputed claim nor which law would determine the ability of the debtor or the administrators to set aside pre− petition transfers.

The English banks, faced with the expectation that the United States debtor in possession would commence preference litigation to recover funds paid to the banks pre−petition, obtained an injunction from the English High Court. But the British Judge (Justice Hoffman) vacated the ex parte this anti− avoidance suit order. He declined to interfere with the American court's determination of the reach of the avoiding power. He cited the British presumption that in such a situation the foreign judge is normally in the best position to decide whether proceedings are to go forward in the foreign court, and the rule that anti− suit injunctions will issue only where an assertion of jurisdiction of the foreign court would be "unconscionable." [115]

The Court of Appeals viewed the British Court decision as assuming "that the Bankruptcy Court would dismiss the anticipated suit if it found there was an insufficient connection with the United States." [116]

The administrators filed avoidable preference action under the section 547 of the Bankruptcy Code against the English banks. The examiner joined the administrators in instituting these proceedings. The loan had been made in the U.K., the loan agreements were governed by U.K. law and the repayments were made in the U.K., but from assets in the United States, namely, two United States subsidiaries. The payment would not have been deemed avoidable preference under U.K. law, but probably would have been avoidable under the United States avoiding powers. In an application of both the doctrine of international comity and of "presumption against extraterritoriality," the Bankruptcy Court dismissed the action and the district court affirmed.

The Bankruptcy Court found that U.K. laws and policies were implicated to the greatest extent, that Maxwell's insolvency did not jeopardize United States interests because its holdings were sold as a going concern business, that most of its creditors were not the United States residents, that the two countries' preference laws in any event serve similar ends, and that pursuant to choice of law principles, the U.K. had a greatest interest in applying its own laws than the United States. Neither the reorganization plan nor the confirmation order addressed the specific issue of whether the debtor could maintain an avoiding action to recover pre−petition transfers pursuant to United States Bankruptcy law.

On appeal, the district court affirmed the Bankruptcy Court decision, but made clear that the doctrine of international comity is a separate notion from the presumption against extraterritoriality which, when described by the Circuit Court, requires "a clear expression from Congress for a statute to reach non domestic conduct." [117] The court described international comity as two distinct doctrines, as a canon of statutory construction and as a discretionary act of deference by a national court declining to exercise jurisdiction in a case properly adjudicated in a foreign state.

The Circuit Court held concerning the choice of law that the United States avoiding powers were not available to the chapter 11 D.I.P. as against the English banks. The issue is could the United States D.I.P. (the administrator in this case) invoke United States avoiding powers of section 547, or did comity and the presumption against extraterritoriality mean that if the transaction were deemed localized outside the United States, such as payment of the funds being made in London, that the United States law was inapplicable and only U.K. law could be invoked? The Court held that the doctrine of international comity precluded application of United States Bankruptcy Code avoiding powers to transfers in which U.K.'s interest has primacy. The Court also held that the interest of the system as a whole

– that of promoting "a friendly intercourse between the sovereignties," *Hilton* also further American self−interest, especially where the working of international trade and commerce are concerned. [118] The Court, however, declined to rule whether the United States preference laws apply extraterritorially.

3. *Maruko Inc.* [119]

Maruko, a Japanese company headquartered in Tokyo, filed a petition under Japanese Corporate Reorganization Law in the Tokyo District Court and then the trustee in Maruko initiated a chapter 11 case on October 30,1991 in San Diego, California. [120] Maruko owned hotels in the United States and had United States subsidiaries operating in various states in the United States. Because of the question of the power of a Japanese trustee to act extraterritorially, it was filed as both a voluntary and an involuntary. In December 1991, because Japanese Corporate Reorganization Law makes no provision for a debtor to remain in possession, the permanent co−trustee were appointed to manage and administer the assets of Maruko.

At the time of the commencement of the Japanese case, a major resort development on the Gold Coast of Australia was subject to immediate foreclosure by a Japanese bank and certain properties in the United States were threatened by foreclosure and another creditor actions. It appeared that commencing a reorganization case in Australia would not immediately enjoin the foreclosure by a Japanese bank on the Australian property, and it had been previously concluded that the Japanese Court could not enjoin the foreclosure because of strict territoriality principles. The filing of a full chapter 11 in the United States for Maruko was selected in order to have the immediate world− wide umbrella of the automatic stay of section 362. Although the stay purports to be worldwide, as a practical matter the United States Courts can enforce the stay against foreign creditors only if they are subject to personal jurisdiction in the United States or have property in the United States. Because the lenders holding mortgages and other liens against Maruko properties in Australia and Canada conducted business in the United States, they clearly had sufficient minimum conducts to be subject to the automatic stay and none of the Maruko properties in Australia or Canada were threatened with any action once the United States chapter 11 was initiated.

The United States Bankruptcy Court exercise powers of "partial abstention" under 305 and provide that Japanese domiciled creditors whose claims arose pursuant to contracts made in Japan with the Japanese debtor and which contracts are specifically governed by the laws of Japan, be limited to participation in the Japan reorganization proceedings and precluded from participation in the United States reorganization case.

4. Problems

a. Protocol

The *Maxwell* case was famous for being the first case to create a "protocol." Practitioners use protocols to promote an efficient, worldwide coordination and resolution of multiple insolvency proceedings such as worldwide asset identification, collection, and distribution among worldwide creditors. At the same time, protocols serve to protect fundamental, local rights material to parties involved such as due process rights. Whatsoever form protocols may take, their essence is flexibility and harmonization. Protocols are driven by guiding principles comprising the most important elements of both universality and territoriality. Specifically, protocols are guided by an overarching belief that the fundamental goal of insolvency proceeding is to maximize the value of the world−wide estate for the benefit of all parties, consistent with the preservation of due process and other fundamental right. [121]

b. Automatic Stay

The "automatic stay" of section 362 arts as "a bar to all judicial and extrajudicial collection efforts against the debtor or the debtor's property." [122] After filing a petition under the Bankruptcy Code, any creditor subject to United States jurisdiction, whether a United States domiciliary or not, is restrained from taking actions in violation of the automatic stay as to the debtor's property wherever located in the world. The stay is effective without regard to notice to, or knowledge of, any of the parties, but it is powerless to prevent the action unless the creditor has minimum due process

contacts in the United States. For example, Country X creditors would also be subject to sanction for exercising individual rights in country X, if (but only if) (1) they have a presence in the United States to a sufficient extent as to give United States courts jurisdiction over them; or (2) have consented to United States jurisdiction. The automatic stay would apply to the exercise of rights with respect to collateral for secured claims and to setoffs.

In *Maruko*, one of the main purposes to file a chapter 11 case in United States was to stay the foreclosure on its Australian property, which was initiated by a Japanese bank which conducted business in the United States. Apparently, commencing a reorganization case in Australia would not immediately enjoin the foreclosure. In *Maruko*, the Japanese bank did not challenge the automatic stay.

In re

Nakash, [123] however, illustrates a serious problem. The Official Receiver of the State of Israel, serving as liquidator of the failed bank, obtained a judgment against the debtor (Nakash) from the Israeli Court. Then, the debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code in the United States. After this, the Official Receiver filed a second involuntary bankruptcy petition with the Israel court. The debtor sued the Official Receiver in the United States Court, alleging that the filing of the second petition constituted a violation of the automatic stay imposed by chapter 11. Before the second bankruptcy was granted in Israel, the United States Bankruptcy Court entered its order appointing an examiner to attempt to develop a protocol for harmonizing and coordinating the chapter 11 case with the Israeli proceedings. However, the Official Receiver, without seeking relief from the automatic stay from the United States Court, obtained further instructions from the Israeli Court 1) concerning the enforcement of the Judgment against the debtor, 2) authorizing an investigation of third parties alleged to have knowledge relevant to the debtor's assets. These actions resulted in a hearing in the United States Court and after a hearing concerning automatic stay issue, the United States Court issued an opinion holding that the automatic stay applied extraterritorially and that the Official Receiver had violated the automatic stay by filing the second petition. But the Official Receiver asserted that he was under the obligation of Israel law and of the Israel Court order and could not subordinate the sovereignty of the Israeli judicial system by unilaterally requesting permission of the United States courts to pursue obligations mandated under Israeli law. This exposed the conflict between the United States and Israeli proceedings. In response to this situation, and to avoid further jurisdictional conflict, the United States Bankruptcy Court instructed the examiner to begin discussion with the debtor and the Official Receiver as to whether a protocol could be implemented with the Israeli Court. As a result, the protocol was implemented in the Nakash proceedings, having been agreed to by the examiner and the Official Receiver but not the debtor, and ordered by the United States and Israeli Courts. This is the first case for the United States courts to make a protocol with the courts of a Civil Law country. [124]

The protocol addresses the actions of enforcement and the investigation against the automatic stay prosecuted by the Official Receiver as follows: The protocol authorizes the Official Receiver to investigate into the debtor's worldwide assets, including certain actions to marshal and preserve such assets; These assets should be preserved for the benefit of all the creditors; the Official Receiver must coordinate his investigation with the Examiner and keep the Examiner informed of the investigation; if the Examiner disagrees with any action proposed by the Official Receiver, the Official Receiver is required to inform the court from whom the Official Receiver is seeking authority to purse such actions, and Examiner has a reasonable opportunity to be heard in, and to seek relief from the United States Court and/or Israeli Court with respect to his concerns as to the Official Receiver's proposed actions.

c. Abstention

In *Maruko*, Maruko filed its motion asking that United States Bankruptcy Court and the United States trustee abstain from exercising jurisdiction over those areas of the Maruko reorganization case that were then administered by the Japanese Court and the Japanese co− trustees. The US bankruptcy concept is one of worldwide jurisdiction over the debtor and its property wherever located, whereas the Japanese concept is of limited territoriality. Because of this different concept of jurisdiction and territoriality, Maruko, the debtor both the United States and Japanese reorganization case, would like to divide the jurisdiction and powers of the two courts. The abstention which Maruko requested was a "selective" or a "partial" abstention with regard to actions concerning the debtor's real or personal

property located in Japan, related to its business operations in Japan and so on. Even though the section 305(a)(2) does not provide a "concept of selective" or "partial" abstention, the United States Bankruptcy Court granted the motion and adopted a flexible approach with regard to procedures and abstention, and permitted the Japanese Court to continue administering that portion of the case that concerned assets and business operations in Japan. It was told that the partial abstention was valid because that the Bankruptcy Court held the power issuing this order under section 105 and section 305. But the Supreme Court decision of *Groupo Mexicano de Desarollo v. Alliance Bond Fund,* [125] which limits the scope of federal equity jurisdiction, calls into question the validity of *Maruko*'s decision.

d. Avoiding Powers

In *In re Maxwell*, a United States D.I.P. filed a voidable preference action under the Bankruptcy Code section 547 against English banks and one French bank and the court of appeals held that comity precluded application of United States Bankruptcy avoiding powers stated:

Comity is exercised with reference to 'prevalent doctrines of international law.' The management of transnational insolvencies is concededly underdeveloped. However, certain norms shared among nations are relevant to the present case and have guided the choice of law analysis in such cases as Lauritzen and Romero. The same principles normally refrain from prescribing laws that govern activities connected with another state 'when the exercise of such jurisdiction is unreasonable.' Whether so legislating would be 'unreasonable' is determined 'by evaluating all relevant factors, including, where appropriate,' such factors as the link between the regulating state and the relevant activities, the connection between the state and the person responsible for the activities (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict with other states' regulations. [126]

Principles of international comity counseled against application of United States law to preference claims asserted in chapter 11 case of English holding company which was subject of dual insolvency proceedings in the United States and England; the debtor and most of its creditors were British, challenged transfers related primarily to England and was appropriate in keeping with spirit of cooperation and harmony prevailing in joint proceedings.

In *Maruko*, a Japanese bank lent money to Maruko in Japan, but created a lien on properties located in the United States, which lien is vulnerable under the Bankruptcy Code but valid under the Japanese law. This issue was compromise instead of litigated; as a result, the Japanese bank released all mortgages created within the 90 days voidable preference period.

In general rules that might be adopted for avoidance actions when the transaction had material contacts with two countries are as follows: [127] The transaction will be avoided a) only if it is avoidable under home−country law (that is, home country law governs completely); b) only if it is avoidable under the law of the territory where the key event or events took place (that is, if the events occur in America, the United States law governs completely); c) only if it is avoidable under both home−country and the United States law (that is, it is unavoidable unless both laws would avoid); d) if it is avoidable under either home−country or the United States law; or e) if it is avoidable under the law chosen by the applying case−specific choice−of−law rules based on the contacts and states interest presented in each case. The *Maxwell* case adopts rule e) where the *Maruko* case adopts rule b). Professor Westbrook has proposed b) and Professor LoPucki agrees with this treatment by making an adjustment: treat international movements of debtor's assets as if they were transfers to a separate entity in the destination country. [128]

e. Claims

The source of the substantive law governing the validity of all claims is determined by the general rules of private international law, which in the United States are generally a matter of state law. The conventional view is that Bankruptcy Courts will ordinary apply the choice of law rules of the state in which the Bankruptcy Court is located. To the extent those choice−of−law rules identify the law of country X as applicable to a given claim, its validity and amount will be governed by that law in the United States Bankruptcy case. On the other hand, its priority of payment in distribution will be governed by United States Bankruptcy law.

In *Maruko*, however, the United States bankruptcy court entered an order of partial abstention, which provided that the Japanese domiciled creditors, whose claims arose pursuant to contracts made in Japan with the Japanese debtor, and which contracts are specifically governed by the laws of Japan, would be limited to participation in the Japanese reorganization proceedings and precluded from participation in the United States reorganization case. The United States court confirmed a reorganization plan that was more favorable than the Japanese plan. Japanese domiciled creditors with claims arising out of the rejection of the leasebacks on hotels located in the United States, were permitted to also file a claim in the Japanese case, but were required to give full credit against any payments made pursuant to the United States reorganization plan.

f. Notice Problem

Professor LoPucki [129] indicates this problem which is an inevitable delay between the filing of the bankruptcy cases and the availability of local assets for international administration by the home country. While it would be necessary to administrate bankruptcy cases as soon as possible, especially in reorganization cases, what creditors think more seriously is the transparency of the procedure and notice of what kind of procedure the debtor is now taking. If the procedure of reorganization cases move swiftly without disclosure, creditors would become skeptical about the procedure and doubt the likelihood of rehabilitation. There are various kinds of creditors' committees, United States trustees, Bankruptcy Courts to supervise, or disclose information about a debtor. But the creditors of the bankruptcy case administered in the home country would like to know the procedure of the second bankruptcy case administered in other states.

One of the appropriate solutions would be to appoint a co–trustee with responsibility for the debtor's assets either in the United States or the home country. In *Maruko*, the Japanese trustee filed a chapter 11 case in the United States and the United States trustee appointed a co−trustee. Because Maruko had approximately 30,000 investors/ creditors living in Japan that presumably spoke and read only Japanese, the court required a Japanese translation of important notices and extended the notice period under Rule 2002.

5. Advantage of Territorial Approach

Secondary bankruptcy provides an orderly mechanism for giving effect to local public policy, including policies embodied in rules of distribution. Instead of refusing to surrender assets to the home country, or conditioning their surrender on the home country's commitments regarding distribution, the local court can make the distributions to local creditors that it considers necessary as a condition to cooperation.

Universalists might criticize the territorial approach, [130] because the Territorialist courts' leaning toward nonrecognition can needlessly lead to excess litigation: one proceeding in the United States and another in a foreign country. This result would not seem to promote "an economical and expeditious administration of the estate," as directed by the language of section 304(c). [131] The courts, however, unlike the old era before *Maxwell*, have a method of cooperating and making protocols among related countries now.

If we favor a Universal approach, to decide whether a home country's bankruptcy law would distribute the local assets substantially in accordance with the local Bankruptcy Code, the ancillary court must determine how the home country's court would distribute the assets. To make this determination, the ancillary court must hear testimony on the foreign law. If it then decides to surrender the assets conditionally, it must negotiate an agreement with the court of the home country. For a debtor that operates in dozens of countries, modified universalism may necessitate dozens of complex proceedings. [132] It is impractical.

Under the territorial approach, each country attempts to maximize a recovery for its own creditors.

III. Recent Cross−Border Bankruptcy Proceedings under the Japanese Insolvency Laws

A. Territorial Provisions Under the Bankruptcy Law and the Corporate Reorganization Law

Japanese scholars and courts had been anguished with regard to the territorial provisions under the Japanese insolvency laws until 2001. Former article 3(1) of the Japanese Bankruptcy Law, which deals with only liquidating cases, provided the principle of territoriality stating, "the bankruptcy declared in Japan shall be effective only with respect to the bankrupt's assets located in Japan." [133] And former article 3 (2) also provided, "the bankruptcy declared in a foreign country shall not be effective with respect to the assets located in Japan." On the other hand article 2 declares that "the bankruptcy law declare that foreign individuals and foreign corporations shall have the same status as a Japanese individual or a Japanese corporations in connection with bankruptcy on condition the laws of his or its own country does not discriminate Japanese individual and Japanese corporations from their own nationals." [134] Former article 4(1) of the Corporate Reorganization Law provided that: reorganization proceedings commenced in Japan shall be effective with respect to only the company's assets located in Japan. [135] Former article 4(2) also provided that reorganization proceedings commenced in a foreign country shall not be effective with respect to assets situated in Japan. [136] Therefore scholars and many courts in Japan had been trying to interpret those territorialism articles loosely because the strict interpretation would have developed various problems as the cross−border insolvent companies have become common in these days. However, "The Law to Reform a Portion of The Civil Rehabilitation Law, etc," became effective on April 1, 2001. The law deletes and amends strict territoriality provisions mentioned above both in the Bankruptcy Law and in the Corporate Reorganization Law, harmonizes domestic insolvency proceedings with foreign insolvency proceedings and clarifies the international jurisdiction under the three laws.

B. A Unilateral Provision Under the Civil Rehabilitation Law

The Civil Rehabilitation Law provides that the debtor may maintain its authority to manage and dispose of its assets located abroad. [137] The law also provides that proceedings equivalent to the law commenced in foreign countries must be effective regarding assets inside Japan only if there is a special provision in the law. [138] These provisions are inconsistent with each other. The law establishes such a unilateral provision because the distribution system of foreign insolvency proceedings will not necessarily contain the same priority standards as that of the Civil Rehabilitation Law. There may also be a situation in which Japanese creditors will encounter difficulties participating in foreign proceedings. Since these conflicting provisions are antithetical to the current trend of internationalism, "the Law on Recognition of and Assistance in Foreign Insolvency Proceedings" ("LRAF") provides provisions to permit the disposition or outbound delivery of the debtor's assets within Japan.

C. Summary of the Law on Recognition of and Assistance in Foreign Insolvency Proceedings ("LRAF")

LRAF, based mostly on the "UNCITRAL Model Law on Cross−Border Insolvency," provides provisions by which the court may enter a recognition order and an assistance order for a foreign proceeding. It became effective on April 1, 2001.

1. Recognition Order and Assistance Order

To obtain an order from the Tokyo District Court, the court of which being the exclusive jurisdiction, the trustee (including a debtor in possession) of a foreign insolvency proceeding may file a petition for recognition of the relevant foreign insolvency proceeding. [139] After considering the basic requirements, such as the debtor's location and whether the case has commenced in the foreign country, the court issues a recognition order, which dose not have any automatic effect in itself. [140] The recognition order, however, is the prerequisite for the following assistance order. The court may order seven types of the assistance orders if necessary: a temporary suspension order against a compulsory execution proceeding upon judgment, lawsuit, or administrative proceeding with respect to the debtor's assets located in Japan; a cancellation order against the compulsory execution proceeding after ordering the temporary suspension order mentioned above; a temporary suspension order against a public auction proceeding in foreclosure; a prohibition order from commencing compulsory execution proceedings against the debtor's assets; an injunction prohibiting the debtor from disposing of its assets and repaying its debt; an administration order through which the court appoints a "recognition trustee," who has an exclusive power to manage the debtor's business and to dispose of its assets located in Japan; and a provisional administration order where an interim trustee is appointed. [141]

2. The Disposition or Outbound Delivery of the Debtor's Assets Within Japan

The court may order the trustee of a foreign insolvency proceeding to obtain a court approval for disposition or outbound delivery of the debtor's assets with in Japan. [142] This provision reserves for the court the power to evaluate the fairness of the foreign proceeding and to protect the interest of local creditors. A recognition trustee must obtain the court approval to do the same thing. [143]

3. Harmonization Between LRAF and Other Insolvency Proceedings

It is possible that the same debtor may commence both a proceeding under a Japanese insolvency proceeding and an LRAF proceeding. LRAF adopts the principle that a debtor shall be subject to only one insolvency proceeding and that the proceeding under among the Japanese insolvency laws would govern in the case of any conflict. [144]

Conclusion

The globalization of business and resulting increase in the frequency and importance of multinational corporate bankruptcy in the past decade have highlighted the previously obscure problems of multinational bankruptcy. To deal with these problems, the Japanese Government has been establishing and revising laws relating both insolvency and globalization. Both the Corporate Reorganization Law and the Bankruptcy law are expected to revise in a couple of years. Both Congress and the courts struggle for a clearly defined bankruptcy policy to guide them as conflicts among competing considerations become sharper, as novel applications and revisions of bankruptcy law multiply, and as concern increases over the effects of bankruptcy law on economy. [145] Differences between courts have had a significant impact on debtors, creditors and the parties in interest. The Japanese insolvency laws and practice are still under way to mitigate the differences and smoothen cooperation with other countries' bankruptcy regime.

FOOTNOTES:

[1] Mr. Abe is a Vice President, Corporate Counsel, at the Prudential Insurance Company of America. He is admitted to practice in Japan. Mr. Abe originally submitted this article as a thesis in connection with his LL.M requirements at the U.C.L.A. School of Law during 2001. The article has since been modified to keep up with the latest changes occurring in the Japanese bankruptcy area. He wishes to thank Professor Kenneth Klee and Professor Daniel J.Bussel for their review of his original thesis. He would also like to thank Arnold M. Quittner Esq. for his help on Maruko case. Any questions regarding the article may be directed to Shinichiro Abe at masayosi@mb.kcom.ne.jp. Back To Text

[2] See Minji saisei Ho [Civil Rehabilitation Law] (2000), arts. 21, 25, 33. Back To Text

[3] See HASAN Ho [Bankruptcy Law] (1922), arts. 126(i), 127. Back To Text

[4] See Kaisha Kosei ho [Corporate Reorganization Law] (1952), art. 30(i). Back To Text

[5] See Minji saisei Ho [Civil Rehabilitation Law] (2000), art. 38(i). Back To Text

[6] See id. art. 54(i). Back To Text

[7] See id. art. 54(iii). Back To Text

[8] See id. art. 54(ii). Back To Text

[9] See id. art. 59. Back To Text

[10] See Minji saisei Ho [Civil Rehabilitation Law] (2000), art. 56. Back To Text

[11] See id. art. 188(ii). Back To Text

[12] See id. art. 62(i). Back To Text

[13] See id. art. 21(ii). Back To Text

[14] See id. arts. 59, 63. Back To Text

[15] See Minji saisei Ho [Civil Rehabilitation Law] (2000), art. 64(i), 79(i). Back To Text

[16] See id. art. 118(i). Back To Text

[17] See HASAN HO[Bankruptcy Law] (1922), arts, 72−86; kaisha kosei ho [Corporate Reorganization Law] (1952), arts. 78−92. Back To Text

[18] See Minji saisei Ho [Civil Rehabilitation Law], arts. 127−41. Back To Text

[19] See id. arts. 180(i), (ii). Back To Text

[20] See id. art. 180(iii). Back To Text

[21] See id. art. 32. Back To Text

[22] See id. arts. 154−62. Back To Text

[23] See Minji saisei Ho [Civil Rehabilitation Law], art. 171(iv). Back To Text

[24] See id. art. 172. Back To Text

[25] See id. arts. 27−29. Back To Text

[26] See id. arts. 26, 30, 31. Back To Text

[27] See id. art. 148. Back To Text

[28] See id. art. 42(i). Back To Text

[29] See Minji saisei Ho [Civil Rehabilitation Law] (2000), art. 42(ii); Shoho [Commercial Code], art. 245(ii). Back To Text

[30] See Minji saisei Ho [Civil Rehabilitation Law], arts. 43(ii), (iii). Back To Text

[31] See id. arts. 211−16. Back To Text

[32] See id. arts. 217−20. Back To Text

[33] See id. art. 3. Back To Text

[34] See id, arts. 4,2. Back To Text

[35] See Minji saisei Ho [Civil Rehabilitation Law] (2000), art. 38(i). Back To Text

[36] See id. art. 89. Back To Text

[37] See id. art. 4(ii). Back To Text

[38] See id. art. 207. Back To Text

[39] See id. art. 208. Back To Text

[40] See id. art. 209(i). Back To Text

[41] See Minji saisei Ho [Civil Rehabilitation Law] (2000), art. 210. Back To Text

[42] 11 U.S.C. § 304 (1994). Back To Text

[43] See id. § 101(24) (defining foreign representative as "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding"). Back To Text

[44] See Koreag, Controle et Revision, S.A. v. Refco F/X Assocs. Inc., (In re Koreag, Controle et Revision, S.A.) 961 F.2d 341, 348 (2d Cir. 1992). Back To Text

[45] See Richard A. Gitlin & Ronald J. Silverman, International Insolvency and the Maxwell Communication Corporation Case: One Example of Progress in the 1990's, International Bankruptcies: Developing Practical Strategies 7, 12 (1992). Back To Text

[46] See In re Koreag, Controle et Revision, S.A., 961 F.2d at 348 (stating "[a] bankruptcy court is given broad latitude in fashioning an appropriate remedy in a § 304 proceeding."). Back To Text

[47] See In re Treco, 205 B.R. 358, 364−65 (Bankr. S.D.N.Y. 1997) (declaring common practice pursuant to section 304 allows foreign representatives instituting ancillary proceedings to seek first day orders staying all actions in any United States court). Back To Text

[48] See Melissa S. Rimel, American Reorganization of International Insolvency Proceedings: Deciphering § 304 (c), 9 Bankr. Dev. J. 453, 460 (1992) (discussing policy and legislative considerations behind § 304); see also 2 Collier on Bankruptcy ¶ 304−05 (Lawrence P. King et al. eds., 15th ed. Rev. 2000) (discussing policy and legislative considerations behind section 304). Back To Text

[49] See Maxwell v. Barclays Bank (In re Maxwell), 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (addressing universalism concept). Back To Text

[50] See 124 Cong. Rec. 32, 394 (1978) (discussing original draft containing section 304 (c)). Back To Text

[51] See S.Rep. No. 95−989, 95th Cong., 2d Sess. 35 (1978) (defining international comity principal). Back To Text

[52] See Pub. L. No. 95−598, 1978 U.S.C.C.A.N. (95 Stat.) 6013. Back To Text

[53] See 11 U.S.C. § 304 (1994). Back To Text

[54] Id. Back To Text

[55] Id. Back To Text

[56] Hilton v. Guyot, 159 U.S. 113 (1895). The court in Hilton ultimately denied recognition of a French judgment by considering an additional requirement− reciprocity. The court expressly stated that the United States courts should not give full credit and conclusive effect to foreign judgments rendered in countries which themselves refused to give conclusive effect to similar United States judgments. Back To Text

[57] Id. at 163−64. Back To Text

[58] See New Line Int'l Releasing v. Ivex Films, 140 B.R. 342 (Bankr. S.D.N.Y. 1992). Back To Text

[59] See id. at 342. Back To Text

[60] See id. at 344. The court held that a foreign representative has to show irreparable harm to get injunction. The Hilton Court, however, did not mention about irreparable harm. It would be possible that comity overrides the requirement of irreparable harm and a foreign representative needs only to show injury. Back To Text

[61] 773 F. 2d 452 (2d Cir. 1985). Back To Text

[62] Id. at 458. Back To Text

[63] 961 F.2d 341 (2d Cir. 1992). Back To Text

[64] Id. at 347. Back To Text

[65] Id. at 348. Back To Text

[66] Id. Back To Text

[67] Id. Back To Text

[68] 88 B.R. 597 (Bankr. S.D.N.Y. 1988), aff'd, 115 B.R. 442 (Bankr. S.D.N.Y. 1990). Back To Text

[69] Id. at 608. Back To Text

[70] See Rimel, supra note 47, at 467. Back To Text

[71] 229 B.R. 280 (Bankr. S.D.N.Y. 1999), aff'd, 239 B.R. 36 (Bankr. S.D.N.Y. 1999), vacated by 2001 WL 124938 (C.A.2 (N.Y.), 2001). Back To Text

[72] See 11 U.S.C. § 304 (1994). Back To Text

[73] In re Treco, 229 B.R. at 284. Back To Text

[74] Id. at 284. Back To Text

[75] 208 U.S. 570 (1908). Back To Text

[76] 28 B.R. 165 (Bankr. E.D. Mich. 1983). Back To Text

[77] Id. at 167. Back To Text

[78] 102 B.R. 373 (Bankr. N.J. 1988), appeal dismissed 878 F.2d 111 (3d Cir. 1989). Back To Text

[79] See Rimel, note 47, at 470 (discussing Interpool's non−application of Australian law). Back To Text

[80] 961 F.2d 341 (2d Cir. 1992), cert. denied, 506 U.S. 865 (1992). Back To Text

[81] 240 F.3d 148 (2d Cir. 2001). Back To Text

[82] Id. at 157. Back To Text

[83] 159 U.S. 113, 164 (1895). Back To Text

[84] 961 F.2d 341, 348 (2d Cir. 1992). Back To Text

[85] 225 B.R. 358 (Bankr. S.D.N.Y. 1999); 88 B.R. 597 (Bankr. S.D.N.Y. 1988). Back To Text

[86] In re Toga, 28 B.R. 165 (Bankr. E.D. Mich. 1988). Back To Text

[87] See Rimel, supra note 47, at 464 (analyzing narrow interpretation given to § 304(c) (2)). Back To Text

[88] 11 U.S.C. § 304(c)(1) (1994). Back To Text

[89] Id. Back To Text

[90] Id. Back To Text

[91] 2 Collier On Bankruptcy ¶ 304.08(5) (a), at 304−34, 304−35 (Lawrence P. King et al. eds., 15th ed. Rev. 1997). Back To Text

[92] In re Treco, 22 B.R. 280; In re Toga, 28 B.R. 165. Back To Text

[93] Interpool Ltd., 102 B.R. 373. Back To Text

[94] In re Koreag, 961 F.2d 341. Back To Text

[95] See supra note 47. Back To Text

[96] As for discharge, there is a significant court decision about the U.S. federal tax claims, and it refuses to recognize the effect of a foreign reorganization plan. See Overseas Inns S.A.P.A. v. United States, 911 F.2d 1146, 1149 (5th Cir. 1990). Another case is much the same as partial recognition of a discharge in a reorganization case. See Allstate Ins. Co. v. Hughes, 174 B.R. 884 (S.D.N.Y. 1994). If we have tax treaties with other countries, other considerations should be required. Back To Text

[97] See Rimel, supra note 47, at 480 (introducing balancing approach for courts when faced with section 304 petition). Back To Text

[98] 122 B.R. 621 (Bankr. D.D.C. 1991). Back To Text

[99] See id. at 631. Back To Text

[100] See id. Back To Text

[101] See id. at 634 Back To Text

[102] See Rimel, supra note 47, at 473. Back To Text

[103] 153 F.3d 991 (9th Cir. 1998). Back To Text

[104] See id. at 995. Back To Text

[105] See id. (relying on Envtl. Def. Fund, Inc. v. Massey 986 F.2d 528 (D.C. Cir. 1993) and Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)). Back To Text

[106] In re Maxwell, 93 F.3d 1036 (2nd Cir. 1996). Back To Text

[107] Id. at 1041−42. Back To Text

[108] Unpublished Decision. Back To Text

[109] Unpublished Decision (on File with Author). Back To Text

[110] "Foreign representative" means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding. See 11 U.S.C. § 101(24) (1994). Back To Text

[111] See Lynn M. LoPucki, Cooperation in Interantional Bankruptcy: A Post−Universalist Approach, 84 Cornell L. Rev. 696, 704, 733 (1999) (discussing transfer of portion of estate for distribution). Back To Text

[112] See Ian F. Fletcher, The European Union Convention on Insolvency Proceedings: An Overview and Comment, With U.S. Interest in Mind, 23 Brook. J. Int'l L. 25, 44 (1997) (discussing process of distribution in secondary proceedings). Back To Text

[113] 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994), aff'd, 93 F.3d 1036 (2d Cir. 1996). Back To Text

[114] Jay Lawrence Westbrook, The Lessons of Maxwell Communication, 64 Fordham L. Rev. 2531, 2535 (1996). Back To Text

[115] See id. at 2536. Back To Text

[116] In re Maxwell, 93 F.3d at 1043. Back To Text

[117] See id. at 1047. Back To Text

[118] 159 U.S. at 165 Back To Text

[119] See Arnold M Quittner, Cross−Border Insolvencies−Ancillary and Full Cases: The Concurrent Japanese and United States Cases of Maruko Inc, 4 Int'l Insolvency Rev. 171 (1995). Back To Text

[120] 160B.R. 633 (Bankr. S.D. Cal. 1993). Back To Text

[121] Evan D. Flaschen & Ronald J. Silverman, Cross−Border Insolvency Cooperation Protocols, 33 Texas Int'l L. J. 587, 589 (1998). Back To Text

[122] 11 U.S.C. § 362 (1994). Back To Text

[123] 190 B.R. 763 (Bankr. S.D.N.Y. 1996). Back To Text

[124] See Flaschen, supra note 120, at 599 (stating "[p]erhaps where the relevant for a have common legal traditions, such as those among the Commonwealth countries, Protocols can be more specific and detailed about the substantive rules that will govern the proceedings. Where the relevant fora utilize legal systems that are less common, such as might be the case in multinational proceedings involving both common law and civil law jurisdictions, Protocols may need to focus more on process, serving more as a framework for communication and corporation, and leaving more substantive issues to be addressed in stages or in corollary instrument."). Back To Text

[125] 527 U.S. 308 (1999). Back To Text

[126] In re Maxwell, 93 F.3d 1036, 1047−48 (2d Cir. 1996). Back To Text

[127] See American Law Institute, Transnational Insolvency Project, International Statement of United States Bankruptcy Law at 116 (Tentative Draft, April 15, 1997). Back To Text

[128] See LoPucki, supra note 110, at 748 (supporting Professor Westerbrook's proposal with minor adjustment). Back To Text

[129] See id. at 735 (noting delay problem in secondary bankruptcy). Back To Text

[130] See, e.g., Rimel, supra note 47, at 477 (discussing disadvantages of territoriality approach including, inter alia, non−recognition of foreign proceeding in American courts). Back To Text

[131] 11 U.S.C. § 304(c) (1994). Back To Text

[132] See LoPucki, supra note 110, at 729 (discussing effect of favoring Universal approach). Back To Text

[133] [Former Civil Rehabilitation Law], art. 3(1). Back To Text

[134] See id. art. 2. Back To Text

[135] [Former Corporate Reorganization Law], art. 4(1). Back To Text

[136] See id. art. 4(2). Back To Text

[137] Minji Saisei Ho [Civil Rehabilitation Law] (2000), art. 38. Back To Text

[138] See id. art. 4(1). Back To Text

[139] See LRAF (2001), art. 17. Back To Text

[140] See id. art. 22. Back To Text

[141] See id. arts. 25−28, 32, 51. Back To Text

[142] See id. art. 31. Back To Text

[143] See id. art. 35. Back To Text

[144] See id. arts. 57−60. Back To Text

[145] See Elizabeth Warren, Bankruptcy Policymaking In an Imperfect World, 92 Mich. L. Rev. 336, 378 (1993). Back To Text