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Proposal for Reform of Choice of Avoidance Law in the Context of International Bankruptcies from a U.S. Perspective

David Costa Levenson [1]

Introduction

The field of international insolvency, also referred to as cross−border insolvency or transnational insolvency, has only recently been experiencing a sudden burst of interest from academics, [2] from international organizations, [3] and from legislatures across the world. [4] This increasing interest in international insolvency has been due, in part, to the expansion of multinational enterprises and the consequent increase in the bankruptcies of enterprises such as BCCI, Maxwell, and Olympia & York. [5] Often, the assets of these multinational corporations will be spread out over several different countries, each with their own separate insolvency policies and laws, thus creating a potential conflict in which forum(s) to administer the bankruptcy proceeding(s) and which law(s) to apply to the proceeding(s). In essence, the current debate in international insolvency can be distilled to a choice−of−law problem: How to choose the law applicable to an international insolvency proceeding, or to a certain aspect of that proceeding.

This issue is critical, as it will frequently determine important consequences in the proceeding such as whether a reorganization or a liquidation will occur, what distribution and priority scheme will apply, and, for the purpose of discussion in this paper, what avoidance law will apply to the pre−bankruptcy transfers.

The current movement for reform in international insolvency has centered around the debate between the opposing theories of universality and territoriality. Universality promotes the centralized administration of a debtor's assets in one main proceeding, preferably under that main forum's laws. [6] Ideally, under universality, the assets of the debtor are transferred to the main proceeding to be ranked and distributed under that forum's laws. [7] Universality thus favors a system in which courts will cooperate to maximize the assets of the debtor and formulate one coherent objective for the debtor, whether it be reorganization or liquidation in a single forum. Territoriality, on the other hand, favors the simultaneous administration of a debtor's assets in each forum in which the debtor has assets, according to each forum's laws, irrespective of any cooperation between courts. [8] Under territoriality, courts will administer and distribute the assets of the debtor located in their jurisdiction and will often not cooperate with other courts in this distribution. The problem with this approach is that it will be very difficult to successfully reorganize a debtor or sell a business for its higher "going concern value" when the debtor's assets are spread over a few countries. [9] Thus, most courts will simply liquidate the assets piecemeal, and creditors, as a collective unit, will receive less than if there had been cooperation between courts and one main proceeding had administered all the debtor's assets. This theory is also known as the "grab rule" and represents the status of international insolvency in a majority of countries. [10]

Although the concepts of territoriality and universality focus on which jurisdiction will administer the bankruptcy proceeding, there is an implicit assumption that the choice of forum will affect the choice of law as well. [11] An example will serve to clarify this point. Consider the situation where local U.S. creditors of a foreign debtor attach certain assets of the debtor located in the U.S. while a foreign insolvency proceeding of the debtor is pending. The foreign debtor will bring an action under section 304 (ancillary proceeding) and 305 seeking to dismiss the attachments and transfer the assets to the foreign proceeding. If the U.S. court chooses to void the attachments and transfer the assets pursuant to sections 304 and 305, the court will in fact not only decide that the foreign court is the best forum to conduct the entire bankruptcy proceeding and that the creditors should submit their claims to the foreign

court, but that the foreign court's laws will also determine the essential aspects of the bankruptcy, such as the ranking of the creditors, their distributions and other similar considerations. As one scholar has observed, no court will conduct bankruptcy proceedings pursuant to the bankruptcy laws of another jurisdiction. [12] With this consideration in mind, the theories of territoriality and universality are simply choice−of−law principles in which universality favors the law of the main forum and territoriality favors the law of the local attaching court.

Although universality and territoriality represent the extremes in choice−of−law approaches, there are other intermediate approaches such as modified universality, secondary bankruptcy system, "cooperative territoriality" and contractualism.

Modified universality represents the system adopted by the U.S. Bankruptcy Code under sections 304, 305 and 306. [13] Under the aforementioned sections, a U.S. court will allow a "duly appointed" foreign representative to commence an ancillary proceeding in the U.S. for a limited purpose in order to assist a pending foreign insolvency proceeding. [14] Typically, the foreign representative will seek to enjoin U.S. creditors from attaching the debtor's assets located in the U.S. and a transfer of such assets to the foreign proceeding. Generally, the law of the main forum will apply to avoidance laws, distributions and priority schemes. [15] This system is a modified version of universality because the court will not automatically grant the foreign representative relief, but instead it will have discretion to do so only after weighing and considering various factors such as protection of local creditors, equality of distribution to all creditors, comity and other similar considerations, according to the guidelines set in section 304(c). [16]

The secondary bankruptcy system is similar to modified universality. The only difference is that instead of the local court deferring to the foreign court's bankruptcy law, the local court will generally apply its own law to the collection and distribution of the debtor's assets located in its jurisdiction. [17] This system is also known as "modified territoriality."

The "cooperative territoriality" approach, espoused by Professor Lynn LoPucki, represents the current status of international insolvency. [18] Under cooperative territoriality, the foreign representatives of each proceeding have the option of entering into agreements (protocols) that regulate certain aspects of the bankruptcy proceedings in each court in order to maximize the asset distribution to creditors and assure equality of distribution. [19] This system is an "ad hoc," extra−regulatory approach that is currently gaining favor amid judges and international insolvency practitioners due to the inadequacies of the present systems. [20]

The fourth approach, contractualism, espoused by Professor Robert Rasmussen, proposes that the debtor choose which country's bankruptcy law will apply as a contractual matter. [21]

The goal of all these systems is to find the most efficient and fairest choice−of−law process. The "optimal" choice−of−law system is the one that is most predictable, least costly (in terms of litigation and administrative costs), least amenable to "forum shopping," and ultimately the fairest in terms of the expectations of the parties and the location of the assets. [22] Unfortunately, these attributes often conflict. For example, a system that adopts a rule that the laws of the debtor's country of incorporation will apply to all the ancillary proceedings in other jurisdictions will be predictable but will also be amenable to "forum shopping" as the debtor will seek to incorporate its business in countries that have "debtor−friendly" bankruptcy laws (pro−debtor). [23] In addition, the application of this rigid rule will not always be fair because, in some cases, the debtor might not have any substantial assets in its country of incorporation. [24] Thus, one attribute is promoted at the expense of another attribute. Consequently, an equilibrium of sorts must be reached which compromises each attribute to a certain extent in order to collectively strengthen all attributes and reach an optimal choice of law system.

Currently, the U.S. legislature is considering adopting a new chapter 15 to the U.S. Bankruptcy Code which would modify the existing international bankruptcy provisions in the Code, namely, sections 303(b)(4), 304, and 305, and would have an impact on choice of avoidance law. [25]

This paper will attempt to determine whether the choice of avoidance law provisions in the proposed chapter 15, under Article 23, will promote a more "efficient" choice of law system, according to the listed attributes in the above "optimal" system or whether, instead, the U.S. should modify the choice of avoidance law provisions of Article 23.

This paper will propose that Article 23 be modified to incorporate a new subsection that a presumption will arise in favor of applying the law of the foreign debtor's "home country" to any ancillary proceeding. This presumption will be rebuttable if the objecting creditor shows, by a preponderance of the evidence, that the law of the local court's nation (where the ancillary proceeding is pending) would have a result different from that of the "home country" and that this local law would be applicable in the particular circumstances based on a set of factors enumerated in Judge Brozman's analysis in the *Maxwell* case. A presumption will arise that the "home country" is the place of incorporation of the debtor. This presumption would be rebuttable by showing that the "center of main interests" of the debtor is different from its place of incorporation. [26]

In addition, this paper will propose that a clear and coherent choice of law provision be added to chapter 5, dealing with concurrent proceedings, based on a list of factors enumerated in Judge Brozman's analysis in the recent *Maxwell* case. [27] This would have the effect of codifying the *Maxwell* decision and preventing future courts from deviating from this effective approach to determining choice of avoidance law in the context of two concurrent proceedings. [28]

Finally, this paper will propose that a foreign representative, under section 303(b)(4), will only be able to commence a full U.S. bankruptcy proceeding if certain minimum assets are present in the U.S. territory. This recommendation will not only complement the second proposal above, but will also safeguard the use of avoidance powers and the automatic stay, as well as other provisions normally available under a full proceeding, only to foreign debtors who deserve such protection based on the presence of substantial assets in U.S. territory. [29]

This paper will examine the evolution of choice of law issues in international insolvency, with particular emphasis on choice of avoidance law, from a U.S. perspective from the early days prior to the Bankruptcy Reform Act of 1978, to an analysis of the potential impact of adoption of chapter 15 into the Bankruptcy Code.

Choice of avoidance law has played a particularly important role in many international insolvency proceedings and is a major factor in strategic considerations for insolvency practitioners. [30] Although most scholars have focused on the broad topics in international insolvency, such as the study of ancillary proceedings or the economic benefits of universality, comparatively little has been written on choice of avoidance law. [31] This is mainly due to the primitive and nascent state of the international insolvency framework. [32] However, choice of avoidance law presents certain inherent legal difficulties and issues not present in the broader context of international insolvency that could shed some light on ways to improve the current U.S. treatment of international insolvencies.

Part I of this paper will discuss the traditional, pre−1978 Reform Act, comity analysis used by courts in considering international insolvencies. Part II(A), (B) and (C) will examine the functions of sections 303(b)(4), 304 and 305 in the context of the legislative history and case law interpretation of these sections, with a focus on the development of choice of avoidance law analysis. In part III, the focus of the paper will shift to a discussion of the general characteristics, including choice of avoidance law, of the proposed chapter 15 to the U.S. Bankruptcy Code as well as a brief outline of other conventions and model laws and their approach to choice of avoidance law.

Part IV will examine these choice−of−avoidance law rules from the viewpoint of

the universality and territoriality theories in order to determine which rule is "optimal." The conclusion will propose certain modifications to the currently pending chapter 15 addition to the U.S. Bankruptcy Code.

I. Pre−Reform Act of 1978 Comity Analysis of International Insolvencies

As alluded to earlier in the introduction, choice of law and choice of forum, at least in the context of international insolvencies, are interchangeable concepts, as the determination of which forum should administer a proceeding will inextricably involve a determination of which law will apply to that proceeding. [33] The current debate over how to administer the assets of a multinational enterprise between proponents of different systems ranging from universality to territoriality is essentially a debate over which choice of forum/choice of law system is the fairest and the most efficient. In order to understand the current debate and the prevailing system of modified universality, codified in sections 303 to 305 of the U.S. Bankruptcy Code, one has to look to the origins of universality: comity.

The concept of comity, from a U.S. perspective, was defined in the landmark case of *Hilton v. Guyot*, a U.S. Supreme Court case decided in 1895. [34] There, the liquidator of a French firm sued two U.S. citizens to enforce a judgment issued by a French court for the debts owed to the firm. The court began its analysis by observing the international legal principle that "no law has any effect" beyond the jurisdiction from which its authority is derived. [35] However, the court noted that it could recognize legislative, executive or judicial acts of another nation under the concept of comity. It went on to define comity:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. [36]

Despite claims by the U.S. defendants that the foreign judgments should not be enforced due to conflicts between U.S. and foreign procedures, the court chose to ground its decision not to extend comity on the lack of French reciprocity to U.S. judgments. [37]

The classic definition of comity, articulated by the U.S. Supreme Court in *Hilton v. Guyot*, to this day remains the overarching concept employed by courts in determining whether to recognize a foreign proceeding or judgment, even in the context of international insolvencies. [38] Comity, however, can alternatively be defined as a U.S. court's decision to limit the effect of its laws upon the jurisdiction and sovereignty of another State. This alternative definition of comity, also known as the "presumption against territoriality" doctrine has recently played an important role in U.S. courts' approach to determining which avoidance law to apply to transfers. [39] Irrespective of which definition of comity is used, the effect is the same: determining which forum and, consequently, which law will apply to a particular proceeding or issue.

Prior to the emergence of sections 303(b)(4), 304 and 305 under the 1978 Bankruptcy Reform Act, U.S. courts employed essentially a territorial approach. [40] It was only later, in the 1970's and especially just prior to the 1978 Bankruptcy Act, with the landmark *Herstatt* case, that courts began to earnestly adopt a universality approach and defer more readily to foreign proceedings. [41] In the early case of *Harrison v. Sterry*, the U.S. Supreme Court held that "the bankruptcy law of a foreign country is incapable of operating a legal transfer of property in the United States." [42] The U.S. Supreme Court case of *Disconto Gesellschaft v. Umbreit* is an example of this highly territorial approach. [43] The *Disconto* case clearly demonstrates the primary concern of U.S. courts at the time: protection of local creditors, even at the cost of promoting cooperation among courts. [44] Interestingly, had the German trustee begun a plenary bankruptcy proceeding in the U.S., the amount would have been garnished. [45]

Although the universality−based comity approach in an international insolvency setting would not be used with any frequency by U.S. courts until the 1970's, the universalist principle was first espoused by a U.S. Court in the early U.S. Supreme Court case of *Canada Southern Railway Co. v. Gebhard*. [46] The *Gebhard* case represents a milestone in the U.S. courts' approach to foreign insolvency proceedings and to this day, is still cited by courts in determining whether a U.S. creditor could have reasonably expected to litigate his claim in a foreign forum, subject to foreign law, in the event of the foreign debtor's insolvency, at the time he dealt with the debtor. [47]

Although the *Gebhard* case provided a first stepping stone to the adoption of a universality approach for later decisions, it would take approximately one century for the change from a territoriality−based approach to universality−based approach to occur. In the early 1970's, courts began to apply a more universality−based comity approach to deferring to foreign courts and proceedings. [48]

In 1974, the financial collapse of three large foreign banks−Bankhaus I.D. Herstatt K.G.a.A. (Herstatt), Israel−British Bank (London) Ltd. (IBB), and Banque de Financement, S.A. (Finabank)−precipitated several U.S. bankruptcy filings. [49] Both the *Finabank* and *IBB* courts adopted a pro−universality approach in dealing with foreign insolvencies and, pursuant to section 2(a)(22) and Bankruptcy Rule 119, permitted the foreign trustees the option of commencing either a plenary proceeding or an "ancillary" proceeding. [50] Interestingly, in both *Finabank* and *IBB*, the courts expressly stated that a foreign representative could commence a chapter 11 case in order to avoid U.S. preferential attachments. [51] Both courts did not discuss whether U.S. or foreign avoidance law could be used, but simply assumed

that U.S. avoidance law applied. [52]

Unlike the reasoning adopted by courts following the 1978 Bankruptcy Reform Act, the *Finabank* and *IBB* courts did not focus on the differences between "ancillary" and "full" proceedings, and whether the U.S. Bankruptcy Code could be used by the foreign debtor to avoid transfers. [53] Both ancillary and plenary proceedings were treated equivalently: to permit the foreign debtor to avoid preferential attachments in the U.S. under U.S. preference law and recover the assets to be transferred abroad. [54]

Both the *Finabank* and the *IBB* decisions based their holdings on three key concepts that would play an important part in subsequent U.S. transnational insolvency decisions. First, the courts stressed the principle of equality of distribution. By voiding the preferences of fast−moving U.S. local creditors, the courts were in effect protecting both U.S. and foreign unsecured creditors. [55] Second, the principle of international cooperation among bankruptcy courts would be advanced by the recovery of U.S. assets and their transfer abroad. [56] Third, the courts noted that allowing the foreign court to control the administration and distribution of the assets to creditors worldwide would promote economy and efficiency of administration because it would avoid the need of two proceedings that would potentially engender conflicting decisions and also greatly increase the legal and administrative costs to the parties. [57] Flexibility in formulating decisions in the area of transnational insolvency was also considered important. Despite these significant advances in the area of international insolvency, the courts did not address whether use of U.S. avoidance laws was proper under the circumstances.

The use of the U.S. Bankruptcy Code for the sole purpose of voiding preferences in the U.S. presents potential difficulties such as "forum shopping" and, as we will see in Part II(C) and Part III, "section shopping" by foreign debtors. [58] These difficulties were probably not contemplated by the courts in *Finabank* and *IBB*, whose main goal was to promote some form of coordination with foreign courts in order to efficiently administer foreign debtors' assets. Although I will briefly touch on these issues here, they will be raised again in more detail later in this paper in Parts II and III.

First, it is arguably unfair to allow a foreign debtor to have access to U.S. judicial resources as well as access to the full panoply of U.S. law, including avoidance law, based on little or no connection to the U.S. [59] Arguably, access to the limited ancillary proceeding would be fair on a minimal showing of assets in the U.S., but this reasoning might not apply with the same force to access to a full proceeding. Second, a certain amount of choice of law analysis should be employed by courts in deciding whether to employ U.S. avoidance law or allow the foreign avoidance law to be used, both in an ancillary proceeding and in a full, concurrent proceeding. [60] Third, courts should accord different treatment to ancillary proceedings and to full, concurrent proceedings and should not equate these two types of proceedings. [61]

Despite not having raised these issues, the *Finabank* and *IBB* cases ushered a more universality−oriented approach to foreign insolvencies and prodded Congress to enact provisions which would enable foreign representatives to request assistance from U.S. courts in recovering and administering the foreign debtor's U.S. assets and facilitate international cooperation. We will now turn to an analysis of the development of choice of avoidance law in the context of these sections of the U.S. Bankruptcy Code.

II. Development of choice of avoidance law in the context of sections 303(b)(4), 304 and 305 of the 1978 U.S. Bankruptcy Code

In 1978, Congress revised the Bankruptcy Act of 1898. Encouraged by the flexible and pro−universality approaches adopted by the *Finabank* and *IBB* courts, Congress decided to provide a more comprehensive framework for dealing with foreign insolvencies under the U.S. Bankruptcy Code and enacted sections 304, 303(b)(4), 305 and 306. [62]

A. General description of sections 303, 304, 305, 306.

Section 304 generally permits a foreign representative to begin an "ancillary" case in the U.S. to assist a pending foreign proceeding. [63] The court must first decide whether to recognize the foreign proceeding, and second, must determine what relief it should give to the foreign representative. Typically, the court will allow a limited stay from collection efforts of U.S. creditors or will vacate attachments, and will permit the foreign representative to recover

assets through avoidance provisions, generally foreign avoidance provisions. [64]

The court will then transfer the assets to the foreign proceeding and dismiss the ancillary proceeding under section 305. Section 304 thus represents a limited proceeding to prevent dismemberment of U.S. assets and an "economic and expeditious" alternative to filing a full proceeding under chapter 7, 11 or section 303(b)(4) of the Code. [65]

Section 303(b)(4) permits a foreign representative of the foreign debtor's estate to file an involuntary full proceeding against the foreign debtor. [66] Alternatively the foreign debtor can file a full voluntary proceeding under chapter 7, 11, or an involuntary case can be commenced by its creditors in the U.S. In general, a full proceeding has the advantage of permitting use of the automatic stay and the Code's avoidance powers, whereas under section 304, the foreign representative is only allowed a limited stay, at the discretion of the court, and can only apply foreign avoidance powers. [67] However, the full proceeding is more costly and time−consuming.

Section 305 permits a U.S. court, in its discretion, to abstain, suspend or dismiss an ancillary proceeding commenced in the U.S. when a foreign proceeding is pending. Interestingly, the decision by the bankruptcy court is not reviewable on appeal.

Section 306 directly addresses the *Herstatt* affair, and provides that a foreign representative is allowed to make a limited appearance in the U.S. court and is not subject to the jurisdiction of the court for any matter not related to the foreign proceeding. This encourages foreign representatives to appear in the U.S. court.

Although Congress provided some basic guidelines for dealing with international insolvencies by allowing foreign debtors to file ancillary proceedings or full proceedings in the U.S., nonetheless certain problems have arisen which were unforeseen at the time of drafting.

First, courts have interpreted section 304's list of guidelines in determining whether to grant relief in different ways, some emphasizing a more territorialist approach and thus placing more emphasis on each individual factor of the list, and other courts have adopted a more universalist approach, placing greater emphasis on the comity factor. [68] The general trend, however, has been towards a more universalist interpretation and thus greater deference to foreign proceedings.

Second, gaps in the operation of the international statutes have arisen. The international statutes are devoid of any guidance as to what country's avoidance law should be used by the local courts in recovering assets for the estate. Unfortunately, when Congress envisioned how the Code should deal with international insolvencies, it did not focus on choice of law, and specifically choice of avoidance law and its important role in international insolvencies. [69] Sections 304, 305, and 303(b)(4) were principally directed at giving some guidelines for courts in considering whether to defer to foreign proceedings. Although Congress expressly intended that foreign representatives be permitted to recover U.S. assets through the use of avoidance powers and that preferential and fraudulent dispositions of property should be voided, as 304(c)(3) clearly mentions, it did not state whether the U.S. avoidance powers or the foreign avoidance powers should be used. In addition, Congress did not provide any choice of law provision in section 304 or any other section dealing with international insolvency in the Code. In addition, even in the context of concurrent proceedings under either involuntary (303(b)(4)) or voluntary proceedings (two full proceedings), courts have disagreed on whether U.S. or foreign law should apply to void preferential or fraudulent transfers (footnote, quick mention of *Maxwell* and *Axona*). Consequently, the international statutes have been a source of frustration and confusion to international insolvency practitioners. [70] The following discussion will first briefly outline courts' treatment of section 304, including the ambiguities of the statutory language. Second, I will discuss, in greater depth, the interplay between the international statutes in the context of choice of avoidance law.

B. Conflicting Interpretations of Section 304 and the Role of Comity

Although not directly bearing on choice of avoidance law issues and the interplay of sections 303(b)(4), 304 and 305, I will provide a brief analysis of courts' varying interpretations of section 304 for two reasons. First, the courts' interpretation of comity, under section 304(c), can be contrasted to the comity interpretation and the "presumption against extraterritoriality" doctrine used by the *Maxwell* court in determining whether to apply U.S. or English

avoidance law. Second, I will examine court's application of the 304(c) factors, especially 304(c)(3), in order to shed light on the choice of avoidance law issue.

As mentioned previously, in deciding whether to defer to a foreign proceeding under section 304, U.S. courts are implicitly choosing which law should apply to the distribution and administration of the assets located in U.S. territory. [71] Thus, one can read the 304(c) factors as simply factors used by courts in determining which law should apply to the administration of the assets. Unfortunately, as the split of case law demonstrates, courts have not adopted a uniform interpretation of these factors. [72]

The principal reason courts have adopted different interpretations stems from the two competing policies underlying section 304: (1) assuring some minimum protection for U.S. creditors and (2) encouraging courts to defer to foreign proceedings. [73] Although Congress hoped to encourage the "most economical and expeditious" administration of a foreign debtor's assets by permitting ancillary proceedings, it nonetheless strove to safeguard U.S. creditors from "inconvenience and prejudice" of litigating their claims abroad, under foreign law. [74] The conflicting policies have contributed to the split in case law and different interpretations of comity.

The majority of courts have adopted a pro−universality approach to interpreting section 304 and considered comity to be the preeminent factor in section 304(c). Courts have given two justifications: (1) the statute's foremost goal is to provide an "economical and expeditious" administration of the estate and the best way to accomplish this is by deferring to a foreign proceeding [75] and (2) any individual who does business with a foreign entity impliedly subjects himself to foreign law. [76] .

The landmark universality−based section 304 proceeding was *Culmer*. There, the foreign debtor (BAOL), a Bahamas corporation, petitioned for voluntary liquidation in Bahamian court. It then sought a 304 petition in a U.S. court, requesting that its U.S. assets be transferred to the Bahamas court. The U.S. court ultimately granted the relief. In its decision, the *Culmer* court essentially adopted a test that would presumptively extend comity, unless to do so would be "wicked, immoral or violate American law and public policy." [77] Of particular importance, the *Culmer* court incorporated a presumption of extending comity. Arguably this presumption influenced other courts, to some extent, to adopt foreign choice of avoidance law in ancillary proceedings. [78] The *Culmer* analysis focused on two issues. First, whether deferring to the foreign proceeding would best assure an "economical and expeditious administration of such estate." Among the factors considered was the fact that the debtor's records, preliquidation employees and Bahamian liquidators and staff were in the Bahamas. Second, the court compared Bahamian insolvency law to U.S. law in order to ensure that the "U.S law and public policy" was adhered to. [79] This second factor was the principal focus of the court and is often the crucial determinant in whether a U.S. court will defer to a foreign proceeding. Unfortunately, courts have not agreed which fundamental protections a U.S. creditor should be entitled to, and the related issue of how "substantially similar" a foreign law must be to U.S. law to receive deference.

The *Culmer* decision highlights additional ambiguous interpretations to which section 304 is amenable to. In *Culmer*, the court found that ruling in favor of the objecting creditors would have essentially granted them a preference under both Bahamian and U.S. law, thus violating section 304(c)(3) which states that preferential and fraudulent conveyances should be prevented. [80] Under this reasoning, the U.S. creditors would have received a windfall because their attachments would not have been void, and they would have received more than if they had submitted their claims in the Bahamian court. Section 304(c)(3) can also be interpreted in different fashion.

Courts may interpret it by comparing the foreign avoidance law to the U.S. avoidance law. Generally foreign law will provide more stringent requirements to avoid a transaction than U.S. law. [81] Thus, a U.S. court may not defer because the creditors would not be adequately protected under foreign avoidance law. This reasoning reflects the underlying goal of avoidance laws: ensure equal distribution of the debtor's assets to all creditors. Again, as discussed in the previous paragraph, the crucial issue of the degree of similarity between the foreign and the U.S. legal systems will arise. [82] A universality approach would grant the deference provided the foreign avoidance law existed, as it "does not have to be a carbon copy" of U.S. law. [83] However a territorialist approach would probably only grant the relief if the foreign law had nearly identical provisions. Not only is the interpretation of the entire statute subject to an open−endedness and unpredictability, but so are the very factors that constitute the statute. In light of these findings, we turn to the second section 304 landmark case using a pro−universality approach*: Cunard Steamship Company*

Limited v. Salen Reefer Services AB. [84]

In *Cunard, Salen*, a Swedish corporation, commenced a bankruptcy proceeding in Sweden. Under Swedish law, actions against the debtor were stayed and an administrator was appointed. Subsequently, *Cunard*, a British creditor, obtained attachment on debtor's assets in the U.S. The debtor moved to vacate the attachments. Interestingly, the debtor had not filed a 304 petition, yet the court vacated the attachments and transferred the assets to be administered under the foreign proceeding. The court, under Judge Re, denied the creditor's argument that section 304 was intended to be a foreign debtor's exclusive remedy. Instead, the court applied the principle of comity and analyzed the 304(c) factors. It followed the same line of reasoning as the *Culmer* court, noting that creditors of an insolvent foreign corporation may be required to assert their claims in a foreign tribunal, under foreign law. [85] The court went one step further than *Culmer* by applying the same rationale outside the scope of section 304 petition and observed that the granting of comity enables the assets of the debtor to be "dispersed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." [86] This application of comity outside of the confines of section 304 contributes to international cooperation among courts in administering international insolvencies. [87]

Both the *Culmer* and *Cunard* courts helped establish an interpretation of section 304 which looked to whether the foreign country's laws adhered to fundamental notions of fairness and due process and did not violate American public policy. This test is subjective and has to be applied on a case−by−case basis, thus lending itself to criticisms as being unpredictable, vague and open−ended. Nonetheless, the majority of courts have followed this pro−universality approach. [88] On the other end of the spectrum, some courts have opted for a different interpretation of section 304.

Some courts have refused to give a preeminent role to comity and have instead looked at all the factors of section 304(c) equally in their determination of whether to grant relief. [89] These cases generally have adopted a pro−territoriality outlook and focus on protecting U.S. creditors to the detriment of promoting international cooperation.

The classic pro−territoriality approach is exemplified in the *Toga* case. [90] In *Toga*, a Canadian trustee brought an ancillary petition to enjoin commencement or continuation of actions against it in the U.S. as well as the turnover of certain assets that had been awarded the creditor in an arbitration proceeding against the debtor. The court recognized that although the creditor would not be greatly inconvenienced by being forced to litigate its claim in Canadian court, thus satisfying section 304(c)(2) factor, it would nonetheless not be treated as a secured creditor but rather as an ordinary creditor under Canadian law. The court found that this different treatment would violate section 304(c)(4). [91] Consequently, the court did not grant the 304 petition. Although this decision has been often criticized, it nonetheless demonstrates the ambiguous interpretation to which section 304 is amenable to. The case of *In re Lineas Aereas de Nicaragua* (*Lineas*) shows that, even in granting relief, the court, although recognizing a 304 petition, may nonetheless defeat the purpose of section 304.

In *Lineas*, the foreign trustee of Nicaraguan debtor filed 304 petition seeking turnover of all property located in the U.S. The creditor moved for an appointment of an independent U.S. trustee to determine whether any value could be obtained from the debtor's sole asset in the U.S., a certificate from the Civil Aeronautics Board to operate in the U.S. The court engaged in delicate balancing act, and although it did grant the debtor's 304 petition, it also appointed an independent trustee, under section 304(b)(3) "other appropriate relief". The court conditioned turnover request to the Nicaraguan trustee provided that the U.S. asset would be used primarily to satisfy U.S. creditors and further prohibiting encumbering, assigning or abandoning the asset. [92] Of particular note was that the court wished to avoid forcing U.S. creditors to look to Nicaragua for payment, if possible, under section 304(c)(2). This was the only factor looked by the court. This case demonstrates that although a court may grant a 304 petition, it may defeat the universality aspect of the statute by molding relief in "blank check" fashion, under section 304(b)(3) which would protect U.S. creditors at the expense of the principle of "equal distribution of assets to all creditors." This presents another example of potential ambiguity in the statutory language.

From the foregoing analysis of the different interpretations which can be gleaned from section 304, it can be concluded that the statute is open to ambiguity and unpredictability. These are weaknesses of the current legal framework because the ambiguity will invite excessive and unnecessary litigation. [93] The result will be that foreign representatives will use section 303(b)(4) or simply file full, voluntary proceedings under chapter 7 or 11 when such

proceedings will not be necessary. This, in turn, will result in dismissal of proceedings and waste of judicial resources. The solution would be to provide more specific rules for courts to follow in determining whether to defer to a foreign proceeding and ultimately to determine what law should apply to the administration of the U.S. based assets. In addition, proper guidance should be given as to what role comity should play.

Solutions have been proposed by several commentators. They will be discussed later, in the context of the other sections dealing with international insolvency (303, 304 and 305). On a final note, although the interpretations of section 304 have led to confusion, courts have provided an initial legal framework for addressing choice of law considerations in the context of international insolvencies. This framework and its attendant faults will be useful in understanding choice of avoidance law and the interplay of sections 303, 304 and 305.

C. Interplay between sections 304, 303, 305 and Choice of Avoidance Law

1. Introduction

Armed with an understanding of how courts determine choice of law/choice of forum under section 304 and a sketch of the history of international insolvency law, we can explore the relationship between the options available to foreign debtors under U.S. bankruptcy law and the important role of choice of avoidance law in that relationship.

As described in chapter II (A), the foreign representative has two principal options available for protecting assets from dismemberment by local attaching creditors and gathering the assets located in the U.S. First, the representative can file a petition under section 303(b)(4) (involuntary case) to commence a full bankruptcy case under chapter 7 or chapter 11 against the foreign debtor. Second, the representative can file a petition under section 304 to commence a case ancillary to the foreign proceeding. In addition to these options, the foreign representative may have access to non−insolvency remedies to protect and gather the U.S. based assets. This option is risky and unpredictable however. Although one court decided to extend comity to a foreign proceeding and vacate the attachments even though a 304 proceeding had not been filed, another court has required the filing of a 304 proceeding to vacate the attachments. [94] Although a foreign representative is limited to the above options, a foreign debtor can also file a full bankruptcy case under chapter 7 or chapter 11 provided it has residence, domicile or assets located in the U.S. [95]

Under section 303(b)(4), the foreign representative can commence a full case under the U.S. Bankruptcy Code in order to administer assets in the U.S. In order to be eligible for such a case, the debtor must have residence, domicile or property in the U.S. The involuntary case is treated like any other case under chapter 7 or chapter 11. Under chapter 7, a trustee is appointed to administer the estate. This appointment can result in the representative's loss of control over the debtor's U.S. assets but the possibility of cooperation could mitigate this problem. This full case is often used when the debtor has a substantial portion of its total assets located in the U.S. [96] In contrast, an ancillary proceeding has a different purpose. The ancillary proceeding is primarily used to assist a foreign main proceeding and limits the foreign representative to certain, enumerated relief: (1) enjoin commencement, continuation of any legal action taken against the debtor or debtor's property; (2) turnover of such property to the foreign representative and (3) other relief. Although the ancillary proceeding is limited in scope, the relief given by courts can be extensive.

In addition to the above distinctions, a full bankruptcy case is often more expensive and more time−consuming than ancillary proceedings filed under section 304. A full bankruptcy case, however, presents two principal advantages. First, the foreign representative has access to the automatic stay under section 362(a) of the Bankruptcy Code. This stay extends to all property of the debtor located in the U.S. [97] In contrast, under an ancillary proceeding, the representative has to request the court to enjoin actions against the debtor's property in the U.S. and the relief is dependent upon the court's discretion. Furthermore, the representative may have to commence section 304 proceedings in each district in which debtor's assets are located, a very burdensome process. [98] Second, under a full case, the representative has access to U.S. avoidance law, which is broader and has less stringent requirements for successful avoidance of a transaction than foreign avoidance law. [99] This access to U.S. avoidance can frequently be a major criterion in a foreign representative's decision of whether to file a full case under 303(b)(4) or an ancillary proceeding under 304. [100] Indeed, under ancillary proceedings, courts have found that the foreign representative is limited to using foreign avoidance law. [101] Thus, assuming that the costs associated with recovering the U.S. assets are less than the benefits derived from recovering the assets, then the foreign representative will typically commence a

full case rather than an ancillary proceeding. [102] This might occur, even if the sole purpose of commencing a full case was to use U.S. avoidance powers.

Thus, a foreign representative with some assets might begin a full bankruptcy case, take advantage of U.S. avoidance law which would not be available in an ancillary proceeding, and transfer the assets back to a concurrent foreign proceeding which was already pending. [103] The problem with such a strategy is that the foreign debtor could possibly apply U.S. avoidance law to transactions which might have had very little contact with the U.S. [104] The problem is exacerbated by the lack of any minimum eligibility requirements under the U.S. Bankruptcy Code for the debtor to commence a full case, as opposed to an ancillary proceeding. [105] Further, under section 305, the representative can make a motion for the court to dismiss the full bankruptcy case and allow the assets recovered in the U.S. under U.S. avoidance law to be transferred to the foreign proceeding. The issue is whether the Code permits a 305 dismissal under a full case or whether a dismissal under 305 only applies to a proceeding commenced under 304. These and other issues present a dilemma to courts of how to successfully coordinate the applications of sections 303, 304 and 305 in order to arrive at the fairest and most predictable choice of avoidance law to international insolvencies.

Unfortunately, the drafters of sections 304, 303(b)(4) and 305 apparently did not contemplate whether the foreign representative should have access to either U.S. or foreign avoidance laws. [106] This lack of clear statutory guidance on choice of avoidance law is present both in ancillary proceedings under section 304 and in concurrent bankruptcy cases. [107] Due to the substantial amount of voidable assets at stake in most large transnational insolvency cases, this issue has instigated considerable litigation in U.S. courts. [108]

The following discussion will study the positions that courts have taken with regard to choice of avoidance law in both ancillary proceedings and full, concurrent bankruptcy cases.

2. Choice of Avoidance Law and Ancillary Proceedings

On July 24, 1984, the managing director of Uni−Petrol Gesellschaft ("Uni−Petrol"), Mr. Georg Wolfgram, applied for the institution of bankruptcy proceedings of Uni−Petrol. [109] The court appointed as trustee in bankruptcy Mr. Metzeler. [110] Prior to July 1984, Uni−Petrol was engaged in the oil products business and had no place of business or any tangible assets in the U.S. [111] Apparently Uni−Petrol conducted business in the U.S. through an intermediary, Triad Petroleum ("Triad"). [112] Triad had hired Bouchard to provide services related to transport and off−loading of oil in New York. [113] Uni−Petrol made payments directly to Bouchard and deposited these sums in Bouchard's New York bank account. Prior to the declaration of bankruptcy, Uni−Petrol had made three payments by wire−transfer to Bouchard's New York bank account. [114] Subsequently, Metzeler commenced a 304 petition in U.S. Bankruptcy Court seeking to avoid these payments as preferences and fraudulent conveyances both under sections 547, 548 and 550 of the U.S. Bankruptcy Code and under sections 28−48 of the German Bankruptcy Act. [115]

The court denied Bouchard's motion to dismiss the 304 petition, noting that the purpose of the statute was to prevent "piecemeal distribution" of the U.S. assets by allowing foreign representatives of a foreign bankruptcy to commence an ancillary proceeding. [116] The ancillary proceeding's function would be to assist the foreign proceeding and "assure and economical and expeditious administration of such estate." [117]

The court's holding can be divided into two separate issues, both of which have an impact on choice of avoidance law. The first issue was whether the foreign representative could maintain a cause of action pursuant to preference and fraudulent transfer provisions of the U.S. Bankruptcy Code or was limited to those granted by foreign law.

The court held that the representative was limited to the foreign law provisions for two reasons. First, the court observed that the nature of the ancillary proceeding was to assist the "implementation of the foreign court's decrees" and not to "provide the representative with the benefit of American avoidance powers, which may be better (from a debtor's perspective) than those available in the foreign court." [118] The overall purpose of section 304 was to provide assistance to a foreign court. Implicit in the court's decision was the fact that the representative had the option of commencing a full, concurrent bankruptcy case in the U.S. if it wished to do so and only under those circumstances would the representative have access to all U.S. bankruptcy provisions, including the U.S. avoidance laws. [119] Second, the court held that there was a clear lack of any express authorization under either sections 547 or 548 that the

avoidance powers were to be vested in a foreign representative. [120] In addition, there was a similar absence of authorization in section 304. The court went on to add that the "trustee" referred to in the avoidance statutes were those appointed under sections of the Code only applicable to full bankruptcy cases, under either chapter 7 or chapter 11. [121] From the court's opinion, it would seem that in all 304 proceedings, the foreign representative would only have access to foreign avoidance provisions available in the foreign court [122] ("home country" rule). This would be the result, even if the debtor had substantial contacts with the U.S. before the 304 petition and regardless of the amount of the voidable transfers, the expectations of the parties, the nationality, location of the parties and the transfer, and the sophistication, size and the number of creditors.

The second issue was whether the debtor, as represented by Metzeler, had any domicile, place of business or tangible property in the U.S. as required by section 109(a) of the Code. [123] The court held that although the debtor did not have any domicile, place of business or tangible property in the U.S., the property recoverable under U.S. avoidance provisions (sections 547, 548) qualified as property under section 109(a). [124] The court was in effect stating that preferences and fraudulent conveyances were part of the estate, even before they had been recovered. [125] In addition, the court offered three other reasons for allowing a 304 petition.

First, the court observed that in enacting 28 U.S.C. § 1410(b), Congress intended that preference and fraudulent conveyance actions be included within the requests for turnover of property under section 304. [126] This would mean that the avoidance actions were in themselves sufficient basis for commencement of a 304 petition and that the venue provisions reflected this intent. Second, the court found that, under policy considerations, permitting the avoidance actions to proceed without any other nexus in the U.S. could be justified as "other appropriate relief" under 304(b)(3). [127] Thus, the fairness factors of 304(c) would be upheld under a broad interpretation of 304(b)(3). [128] Lastly, the court argued that the policy of equal treatment under the prior Bankruptcy Act still applied in section 304, and that allowing a prevention of preferential and fraudulent conveyances would support this policy. [129]

An interesting point raised in the decision was the significance of section 304(c)(3). As mentioned earlier, the problem with 304(c)(3) is that it can have ambiguous meaning. It can support the theory that U.S. creditor should not be able to keep their attachments under local law, but rather that these attachments be vacated and the assets be distributed equally under the foreign court's distribution. Under this theory, the foreign avoidance law will presumably apply because the foreign proceeding will be deferred to. [130] Alternatively, 304(c)(3) can support the opposing theory that applying U.S. avoidance law is preferable to applying foreign law. The reason for this is that U.S. avoidance laws are broader and preferable to foreign law and will ensure the avoidance of the transfers. [131] This theory would result in not deferring to the foreign proceeding, so that U.S. avoidance law could apply to the transaction. Bouchard argued that 304(c)(3) applied only to transfers occurring after the filing of the 304 petition. [132] However, the court rejected this argument and adopted the better position that, in order for the statute to make sense, transfers occurring before the petition could be recovered and the word 'prevention' meant that the property would be lost unless recovered. [133] Ultimately, the court held that a foreign representative can commence a 304 petition if the only ground for doing so is the presence of property which is recoverable under avoidance provisions of foreign law. In addition, only the avoidance provisions of foreign law can be applied. [134]

The cases that interpreted section 304(c)(3) prior to *Metzeler* simply permitted the representative to bring avoidance actions pursuant to U.S. avoidance law. [135] However the cases have not all been in one direction. In two other landmark cases, *In re Gee* and *In re Culmer,* the courts reversed the trend and applied the voidable preference and fraudulent conveyance provisions of the foreign country rather that U.S. avoidance law. [136] However, like their predecessors, the courts did so without any discussion. *Metzeler* was thus the first decision to analyze what choice of avoidance law to use in a 304 proceeding.

The *Metzeler* opinion can be criticized on a few grounds. The *Metzeler* court limited a foreign representative to using foreign avoidance law and not U.S. avoidance law in an ancillary proceeding. As a preliminary matter, neither section 304, nor any other provision in the Code provides a clear choice of avoidance law rule. [137] Apparently, Congress intended that section 304 be used when it would result in 'economical and expeditious administration' of the debtor's estate. [138] However, it might be more 'economical' to permit U.S. avoidance law to be used. In effect, by denying the foreign representative the use of U.S. avoidance laws, the court is forcing the representative to file a full, concurrent case because the representative would theoretically be able to use U.S. avoidance laws under a full case. This would

cause undue delay in the administration of the case and additionally would increase costs. [139] Consequently, this approach would encourage "section shopping." Thus, courts would indirectly be contravening the objective of section 304, by forcing representatives to file cases that would be neither "economical" nor "expeditious" and would only contribute to clogging of the U.S. Bankruptcy court system and waste of judicial resources.

The legislative history provides scant indication of what law to apply as well. The Commission Report indicated, "if it is necessary, however, to avoid a transfer that occurred before relief is sought pursuant to this Section, the foreign trustee of an eligible creditor will ordinarily be well advised to file a petition pursuant to Section 4−205 *involuntary petitions of full proceedings*." [140] This statement shows that Congress intended that a foreign representative be able to use U.S. avoidance powers in a full case. Thus, by negative implication, this indicates that Congress intended that U.S. avoiding powers be limited to full cases. However, the legislative history of section 304 does not provide any specific guidance on what law to apply. In this context, the courts and commentators have turned to policy concerns in determining what choice of avoidance law should be employed in an ancillary proceeding.

The *Metzeler* court stressed that the 304 proceeding was ancillary to the foreign main proceeding and acted only to assist the foreign proceeding. [141] Consequently the law of the foreign proceeding should control in the local proceeding. This would promote fairness for two reasons. First, the foreign representative should not be able to pick and choose which law it wished to apply for certain transactions and not for other issues in the case. [142] Second, applying U.S. avoidance law to U.S. creditors and applying German avoidance law to German creditors would lead to U.S. creditors being treated differently than German creditors for similar transactions. [143]

Applying different laws to assets located in different countries could possibly lead to inequitable results unless a special "protocol" were formulated by courts. [144] However, as Mr. Henzy correctly notes, this level of involvement by the U.S. court would defeat the purpose of an ancillary proceeding that is meant to be "economical and expeditious" administration of the estate. It would lead to duplicative efforts. Additionally, the use of U.S. avoidance provisions in an ancillary proceeding would make ancillary proceedings meaningless because ancillary proceedings would assume, in part, the form and expense of a full case. [145] Although this is a slight overstatement, it is true to some extent.

It appears that the above arguments should lead to adoption of a rule advocating use of foreign avoidance law to every section 304 proceeding. This would, however, be an inflexible rule and would ignore the situation where local avoidance law should be applied in light of special circumstances. As mentioned, there is no express statutory language or even direct legislative history guiding choice of avoidance law. Thus, policy arguments have the greatest weight in determining choice of avoidance law.

Although the main purpose of section 304 is to assist a main, foreign proceeding and the *Metzeler* opinion relied on this theory in its reasoning, it can be argued that section 304 may have other equally important objectives. According to one scholar, section 304's purpose is also to "handle U.S. assets in accordance with U.S. policy and law." [146] Indeed, section 304 has been used to protect the U.S. creditors from prejudice and inconvenience in processing their claims abroad and ultimately from discrimination or unfair treatment under foreign law in a foreign court. [147] The dual purpose of section 304: lending assistance to foreign proceeding and handling U.S. assets under U.S. law and policy lends support to the theory that section 304's policy is handle U.S. assets in accordance with U.S. policy. [148] Indeed, section 304 is not solely used to assist foreign proceedings. [149] Thus, section 304 may have other important objectives besides assisting a foreign proceeding. Consequently, the *Metzler* court's first prong for using foreign avoidance law is open to other equally valid policy concerns.

Three other arguments support use of U.S. avoidance law in a section 304 proceeding. First, use of foreign avoidance law by a U.S. court could not only lead to incorrect applications of that law but also certainly lead to greater legal costs. Bankruptcy law is a complex area of the law and it might be difficult to correctly apply another country's laws in another court. [150] In addition, the costs associated with retaining outside counsel could be significant. Second, as previously discussed, section 304(c)(3) could be interpreted to support use of U.S. avoidance law. The purpose of 304(c)(3) is to prevent preferences and fraudulent conveyances. [151] Generally, U.S. avoidance law has a broader scope and less stringent requirements than foreign law. [152] Consequently 304(c)(3) might be better served by using U.S. avoidance law and ensuring that the preferential attachments are voided rather than relying on the more narrow foreign avoidance law.

Lastly and most importantly, a transaction could have a sufficiently strong nexus with the U.S. to justify creating an exception to the rigid rule that foreign avoidance law should always be used in a section 304 proceeding. [153] To determine this "minimum contact," traditional choice of law rules could be used such as identity and location of parties, location of transaction and place of negotiation of loan, expectation of parties, size and sophistication of parties. [154] If a sufficient nexus with the U.S. could be demonstrated, it is possible that using U.S. avoidance law would be fairer than foreign avoidance law, even though some of the predictability of the rule of using foreign avoidance law will be sacrificed in the process. [155] Thus the *Metzeler* decision is open to debate and the use of foreign avoidance law in all section 304 cases should be subject to exception if a sufficient amount of "contacts" with the U.S. are present. This argument involves consideration of concurrent cases and thus will be discussed later in this paper. I will now turn to a brief discussion of courts' treatment of concurrent bankruptcy cases and choice of avoidance law.

3. Choice of Avoidance Law and Concurrent Proceedings

a. Axona: "section shopping" dilemma

In re Axona International Credit & Commerce was the first case to confront a concurrent ('plenary') bankruptcy case filed under 303(b)(4) and to discuss its relationship to section 304, an ancillary proceeding. [156] *Axona* was also a landmark case in international insolvency for allowing a foreign representative to commence a plenary case in the U.S., use U.S. avoidance powers to recover assets located in the U.S., dismiss the plenary case under section 305 and transfer the assets to the foreign proceeding. [157] This string of events presented several novel issues, each of which was dealt by the court.

First, whether a foreign representative must possess a minimum amount of property under section 303(b)(4) in order to file a plenary case in the U.S. Second, whether U.S. avoidance law can be used to avoid transfers that occurred abroad and presumably could not be recovered under the law of the foreign proceeding. Third, whether a court could dismiss a plenary case under section 305 and transfer the assets to the foreign proceeding near the end of the plenary case, in the same manner as in an ancillary proceeding. These issues will be discussed in turn, after a brief outline of the facts of the case.

Axona was a Hong Kong deposit taking company with its principal place of business in Hong Kong. [158] *Axona* operated as wholesale bank and did not engage in any business in the U.S. and had no office in the U.S., but it had assets in the U.S. in the form of bank deposits. [159] Following a precipitous financial collapse in November 1982, three American banks attached *Axona*'s U.S. bank accounts, totaling $3.8 million. A fourth bank, Chemical, restructured a $3 million unsecured term loan made to *Axona* by Chemical Hong Kong (Chemical's branch in Hong Kong) in Hong Kong into a secured demand obligation which was 'sold' to Chemical's New York office. [160] As a result of this complex recharacterization of the loan, Chemical New York deemed itself insecure and set off its claim against a cash collateral account of *Axona*. An involuntary winding−up proceeding was filed in Hong Kong Supreme Court shortly thereafter in February 1983. [161] The court appointed liquidators to supervise the winding−up procedure.

On the recommendation of U.S. counsel, the liquidators commenced a plenary case under section 303(b)(4) rather than an ancillary proceeding under section 304. [162] This approach was followed because under a plenary case the liquidators would have access to U.S. avoidance powers and the automatic stay. [163] In addition only one action would have to be commenced in the U.S. rather than multiple proceedings. [164] In contrast, under section 304, the liquidators would only have a limited stay at the court's discretion, would probably not have access to the broader and preferable U.S. avoidance powers, under the *Metzeler* decision, and would probably be required, under the venue provisions for ancillary proceedings, to file a proceeding in every district in which the debtor had assets, thus increasing costs. [165]

In the fall of 1983, the liquidators brought suits against the three Attaching Banks to recover the preferential transfers. [166] The Attaching Banks sought to dismiss the 303 proceeding and sought a determination by the Hong Kong court to enjoin the liquidators from continuing the U.S. proceeding. [167] The Hong Kong court, however, dismissed these motions and the Attaching Banks eventually settled the claims with *Axona*. [168]

In October 1983, the liquidators commenced an action to avoid the amounts setoff by Chemical under sections 547 and 548 of the U.S. Bankruptcy Code. Over Chemical's various objections, the court held that *Axona* was entitled to

commence a plenary case, recover the transfers under U.S. avoidance law and transfer the recovered assets to the Hong Kong proceeding pursuant to section 305. [169]

This decision can be criticized as "unfair" because it promotes "forum shopping" and, as Chemical coined, "section shopping." [170] The problem in *Axona* was that a foreign representative, with very few assets in the U.S., whose "contacts" with the U.S. could be characterized as minimal, and who would otherwise not have access to U.S. avoidance law under section 304, could nonetheless take advantage of U.S. avoidance law by filing a plenary case under section 303(b)(4) and, after recovering the U.S. assets, dismiss this case, under section 305 as if it were an ancillary proceeding, and transfer the recovered assets to the foreign main proceeding. [171]

These issues touch upon three key areas in international insolvencies which are interrelated: (1) what minimum amount of property must be present in the U.S. to commence a plenary case, as opposed to an ancillary proceeding, (2) whether U.S. avoidance law is proper in a plenary case and (3) when should a plenary case be dismissed in favor of a foreign proceeding. [172]

Axona's only assets in the U.S. at the time of filing were bank deposits. [173] Under the literal language of 109(a), the court held that "property in the U.S." was a sufficient jurisdictional basis for the commencement of a full bankruptcy case. [174] In comparison, in order to commence an ancillary proceeding, many courts have held that section 109(a) must be satisfied as well. [175] In contrast, very little attention has been paid to 303(b)(4).

Indeed, neither the former Bankruptcy Act nor the present Bankruptcy Code directly addresses the issue of whether a minimal amount of property is required to commence a full case, as opposed to an ancillary proceeding, and if so, how much property and under what circumstances. [176] Chemical argued that this lack of express language was an oversight by Congress in drafting the statute and should be corrected by adoption of legal standards by the courts. [177] In essence, Chemical proposed that a full case be permitted only if the debtor had some business nexus to the U.S. and the American creditors were put on notice of the possibility of a U.S. bankruptcy filing. Alternatively, a plenary case was to be limited to special circumstances, such as when creditors had disregarded foreign decrees, or when the U.S. avoidance law would not offer any special advantage to debtor over foreign avoidance law. This last proposal would eliminate any "forum shopping" on the part of the debtor. Indeed, if the debtor would not be eligible to file a full case unless U.S. avoidance law did not offer any advantages over foreign avoidance law, then this would eliminate "forum shopping." [178]

However, the *Axona* court rejected these arguments and found that the plain language of the Code permitted a few bank accounts to entitle the debtor to a plenary case, with full use of U.S. avoiding powers. [179] Thus, the *Axona* decision, by not distinguishing the jurisdictional requirements of commencing a plenary case from an ancillary proceeding was in effect allowing foreign debtors free rein in "forum shopping." Indeed, section 109(a) may be considered too broad and should be limited in some ways. [180] In order to limit the potentially "unfair" use of U.S. avoidance law, several options are available. [181] Courts can limit the reach of section 109(a) by increasing minimum eligibility requirements. [182] Alternatively, the reach of the preference statute could be restricted to transactions which have a greater "connection" to the U.S. [183] As a third option, courts could dismiss or suspend plenary cases when an ancillary proceeding would be more appropriate. [184]

This brings us to the second issue in *Axona*: (1) whether the court could dismiss a plenary case near its end, after U.S. avoidance powers had been used, under section 305 and (2) the related issue of whether the court should have dismissed the plenary case in favor a 304 proceeding. Chemical contended that section 305 should not be applied to a plenary case, but rather be limited to ancillary proceedings. [185] The combination of the use of U.S. avoidance powers under plenary cases combined with a dismissal of the case and transfer of the assets under 305, as though it were an ancillary proceeding, resulted in an unfair advantage to the debtor. In effect, it allowed the debtor to pick the most favorable elements of both a plenary and ancillary case, resulting in the creation of a new provision, a "section 303 ½." [186] The court rejected this contention under the "plain reading" of the statute. The *Axona* court had another tool to limit the broad reach of section 109(a) and avoid future "forum shopping": it could have simply dismissed the plenary case when it was initially filed and limited the foreign representative to a section 304 proceeding.

In general, although Congress has not established under what circumstances a court should dismiss a plenary case in favor of an ancillary case (or vice versa), courts have limited the filing of a plenary case when the "estate in the United States is substantial or complicated enough to require a full case for proper administration." [187] In contrast, an ancillary proceeding is permitted when it would be "economical and expeditious in the administration of the estate." [188] The caselaw suggests two circumstances under which a plenary case will be permitted under the Code.

First, courts will allow a plenary case to take precedence over an ancillary proceeding where extending comity to a foreign proceeding would be inimical to section 304(c). Generally, as was discussed under *Culmer,* courts will not defer only if the foreign law violates fundamental precepts of fairness and due process of U.S. law and policy. [189] The second scenario under which a court will permit a plenary case is when the assets are "substantial" enough to warrant a plenary case. Although there is little caselaw on this issue, we can infer this from a court's decision to dismiss a full case in favor of an ancillary proceeding. In *In re Gee,* the foreign representative commenced a section 304 proceeding principally for discovery purposes with a view to uncovering assets in the U.S. [190] The debtor, a Cayman Islands corporation, responded by filing a chapter 11 petition. [191] The debtor argued that the chapter 11 petition should automatically supersede a 304 proceeding. [192] The court held that if this were true, then any 304 petition could be dismissed by a chapter 11 filing, which would render the analysis conducted under section 304(c) to determine dismissal under section 305 meaningless. [193] Next, the court found that the chapter 11 case should be dismissed because it was not necessary. Indeed, the court found that section 304 proceeding adequately dealt with assistance to the foreign proceeding and that a chapter 11 case would only create "needless duplication of effort by courts and creditors." [194] The court, however, was careful to state that a foreign proceeding did not preclude a filing under chapter 11 in certain circumstances. [195] We can only presume that the relief sought in this 304 proceeding−−discovery and turnover of documents and records−−did not implicate an estate that was "substantial or complicated" enough to warrant a plenary case. Unfortunately, there is no clear guideline of what is "substantial or complicated," thus it is difficult for a judge to decide whether a plenary case should be dismissed in favor of an ancillary proceeding. [196]

Another related point arises when a foreign debtor files a plenary case in the U.S. with the sole purpose of taking advantage of U.S. laws which have no counterpart in the foreign forum. This problem arose in the case of *In re Ionica*. [197] There, a U.K. telecommunications company, *Ionica,* entered into insolvency proceedings in the U.K. and subsequently sought to file a chapter 11 petition in the U.S. [198] The bankruptcy court dismissed the chapter 11 case under section 305, after having analyzed the 304(c) factors. [199] *Ionica* argued that the English law did not have counterpart to equitable subordination and substantial consolidation claims yet the court rejected this argument and held that the foreign law does not need to "mirror" U.S. law, only provide substantially the same procedural protections. [200] It is important to note that *Ionica* had very few contacts in the U.S. and had no viable prospects for a chapter 11 reorganization. [201] If *Ionica* did have a viable chance of reorganization and substantial assets in the U.S., like *Maxwell*, then it could very well have filed a chapter 11 case, even if the sole purpose for doing so was to take advantage of U.S. laws which had no counterpart in foreign law. This observation is especially important in light of the legal framework of *Axona*.

In *Axona,* the Hong Kong court rejected the Attaching Bank's claims that their attachments were to be governed under Hong Kong law and instead ruled that under Hong Kong conflicts of law, the lex situs governed both the validity of attachments and their defeasance in insolvency. [202] Thus, it was not error for the representative to have filed a plenary case in the U.S. to take advantage of U.S. preference law. The Hong Kong court also rejected the claim that a 304 proceeding should have been filed instead of a 303(b)(4) petition. [203] Under these circumstances, even if the plenary case was filed with the sole purpose of taking advantage of U.S. preference law, it was justified because the Hong Kong court explicitly accepted the use of U.S. avoidance law and more importantly, because Hong Kong avoidance law did not apply extraterritorially. [204] On these facts, *Ionica* can be distinguished from *Axona*.

As one of the leading scholars on international insolvency, Professor Booth, observes in his article, one important guideline which would help prevent "section shopping" (and the attendant choice of law consequences) would be to permit plenary case in those situations where the foreign insolvency law is territoriality−based and does not apply extraterritorially. [205] This test proposed by Professor Booth should be one of the principal factors considered by courts in determining whether to permit a plenary case or simply an ancillary proceeding.

Other important factors useful for prevention of "forum shopping" and "section shopping" would be to consider whether the estate in the U.S. is "substantial or complicated enough" to warrant a plenary case, and additionally whether the foreign proceeding violates U.S. principles of fairness and due process under section 304(c). However, the *Axona* court did not address these crucial issues and left U.S. courts open to potential "section shopping" in the future.

The *Axona* court apparently was not overly concerned about Chemical's arguments that the court should limit the broad reach of section 109(a) by either adopting minimum contact requirements for commencing a plenary case or dismissing the plenary case in favor of a 304 proceeding under section 305. By simply following the "plain meaning" of the statutory language under 303(b)(4), 304 and 305, without contemplation of policy considerations, the court was in effect giving free rein to a future "forum shopping" and ultimately "section shopping" by foreign debtors with potentially negligible amount of U.S. contacts. As a result, foreign debtors would be allowed use of U.S. avoidance powers under a plenary case which essentially functioned as an "ancillary" case, which has led some commentators to refer to *Axona* as a "secondary bankruptcy." [206] Instead of following the "plain language" approach, the *Axona* court could have adopted two other positions with respect to choice of avoidance law.

First, it could have treated the plenary case as a modified version of an ancillary proceeding in this instance and opted for use of foreign avoidance law under the *Metzeler* approach. [207] However, this would have been prejudicial to all creditors because the U.S. creditors would have kept their preferential attachments. [208]

The second better course of action would have been to treat this as a special situation because it involved two concurrent bankruptcy proceedings in two countries. The court could then have adopted a choice of law formulation to see whether it should adopt U.S. or foreign avoidance law. [209] Under this approach, the court could have looked to the identity of the parties, the location of the loan transaction, the location of the transfer, the expectation of the parties and other appropriate factors. [210] This approach would have helped substantially to limit the problem of "forum shopping" and "section shopping" which could have subsequently developed in international insolvencies. The *Axona* decision, while arriving at the correct result, did not address the "forum shopping" problem and did not articulate any coherent, fair and predictable choice of avoidance law rule. This gap was to be closed eight years later, in the seminal choice of avoidance law case of *Maxwell*.

b. Maxwell: solution to "section shopping" dilemma

Many commentators and leading scholars of international insolvency have described the *Maxwell* case as one of the most important transnational insolvencies of modern times and certainly as the most important transnational avoidance case to date. [211] The *Maxwell* case is important for two reasons.

First, it serves to highlight the lack of a coherent and predictable legal framework which courts can turn to in deciding critical issues in international insolvency, such as choice of avoidance law. Second, it illustrates the flexible and extraregulatory approach which judges must pursue in order to achieve fair and just results in the current, chaotic state of international insolvencies. [212] Although *Maxwell* has been considered to be an anomaly due to the unusual allocation of the debtor's assets in two countries, it is increasingly likely that, as global business expands, future transnational insolvencies will share the same complex organizational structure seen in *Maxwell*. [213] Consequently, a coherent and fair legal framework must be established to deal with the issues faced in *Maxwell*, namely choice of avoidance law in the special case of concurrent insolvency proceedings. With this in mind, we turn to the facts leading to *Maxwell* and an analysis of the courts' opinions regarding choice of avoidance law.

Maxwell Communication Corporation (MCC) was originally incorporated in England in 1935. [214] Although it was primarily a printing business, in 1986 it expanded into information services, electronic publishing, and general publishing. [215] In the process of expanding its business, it acquired two U.S. corporations, MacMillan and Official Airline Guides. [216] Interestingly, although the majority of its assets were located in the U.S., the debtor's headquarters were located in England and most of its debt was incurred in England. [217] Faced with this unusual situation, on December 16, 1991, MCC first filed a chapter 11 petition in the U.S. in the Bankruptcy Court for the Southern District and the next day presented a petition to the U.K. High Court of Justice for an administration order under the Insolvency Act of 1986. [218] The debtor had in effect commenced two concurrent proceedings. [219] The administrators and examiner formulated a "protocol," a document which set forth the duties and powers of the examiner and the

administrators. [220] Building on the protocol, the parties drafted a plan and scheme which was designed to avoid conflicts of laws of both countries and provided for common treatment of claims in both courts. [221] Although covering several areas of potential conflict, the plan did not cover the treatment of preferences and choice of avoidance law.

This gap led the administrators and the examiner to attempt to recover, as preferential transfers, large sums of money it had transferred to three foreign banks, Barclays, National Westminster (NatWest) and Societe General (SocGen). [222] The U.S. court dismissed the administrators' motion to bring a preference action by holding that the U.S. preference law did not apply to a transfer if its "center of gravity" was overseas under the presumption against extraterritoriality doctrine. [223] The District Court affirmed the decision, relying essentially on similar reasoning employed by the Bankruptcy Court. [224] The Second Circuit affirmed both courts but interestingly did not do so based on the presumption against extraterritoriality doctrine but rather on the doctrine of comity. [225]

The Bankruptcy Court, under Judge Brozman, held that U.S. avoidance law did not apply to the transfers in question based on two separate doctrines: the presumption against extraterritoriality and the doctrine of comity. [226] Even before addressing the applicability of the doctrines, Judge Brozman observed that whereas the goals of both U.S. and English preference law were the same, U.S. would avoid a transaction based on objective criteria while English law looked to the subjective intent of the debtor preferring one creditor over others. [227] Thus, it would be considerably more difficult to avoid a transfer under English law.

In applying the presumption against extraterritoriality, the court undertook a two−part analysis. First, it had to determine whether the transfer was extraterritorial at all. [228] Second, if the transfer was extraterritorial, it had to determine whether the U.S. preference statute applied extraterritorially. [229]

The first determination hinged on defining the word "extraterritorial." In determining this term, the court looked principally to the nationality of the creditor and the debtor, the location of the transfer and the place where the antecedent debts were incurred. [230] Interestingly, the court was careful to note that not every transfer which has a foreign element implied an extraterritorial application of U.S. law. [231] In the case at bar, the court held, without hesitation, that the transfer was extraterritorial in nature.

The second part of the analysis was subject to greater controversy. In determining whether the statute applied extraterritorially, the court looked to three indicia of legislative intent: (1) the express statutory language, (2) the legislative history of the statute, and (3) any pertinent administrative interpretations of the statute. [232] Of particular importance was whether the court should have looked only at the wording of section 547 individually or whether the "fabric of the Code as a whole" should have been assessed in determining extraterritorial application of U.S. preference law. [233] The court decided to take a "middle approach" and looked both at the whole Code and the individual section. [234] Looking at section 547 individually, the court found no indication that the term "transfer" was meant to be applied extraterritorially [235] Turning to the Code as a whole, the administrators put forth a persuasive argument that section 547 applied extraterritorially to a transfer because section 541 defines the scope of property to include "all property wherever located and by whomever held." [236] This argument would assume that an avoidable transfer which has not yet been recovered is part of the estate. This assumption was rejected by the court. In fact, the court found that property which has "been preferentially transferred does not become part of the estate until recovered." [237]

The strongest argument proposed by the administrators was that under the "plain language" of the Code, Congress "unequivocally" permitted foreign entities to be debtors under U.S. law and to file a plenary case if necessary to administer U.S. assets. This argument is further bolstered by the negative implication that follows from the fact that if section 304 limits the foreign representative to foreign avoidance powers, then it is presumed that Congress would permit the representative to have full access to U.S. avoidance powers and other powers such as the automatic stay. [238] The administrators added that the court was not necessarily required to allow use of these powers and could always dismiss the plenary case under section 305, as *Axona* did. [239] Although these arguments are persuasive to some extent on their face, they will ultimately fail on further consideration.

First, as the *Maxwell* court pointed out, even though the foreign debtor had access to U.S. bankruptcy laws under sections 109(a) and 303(b)(4), the court would permit use of these avoidance laws only if the transfer had some strong

nexus with the U.S. [240] Even though ancillary proceedings are limited to foreign avoidance law, this does not entail that plenary cases are entitled to U.S. avoidance law. [241]

Second, although a court can either maintain or dismiss a case under section 305, such an unconditional approach is not always in the best interest of all the parties. In some cases, such as in *Maxwell*, the complexity of the estate and the substantial amount of assets present in the U.S. necessitate the use of a plenary case rather than the more limited 304 proceeding. [242] If a court were to dismiss the plenary case and only allow the limited 304 proceeding, the U.S. and foreign court would not be able to coordinate their proceedings under a comprehensive plan and scheme such as the one proposed in *Maxwell* and consequently all the creditors would receive smaller distributions due to increased costs and loss of "going concern" value of the estate. [243] As a result, the court, at least in a factual scenario similar to *Maxwell*, would not have the option of dismissing a plenary case under section 305 simply because it did not want to allow the representatives access to U.S. avoidance powers. Rather a middle ground would have to be found where the representatives would have the benefit of the plenary case but could not use the U.S. avoidance powers. The presumption against extraterritoriality doctrine provided the means to achieve this result.

Having concluded that the statute does not apply extraterritorially, Judge Brozman looked to the exceptions articulated under the *Massey* case to determine whether the presumption could nonetheless be overcome. [244] The court found that the cases cited by the administrators were distinguishable from the case at bar, and held that the presumption had not been overcome. [245]

Although it is plausible that the extraterritorial conduct (transfers) was not intended to have an effect in the U.S., nevertheless, by not applying U.S. preference law to the transfers at issue, the U.S. creditors would be required to disgorge their preferences pursuant to U.S. avoidance law and contribute to a common pool of assets to be distributed pro rata to U.S. and English creditors. However, the English creditors would not be required to disgorge their preferences under English law. This treatment does not comport with equitable distribution of assets to similarly situated creditors bankruptcy principle. [246] However, as the District Court remarked, the U.S. creditors were not similarly situated to the foreign creditors. [247]

Having concluded that the presumption had not been overcome, the court turned to the second canon of statutory construction, the doctrine of international comity. [248] Once again, we turn to considerations of comity, much as the courts have done so in the ancillary proceedings under 304(c). However, the choice of law approach in the ancillary proceedings under 304(c) is substantially different from the one used by the court in *Maxwell.*

The *Maxwell* court opted to base its choice of law analysis on the Restatement of Foreign Relations Law (Third), in which a court would have to consider several factors, under a "reasonableness" test, in determining whether the court should exercise jurisdiction over an activity or transfer having connections with other states. [249] The traditional federal choice−of−law rule led it to apply the law of the jurisdiction having the "greatest interest in the controversy." [250] Although the court ultimately adopted this traditional choice−of−law analysis under the principle of comity, it weighed and rejected an alternative choice of law rule proposed by Professor Jay Lawrence Westbrook, in his amicus brief to the court. [251]

Professor Westbrook's approach proposes that the avoidance law of the "home country" of the debtor be applied to an ancillary U.S. proceeding. [252] Judge Brozman agreed that, although in ancillary proceedings this rule might be proper, it could not be accepted "across the board" in a plenary case. [253] The "home country" approach has been touted for its "predictive value." The court noticed, however, that even under Westbrook's approach, the court would have to determine where the "home country" was, a process which would necessarily entail a more complex and less predictable choice of law approach somewhat similar to that used by the court in *Maxwell* under the Restatement approach. [254]

In the end, the *Maxwell* court looked at choice−of−law factors under the Restatement approach. The court looked to the where the debtor was incorporated (U.K.), where its headquarters were located (U.K.), where it negotiated its loans (U.K.), the location of the challenged transfers (U.K.) and the expectations of the parties. [255] From the foregoing it concluded that, although the transfers were made from the sale of U.S. assets, the majority of the factors pointed towards application of English avoidance law. [256] It is interesting to note that the *Maxwell* court did not put too much

emphasis on the location of the transfer. In fact, it acknowledged that this factor was particularly subject to manipulation and should only be used as one of the factors in the analysis. [257] The *Maxwell* court thus established the choice of avoidance law rule to be applied in concurrent proceedings, as distinguished from ancillary proceedings.

Aside from some minor differences, the District Court's opinion merely served to reiterate the holding of the Bankruptcy Court. [258]

The Court of Appeals decision, although affirming the lower courts, raised a few novel issues in its opinion. First, the administrators and examiner argued that the reorganization plan was res judicata with respect to challenging the application of the Bankruptcy Code to the proceedings. [259] The court rejected this argument by stating that the reorganization plan did not address the issue of which avoidance law to apply to avoid transfers, thus the issue was not res judicata. [260]

Second, in an unprecedented but predictable approach, the court extended the considerations of comity and the "spirit" of section 304 to concurrent proceedings. [261] The court deemed comity important because it facilitated "orderly, equitable and systematic distribution of the debtor's assets." [262]

Third, the Court of Appeals focused its decision on principles of comity and refused to hold that the presumption against extraterritoriality doctrine would "compel a conclusion that the Bankruptcy Code does not reach the pre−petition transfers at issue. Thus we express no view regarding the banks' contention that the Bankruptcy Code never applies to non−domestic conduct." [263] The court's holding meant that the choice of avoidance law in every concurrent proceeding could only be determined on a case−by−case approach. Although basing its decision on comity, rather than the presumption doctrine, the Court of Appeals, as well as the Bankruptcy Court, made clear that, under certain circumstances, the U.S. avoidance law could theoretically apply to overseas transfers as well as to foreign debtors and creditors. [264] Both courts were thus sacrificing some measure of predictability for a certain amount of fairness. No predictable rule was set out, as Professor Westbrook had proposed in his amicus brief to the Bankruptcy Court. [265] Rather, the courts adopted a flexible, multi−factor standard which would allow them to judge, on a case−by−case basis, the fairness of applying U.S. avoidance law in the context of concurrent proceedings.

From the point of view of choice of avoidance law, *Maxwell* resolved, to a certain degree, the fears of "section shopping" which the *Axona* court did not address by formulating a clear choice−of−law rule to be applied in concurrent proceedings. [266] But the *Maxwell* decision, notwithstanding its benefits, remains an extraregulatory approach, not codified in statutory language. [267]

From the foregoing study of choice of avoidance law in the context of both ancillary proceedings and concurrent proceedings, it appears that courts will apply the foreign avoidance law in an ancillary proceeding and will apply either foreign or U.S. avoidance law, based on a traditional choice−of−law approach under comity principles, in a concurrent proceeding. [268] These current choice−of−avoidance law rules might soon be obsolete with the adoption, in the near future, of the new chapter 15 in the Bankruptcy Code. [269] The next chapter will discuss the provisions of chapter 15 with a focus on the choice of avoidance law sections and their impact, if any, on the current state of the law. The paper will end with a determination of whether the chapter 15 choice of avoidance law provisions, and the current choice−of−avoidance law rules are "optimal" and, if not, with a proposal for their modification. [270]

III. Chapter 15 and Choice of Avoidance Law

As discussed in the Introduction in Part I, the current state of international insolvency law is one of anarchy and chaos. [271] In the wake of the current slew of multinational insolvencies (*Maxwell*, *BCCI*, *Olympia&York*) and the lack of transnational cooperation, there has arisen a pressing need for international insolvency reform. Commentators have articulated several reasons for reform.

First, states should harmonize the effect of their local insolvency proceedings with those of other states. The rationale is that by creating a common pool of assets from each State's insolvency proceeding, the debtor will be able to maximize the value from the liquidation of its assets or be able to successfully reorganize its business. [272] This, in turn, will allow the creditors to receive greater proceeds from final distribution of the assets. [273] Currently, states do

not have a legal framework from which to cooperate with each other. [274] Rather, as the *Maxwell* case demonstrates, courts must adopt extraregulatory approaches to cooperation, which, although ultimately successful, nonetheless are unpredictable due to their 'ad hoc' nature and are also costly and time−consuming. [275] Many commentators argue that the most important addition to the current system would be adoption of an automatic stay or moratorium which would enable the administrators from States' courts time to coordinate a comprehensive plan of liquidation or reorganization of the debtor. [276]

A third proposal for reform would be to streamline the process of recognition of foreign proceedings. Currently, representatives of foreign proceedings must undergo a laborious and time−consuming process to be recognized in other state's courts. [277] Furthermore, the appearance of the representative in other courts may expose him to personal jurisdiction [278] A fourth issue which remains unresolved and relates to choice of avoidance law is what powers the representative possesses in the local proceeding [279] Another particularly troublesome issue is the current discriminatory treatment of foreign creditors by local courts. Indeed, foreign creditors can be relegated to a lesser status under local law or the problem can be systemic, that is; the local court's priority scheme will not accord the same status that the foreign court would accord to the creditor. [280] The latter issue arises simply from the different bankruptcy policies of States.

Of all these varied problems, however, the greatest is the lack of any coherent and reasoned choice of law and choice of forum rules. [281] Perhaps the reason for this state of affairs is that the bankruptcy law of each country reflects different policy concerns. Consequently, each State is reluctant to apply the laws of another proceeding to its own bankruptcy proceedings and, in the same vein, reluctant to defer to a foreign proceeding Bankruptcy law implicates several parties, and has been regarded as a quasi−public sphere of interest. [282] With so much at stake, it is no surprise that international insolvency law has not significantly advanced beyond the current territoriality approach or "grab rule." [283] In the face of these concerns, the United Nations Commission on International Trade Law investigated the likelihood of an effort to coordinate international insolvency proceedings and provide a means to standardize transnational bankruptcy cases. [284]

The Commission had two main approaches it could take in drafting a Model Law: a territoriality approach or a universality approach. [285] In its Report, the Commission identified five reasons not to adopt the territoriality approach. [286] First, reorganization would be difficult in light of the fact that the local proceedings would be focused on maximizing returns to local creditors, thus making local officials unwilling to turnover the assets. [287] Second, the grab rule would make it difficult to sell assets as "going concern" without regard to national borders. [288] Third, the results under territoriality would be "highly unequal" and dependent on the unpredictable amount of assets found in each country. [289] Fourth, territoriality is easily manipulable because debtors could shuffle assets to different States or prefer creditors in certain States. [290] Fifth, foreign creditors are at a disadvantage due to lack of adequate notice. [291] Instead, the Commission opted for a universality−based Model Law. [292]

The Model Law was adopted on May 30, 1997, five years after the initial UNCITRAL meeting was held that identified the problems in international insolvency. [293] The goals of the Model Law, enumerated in the Preamble, include "fair and efficient administration of cross−border insolvencies," "cooperation between courts of different Enacting States" and "greater legal certainty for trade." [294]

The Model Law is not a set of substantive laws that apply to bankruptcy proceedings. Rather, it is a procedural framework established to provide "fair, quick and predictable access" to the "Enacting State's laws" for the foreign representative. [295] Indeed, the representative can directly apply for recognition of foreign proceeding by presenting certain documents attesting to the fact that he was duly appointed by the foreign court and an insolvency proceeding as duly commenced in that court. [296] This feature resolves one of the problems faced earlier by representatives discussed above. The Model Law also devotes considerable attention to ensuring cooperation between courts, an entire chapter is devoted to it, cooperation between courts is not discretionary, but mandatory. [297] Foreign creditors also receive some measure of protection. Under article 14, for example, the foreign creditors must receive adequate notice (on the same terms as domestic creditors. [298] In addition, article 13 provides that the foreign creditor enjoy the same rights as the domestic creditor by ensuring that the foreign creditor's claim not be ranked lower than a general unsecured claim unless an equivalent local claim would also be downgraded. [299] Foreign creditors are also protected under the hotchpot rule, under Article 32. [300]

One of the great improvements of the Model Law over the current framework is that the Law provides for an automatic stay that immediately comes into effect after a foreign proceeding has been recognized. [301] Unlike section 304(c) of the Code, recognition no longer appears to be dependent on an analysis of the foreign law. Rather recognition is automatic if the proper ministerial documents are presented. However, this benefit is only illusory. Although the Model Law does have some advantages, and is certainly an improvement for most countries, it falls short on improving the current U.S. international insolvency statutory framework.

First, although a court is no longer compelled to analyze the foreign law to see if it protects U.S. creditors under 304(c), Article 22 requires a court to ensure that U.S. creditors' interests are adequately protected. [302] This provision allows a court to use all the 304(c) caselaw and to potentially promote territoriality principles. [303]

Second, the Model Law distinguishes between "main" and "non−main" proceedings. [304] A "main" proceeding is defined as the debtor's "main center of interests", presumed to be its place of incorporation. [305] A "non−main" proceeding is where the debtor has an "establishment." [306] A "main" proceeding enjoys a higher degree of deference. [307]

A problem, however, could arise in determining where the 'main proceeding' is located, leading to costly litigation. [308] Third, the Model Law, despite its universality basis, ultimately defers to local courts. Article 29 provides that local courts shall have pre−eminence over foreign proceedings, and also limits any relief given to a foreign proceeding to accord with the local proceeding. [309] In essence, under Article 29 and 22, local courts are given blank discretion to limit any effect of the foreign proceeding and their cooperation with the foreign proceeding. Although these measures were essential for the Model Law to have any possibility of being accepted by States, they nonetheless dampen the goals of the Model Law and do not substantially alter the current U.S. framework. Perhaps the biggest flaw of the Model Law was the lack of any specific and clear choice of law provision. Although, there is no general choice of law provision, there is a choice of avoidance law provision.

The choice of avoidance law provision, Article 23, provides that the foreign representative of the foreign main proceeding has standing to bring an avoidance action under the avoidance law of the Enacting State. [310] This choice of law rule applies automatically if the foreign proceeding is a "main proceeding" under Article 23(a) but if the foreign proceeding is a "non−main" proceeding, then the U.S. court will only allow use of U.S. avoidance law if the court determines the assets should be administered, under U.S. laws, in the foreign non−main proceeding. [311] In other words, under Article 23 (b), the U.S. court will be permitted to determine, under its applicable choice of law rules, whether the foreign proceeding should administer the assets. This provision would, in essence, incorporate the current analysis under 304(c), to determine whether the assets should be administered in a foreign proceeding. [312]

The "Guide to Enactment of Uncitral" states that the representative is not given any "substantial right" regarding initiating avoidance actions, nor is a conflicts−of−law solution created by this provision. [313] In fact, the sole effect of the provision is that the representative has "standing" to commence such actions under the Enacting State's law. [314] Thus, the representative cannot be prevented from initiating this action 'by the sole fact' that he is not the insolvency administrator appointed in the Enacting State (U.S.). [315] This provision merely protects the representative against discrimination. The effect of this provision does not provide a choice of law rule with respect to avoidance actions, it merely prevents discriminatory treatment of foreign representatives. Presumably, U.S. courts will be permitted, but not required, to allow the representative to avoid transfers under U.S. law. Thus, U.S. courts would have the choice of allowing the representative to use U.S. law, or limit the representative to foreign law, depending on the particular circumstances. This provision is not clear, and has the potential to create highly unpredictable choice of avoidance law rules.

The *Metzeler* approach, despite its inflexibility, provided the benefit of a clear choice of avoidance law rule in ancillary proceedings: the representative could only apply foreign law to avoid transfers, regardless of where they occurred or the identity of the parties. Article 23, on the other hand, would give courts the option of permitting use of U.S. avoidance law, or foreign avoidance law but not mandating the use of either one, and even more significantly, not even giving any guidelines on which law to use. Consequently, courts would be given too much discretion in choice of avoidance law, promoting unpredictability.

Furthermore, there is no clear choice of avoidance law rule in the chapter dealing with concurrent proceedings. [316] Presumably, the *Maxwell* decision would continue to apply. However, in order to remove any conflicting approaches which could potentially be adopted in the future by other U.S. courts, the *Maxwell* decision should be codified in the chapter dealing with Concurrent Proceedings. A choice of avoidance law rule incorporating the various factors of *Maxwell* should be incorporated in this section. [317] This will be discussed later, in the conclusion.

The Model Law represents one possible approach to choice of avoidance law: to allow the courts discretion to choose the applicable avoidance law to the particular circumstances of each case. Other model laws have adopted different choice of avoidance law rules. For purposes of contrast and comparison, we will review MICCA, the Concordat and the European Convention.

In June, 1989, the International Bar Association approved the Model International Insolvency Cooperation Act (the "Act"). [318] MICCA combines laws from several countries in an attempt to provide a framework for countries in international insolvency. [319] The principles adhere to the universality approach.

Under the Act, only one principal proceeding can exist and the several ancillary proceedings function to assist the principal proceeding. [320] In terms of choice of law, the Act specifies that the ancillary proceeding use the principal forum's law. [321] This approach is equivalent to the current approach by U.S. courts under *Metzeler*. Unfortunately, the Act does not specify the choice of principal forum. Section One requires local courts to defer jurisdiction to the foreign representative. Thus, the first proceeding to be filed might appear to be the principal forum. [322] However, such a rationale would be inefficient and absurd. [323]

The fairest approach in this instance would be to undertake some forum non conveniens analysis, similar to the Restatement analysis employed by *Maxwell*, in determining choice of principal forum. [324] In sum, the Act's approach is not an improvement over the current approach by U.S. courts under *Metzeler*. A better law would endeavor to define the choice of principal forum according to international law principles. [325] The other model law, the Concordat, provides a unique choice of law rule.

The Cross−Border Insolvency Concordat was approved by the International Bar Association's Section on Business Law, in 1995, and the International Bar Association in 1996. [326] The Concordat is a set of ten general principles designed to assist courts in harmonizing cross−border insolvencies. [327] The Concordat represents an improvement over MICCA for two reasons: (1) it recognizes the need, not only for ancillary proceedings, but also for concurrent proceedings and (2) it provides a flexible yet coherent choice of avoidance law rule. [328]

The Concordat is similar to other model laws in that it recognizes the need for one principal forum and ancillary proceedings. [329] It strikes a balance between universality and territoriality concerns by providing that secured and "privileged" (priority) claims are paid first, in full, to local creditors in ancillary proceedings before transferring the remaining assets to the main proceeding. [330] However, common claims (general unsecured) are distributed in the principal forum. [331] Thus it is what is commonly called a "secondary bankruptcy system."

Similar to the Model Law, it provides adequate notice requirements to foreign creditors to assure their participation in the main proceeding and notice of insolvency as well as ensuring non−discriminatory treatment to foreign creditors. [332] Unlike other model laws, however, the Concordat provides very flexible rules in determining which laws to apply to ancillary proceedings. [333] For example, under Principle 6, the foreign representative may employ the "administrative rules" of "any plenary forum in which an insolvency proceeding is pending, even though similar rules are not available in the forum appointing the representative." [334] The rationale is that the representatives should be able to maximize the value of the estate. The same rationale applies to choice of avoidance law.

The Concordat, under Principle 7, proposes that the foreign representative be able to use the avoidance law of "any forum". [335] The principle intends to provide flexibility and to allow the debtor to maximize recoveries under the most advantageous avoidance law, provided the use of the law is "consistent with principles of international law." [336] The example provided by the Concordat is taken from the facts of *Axona*. [337] There, the representative of a main insolvency proceeding in Hong Kong, who commences a limited or a full proceeding in the U.S. to avoid transfers made to U.S. banks in connection with U.S.−based loans, may apply either U.S. or foreign avoidance law. The

rationale of this approach is that the goal of avoidance law is to promote equitable distribution of assets to all creditors who are similarly situated. This approach relies on the fact that the parties expected that either one of these avoidance laws might apply. [338] Although this approach represents an improvement over MICCA, it simply seems to reiterate the *Axona* decision in some respects. However, this approach applies to both ancillary as well as plenary proceedings. The advantage of this approach is that courts can tailor use of the laws to fit the circumstances. Under this approach, fairness and "expectations of the parties" are of paramount concern. Of particular note, this approach adheres to "principles of international law," presumably comity principles and traditional choice−of−law principles used by the court in *Maxwell* under the Restatement analysis.

Nonetheless, this approach suffers from a certain measure of unpredictability. The representative can apply the law of any forum in which the debtor has sufficient contacts with. Although this approach would not result in unexpected and unfair choice of avoidance law results in either *Axona* or *Maxwell*, the facts could have been more complicated. For example, imagine a debtor with corporate headquarters in France, and an even split of assets and offices in three other countries. [339] In this scenario, any number of possible avoidance laws could be used, ensuring unpredictability and its attendant disadvantages. [340] The European Convention on Insolvency Proceedings (the "EU Convention") provides the clearest choice of avoidance law rule. [341]

Since 1970, the European Union (the "EU") has attempted to adopt a law which would govern insolvencies affecting more than one EU member state. [342] The first of these attempts, the Draft EEC Bankruptcy Convention of 1970, was rejected because it proposed a system under which a single international insolvency law would govern all European liquidation proceedings and one court would apply this law. [343] This is commonly referred to as the "unity" approach, and represents an extreme version of universality. In 1989, the Council of Europe proposed a multilateral treaty, the European Convention on Certain International Aspects of Bankruptcy (the "Istanbul Convention"). [344] This treaty rejected the EEC Convention and adopted a flexible approach under which one central proceeding would be opened in one principal forum in which the debtor's "center of main interests" was located and that secondary proceedings could be opened in other forums which had "establishments." [345] The treaty was ultimately rejected because, among other problems, the treaty was viewed as promoting territoriality. [346] In effect, the secondary proceedings could apply their own insolvency law to the proceedings. In addition, a country, by "opting out" of chapter II, could refuse to recognize a foreign representative's cross−border powers and could refuse to adopt secondary status, by opting out of chapter III. [347] These overly flexible provisions doomed the Istanbul Convention.

In 1995, a working group, formed under the auspices of the European Union Council of Ministers, produced the European Union Convention on Insolvency Proceedings (EU Convention). [348] Unlike any of the other laws on international insolvency, the EU Convention directly addresses choice of law issues in a clear and comprehensive fashion. Under Article 13, the Convention provides that, generally, the law of the "main" proceeding applies to all ancillary (secondary) proceedings in other EU member states. [349] The problem here is how to determine where the principal forum, or "main proceeding," is located. The law of the main proceeding would determine who is eligible to file a bankruptcy proceeding, and would govern which property is "estate property." [350] In addition, like the Model Law, the main insolvency proceeding would be automatically recognized in other EU member states. Despite this general choice of law provision, certain issues were excluded from its scope.

The excluded issues include validity of security interests, sales of property under reservation of title, the effects of the main proceeding on the rights to acquire or use immovable property, the effects of the main proceeding on accepting and rejecting employment contracts, to name a few. [351] The underlying rationale of these exceptions was that certain "in rem" rights of local creditors should be protected under local law in which the property was located. This theory protects local creditors and especially adheres to the expectations of the creditors. For example, a local, unsophisticated creditor might not expect to be subject to some distant country's law in its dealings with a large subsidiary of an international corporation, especially if the dealings concerned security interests in immovable property perfected under local law. This territoriality aspect of the Convention was probably politically significant in permitting its adoption. These exceptions also apply in the context of choice of avoidance law.

The Convention needed to limit the exportation of avoidance law in some circumstances [352] After long discussions on whether to carve exceptions for categories worthy of avoidance protection (vessels, airplanes), a choice of avoidance law rule was proposed. [353] Under this rule, the avoidance law of the principal forum would apply to ancillary

proceedings, unless the objecting creditor (defendant) satisfied two requirements. [354] First, the local avoidance law (of the ancillary proceeding) applied to the disputed transfer. [355] Second, the transfer could not be challenged under any legal theory under the local law. [356] The second requirement is strict, and requires that not only must the local avoidance law not be able to avoid the transfer, but any other legal theory under the local law will not apply to invalidate the transfer. The rationale of this approach was to protect transfers from avoidance, if possible. This approach is at odds with the Concordat approach, which permits the representative to choose the most advantageous preference law. In addition, the Convention's approach is perhaps more predictable than the Concordat.

Having briefly outlined the other choice of avoidance law approaches under the other Model Laws and treaties, we must now compare and contrast these approaches, in order to choose the "optimal" choice of avoidance law rule.

IV. Comparison and Contrast of Choice of Avoidance Law Approaches

The choice of law approaches discussed will be analyzed under the current debate between proponents of universality and territoriality.

The choice of avoidance law rules are determined, in large part, by the international insolvency philosophy followed by the State. [357] Under a universality approach, courts will generally tend to apply the avoidance law of the principal forum, subject to certain exceptions. [358] Under the territoriality approach, courts will tend to apply their own avoidance law. [359] This discussion will consider the two leading schools of thought on international insolvency, universality and its variants, and territoriality (cooperative territoriality). [360]

The leading proponent of universality, Professor Westbrook, argues that courts should apply the avoidance law of the "home" country of the debtor to the greatest extent possible. [361] In order to understand this theory, we will take a step back and consider the benefits of the universality approach in general.

In the seminal international insolvency article, Professor Westbrook identified three reasons why courts should adopt a universality approach. [362] First, under the "Rough Wash" argument, a universalist rule would roughly even out the benefits and losses for local creditors. [363] Creditors would gain enough from foreign deference to the local forum to wash out the losses resulting from local deference to foreign proceedings. This argument, by itself does not, however, encourage adoption of the universalist rule, it merely mitigates the disadvantages of adopting universality. [364] The second argument, under the theory of "Transactional Gain," relies upon the increased flow of trade at lower transaction costs that would result from a universalist rule. [365] In effect, creditors, due to the perceived higher predictability of application of one country's laws to any future insolvencies of the debtor, would be able to better adjust the costs of the loans to debtors. This, in turn, would stimulate more global economic activity. [366] The third argument states that adoption of universality would promote fairness and equality of distribution to all creditors. [367] This position assumes that distribution by one central forum, under one law, would ensure equitable distribution to creditors. Although this argument is appealing, it can be encompassed under a more cooperative territoriality approach. We now turn to the proposed benefits of universality in the context of choice of avoidance law.

Professor Westbrook identifies a few key arguments in support of a universalist choice of avoidance law rule. First, the rule would be predictable, which would support the "transactional gain" theory. [368] A universalist rule, despite its inflexibility, does have the highest predictability. Second, such a system would provide a better 'systemic fit' with the policies of the distributing court. [369] Under universality, the local court will typically defer to a foreign proceeding, transfer the collected assets to that proceeding and the foreign proceeding will distribute the assets in accordance with its particular distribution policy. The goals of avoidance laws are to distribute assets equally to creditors; this can be better accomplished by employing the avoidance laws of the distributing court. [370] Third, a territoriality system would engender chaos and unpredictability because avoidance results will depend on location of assets at a future time. [371] Consequently, creditors will not be able accurately predict the costs of lending, increasing the risks and leading to higher lending costs. [372] Although the universalist rule has definite benefits, the greatest of which is its predictability, it is not perfect.

Applying a "home" country avoidance law to an ancillary proceeding would be unfair if the creditor was "small, and unsophisticated," such as a supplier dealing with a local branch of foreign debtor whose dealings were local in every

aspect. [373] According to Professor LoPucki, foreign avoidance law should not apply to purely domestic transactions whose only connection to the foreign forum was that the debtor was incorporated in the foreign country. [374] This is a strong argument and involves a consideration of fairness and the expectations of the parties.

A second argument demonstrating a weakness of the universality approach is that use of foreign avoidance would be especially difficult for a local court to apply due to its technicality and complexity. [375] Bankruptcy law is particularly troublesome because it incorporates different areas of the law (property law, contract law). In addition, bankruptcy law tends to promote the particular policy goals of each State and interpretation of another country's laws would therefore be difficult.

A third problem identified by Professor Westbrook is that U.S. debtors might move operations offshore to other States that have not adopted a universalist rule and in which avoidance law would not be more lenient or not particularly well−developed. [376]

Fourth, Professor LoPucki points out the difficulties inherent in determining the "home" country ("center of main interests") of the debtor. In what is probably the strongest argument against universality, LoPucki argues that in some cases it will be difficult to determine the "home" country. [377] Universalist rule generally defines the home country to be the place of incorporation of the debtor. [378] However, in some cases, if the debtor is merely a subsidiary of larger corporation, then the better rule would be to define the "home" country as the parent's place of incorporation because, even though the parent is financially sound, its assets may be necessary for a successful reorganization. [379] Consequently, the "home" should be the place of incorporation of the parent of the debtor. [380] The main problem with this approach is that, under this rule, transactions between a U.S. creditor and U.S. subsidiary of a foreign parent, negotiated in the U.S., relating to U.S. assets, would be subject to foreign law, and, for our purposes, foreign avoidance law. Once again, we are faced with the problem of applying foreign law to domestic transactions, which was addressed above. Courts are thus faced with the dilemma of whether to look to the "home" country of the group and apply foreign law to local transactions, or look to the 'home' country of the entity and not achieve a successful reorganization due to the lack of access to the assets of the parent.

Perhaps then an intermediate approach would be best. The "home" country of the parent would be the presumption, subject to exceptions in cases where the dealings between the local creditor and the local subsidiary had "local" characteristics and the expectations of the creditor were that only local law would apply. Such an exception would have to be shown by the creditor. The same rule could apply to choice of avoidance law.

Having briefly outlined the more significant benefits and costs of the universality approach (which, in the same breath also presents arguments in favor of the territoriality approach), we can attempt to identify the "optimal" choice of law rule.

The MICCA approach, although it opts for the avoidance law of the 'home' country of the debtor (principal forum), does not specify how to choose the principal forum. This approach is unpredictable and has gaps. The Concordat, while providing a very flexible approach, dependent on principles of international law, nonetheless is not appropriate for choice of avoidance law in ancillary proceedings. As discussed above, the advantages of having a predictable law are critical in any international insolvency system under the theories of "Rough Wash" and "Transactional Gain." This is especially true in ancillary proceedings, where there is a valid presumption that the law of the main proceeding should apply to avoid transfers. Nevertheless, as the critiques of the universality approach demonstrate, there are certain considerations of fairness and expectations of the parties that are not adequately addressed by an inflexible universalist choice of avoidance rule which applies the "home" avoidance law in every situation.

In these circumstances, it would be proper to have local avoidance law apply to the transfers. The European Convention seems to provide a fair standard for creating an exception to the universalist rule. [381]

The current choice of avoidance law approach under the proposed, new chapter 15 to the U.S. Bankruptcy Code does not give a clear choice of avoidance law rule, it merely gives "standing" to the foreign representative to use U.S. avoidance powers. Consequently, the U.S. courts are merely given the option of permitting use of either U.S. or foreign avoidance law, based on the circumstances and the court's discretion. This open−ended approach undermines

any predictability in choice of avoidance law. Faced with this problem, I propose that Congress keep Article 23, but add a new section dealing with choice of avoidance law.

My proposal would be to adopt the choice of law rule found in the European Convention for ancillary proceedings under a new Article or as a subsection to Article 23.

The rule would state that the law of the home country should be presumed to apply to ancillary proceedings, subject to an exception. In order for the exception to apply, the defendant (the objecting creditor) would have to prove two elements. First, that the local avoidance law would apply to the transfer. This showing could be made if the local State would be shown to have a greater interest in the transfer than the foreign State. This element would incorporate, by reference, the *Maxwell* factors of choice−of−law such as identity of the parties, location of transfer, location of loan negotiations and agreement and ultimately the expectations of the parties. Second, the objecting creditor would have to show that the transfer could be avoided under local avoidance law. This proposed rule would ensure a substantial level of predictability because most transfers would be governed by the presumptive "home" country avoidance law. However, the rule would be flexible enough to permit certain exceptions in cases where the transactions were essentially 'local' and thus ensure a certain degree of fairness.

Under chapter IV, dealing with concurrent proceedings, I would propose that the choice−of−law factors enumerated by the *Maxwell* court be codified as an additional article in chapter 15. This codification would ensure a predictable, coherent and uniform standard for determining which avoidance law to apply in the admittedly rare concurrent proceeding. [382] This codification would ensure that courts do not adopt conflicting approaches to choice of avoidance law in concurrent proceedings.

FOOTNOTES:

[1] The author completed his undergraduate studies in international relations at Tufts University in 1996, and subsequently attended St. John's University School of Law, graduating in 1999. The article, Choice of Avoidance Law in the Context of International Bankruptcies, was submitted and defended in the spring of 2001 as the thesis for the LL..M in Bankruptcy at St. John's University School of Law. Mr. Levenson recently began to clerk for Judge Craig in the Bankruptcy Court for the Eastern District of New York. Mr. Levenson would like to thank the faculty of the LL.M in Bankruptcy at St. John's University School of Law and Professor Zinman for their guidance and comments. Back To Text

[2] See generally Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post−Universalist Approach, 84 Cornell L. Rev. 696 (1999) [hereinafter LoPucki, Resolving Transnational Insolvencies]; Robert K. Rasmussen, Resolving Transnational Insolvencies through Private Ordering, 98 Mich. L. Rev. 2252 (2000); Jay Lawrence Westbrook, A Global Solution to Multinational Default, 98 Mich. L. Rev. 2276 (2000) [hereinafter Westbrook, A Global Solution]. Back To Text

[3] See generally Int'l Bar Ass'n, Cross−Border Insolvency Concordat 1 (1995); European Union Convention on Insolvency Proceedings [hereinafter EU Convention], opened for signature, Nov. 23, 1995, 35 I.L.M. 1223 (1996); United Nations Commission on International Trade Law: Model Law on Cross−Border Insolvency, adopted by UNCITRAL at Vienna, May 30, 1997, 30th Sess. [hereinafter Model Law], reprinted in 36 I.L.M. 1386 (1997). Back To Text

[4] To date, Mexico has adopted UNCITRAL and England is moving towards its adoption as well. See generally E. Bruce Leonard, The International Year in Review, 19 Am. Bankr. L.J. 24 (2001) (noting globalization of business has led to new and visible effects on international insolvency laws); Josefina F. McEvoy, Mexico's New Insolvency Act, 19 Am. Bankr. L.J. 16 (2000) [Part I of II] (outlining effects of Mexico's adoption of UNCITRAL); Josefina F. McEvoy, Mexico's New Insolvency Act, 19 Am. Bankr. L.J. 12 [Part II of II](continuation of same). Back To Text

[5] See In re Maxwell Communication Corp., 93 F.3d 1036, 1040 (2d Cir. 1996) (describing facts leading up to collapse of publishing empire of Robert Maxwell); Olympia & York Dev. Ltd. v. Royal Trust Co., 20 C.B.R. (3d) 165 (1993) (describing as example of international cooperation between courts case in which Canadian debtor corporation with

assets in Canada, U.S. and England filed concurrent proceedings in each State); Central Bank Chiefs Vow to Learn Lessons from BCCI Debacle, Agence Fr. Presse, July 9, 1991, available at http://www.Lexis.com, Wire Service Stories (chronicling details of collapse of BCCI). Back To Text

[6] See Liza Perkins, A Defense of Pure Universalism in Cross−Border Corporate Insolvencies, 32 N.Y.U. J. Int'l L. & Pol. 787, 789 (2000) [hereinafter Perkins, A Defense of Pure Universalism] (explaining under universalist approach, debtor corporation's insolvency proceeding is administered in debtor's home country, and orders entered and depositions made there are effective in every country in which debtor has assets/business); Jay Lawrence Westbrook, Choice of Avoidance Law in Global Insolvencies, 17 Brook. J. Int'l L. 499, 514 (1991) [hereinafter Westbrook, Choice of Avoidance Law] (opining that, under universality theory, law of main forum should apply to all ancillary proceedings, and asserting "main" proceeding is generally determined by location of principal assets/headquarters); infra Part IV (discussing further concept of "universality"). Back To Text

[7] See Perkins, A Defense of Pure Universalism, supra note 5, at 787 (same); Westbrook, Choice of Avoidance Law, supra note 5, at 514 (observing "[u]niversality in its ultimate realization would provide a single forum applying a single legal regime to all aspects of a debtor's affairs on a worldwide basis."). Back To Text

[8] See Perkins, A Defense of Pure Universalism, supra note 5, at 789 (noting territoriality leads to commencement by individual countries of separate insolvency proceedings, and grabbing of whatever assets debtor may have located in that country in order to protect local creditors); Westbrook, Choice of Avoidance Law, supra note 5, at 513 (same). Back To Text

[9] See Perkins, A Defense of Pure Universalism, supra note 5, at 803−14 (outlining disadvantages and inefficiencies of territorial insolvency proceedings); Westbrook, A Global Solution, supra note 1, at 2308−09 (explaining difficulties arising in attempting to engender cooperation between courts in reorganization or liquidation of multinational corporations and observing lack of efficiency resulting from territorialism). Back To Text

[10] The "grab rule" currently is the "de facto" international insolvency system used by most countries. See Lynn M. LoPucki, The Case for Cooperative Territoriality in International Bankruptcy, 98 Mich. L. Rev. 2216, 2216 (2000) [hereinafter LoPucki, Case for Cooperative Territoriality] (asserting "[t]erritoriality is currently the international law of bankruptcy."); Perkins, A Defense of Pure Universalism, supra note 5, at 790 (noting "on balance, most nations adopt a roughly territorial approach."). Back To Text

[11] See Hannah Buxbaum, Rethinking International Insolvency: The Neglected Role of Choice−of−Law Rules and Theory, 36 Stan. J. Int'l. L. 23, 30−31 [hereinafter Buxbaum, Rethinking International Insolvency] (explaining courts implicitly make choice of law decisions when selecting forum within which to conduct proceedings). This observation results from the fact that, generally, courts will not conduct proceedings under the law of another forum. Choice of avoidance law, however, represents an exception, as demonstrated under Metzeler decision. See Westbrook, Choice of Avoidance Law, supra note 5, at 462 (noting there "seems to be an assumption that choice of law follows from choice of forum."); infra Part II.C.2 (discussing choice of avoidance law). Back To Text

[12] See Buxbuam, supra note 10, at 30 (observing choice of forum decisions frequently determine choice of law rules). Back To Text

[13] See Perkins, A Defense of Pure Universalism, supra note 5, at 792 (opining that sections 303(b)(4), 304 and 305 of U.S. Bankruptcy Code constitute modified universality because court has discretion to assist and defer to foreign proceeding under section 304(c), and, further, that "purer" universality system would automatically assist/recognize foreign proceeding, such as UNCITRAL); Westbrook, Choice of Avoidance Law, supra note 5, at 517 (recognizing section 304 of U.S. Bankruptcy Code as prime example of "modified universalism"). Back To Text

[14] See 11 U.S.C. §§ 303−05 (1994) (providing manner in which involuntary cases and cases ancillary to foreign proceeding may be commenced, and describing circumstances in which court may dismiss case or suspend proceedings); 1 Collier on Bankruptcy ¶ 304.01[1] (Lawrence P. King ed., 15th ed. rev. 1998) (same). Back To Text

[15] Generally, ancillary cases, due to their limited purpose, apply the law of the main proceeding. Although this statement might seem to contradict my earlier position that bankruptcy courts do not apply foreign insolvency law, it does not. Ancillary proceedings, due to their nature, will never apply foreign distribution law or other insolvency laws because the local court will either defer to the foreign proceeding, in which case foreign law would apply, or not defer, in which case U.S. law applies. This also explains why choice of avoidance law presents a special problem. The U.S. court could apply foreign or U.S. avoidance law, even if it intends to defer to the foreign proceeding. The same would not be true of application of foreign distribution law, for example. See Metzeler v. Bouchard Transp. Co. (In re Metzeler), 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987) (holding, under section 304, foreign representative may assert only those avoiding powers granted him by foreign law applicable to estate); see also Henry Lewis Goodman, Mark P. Friedman & William H. Schrag, Use of United States Bankruptcy Law in Multinational Insolvencies: The Axona Litigation−Issues, Tactics and Implications for the Future, 9 Bankr. Dev. J. 19, 24−25 (1992) [hereinafter Goodman, Use of United States Bankruptcy Law] (asserting "[s]ection 305 provides for the dismissal or suspension of a U.S. bankruptcy proceeding in deference to a foreign action, including upon application by a foreign representative."). Back To Text

[16] See 11 U.S.C. § 304(c) (1994) (providing court should be guided by that which will best assure economical and expeditious administration of particular estate in determining whether to grant relief under section 304(b)); see also infra Part II.B (pursuing more in−depth discussion of interpretation of these factors by various courts). Back To Text

[17] The local creditors will presumably prefer this approach because they will not be forced to submit and litigate their claims under the foreign main forum under that forum's laws as they would under a modified universality approach. Instead, the local creditors will have the protection of local law. See Westbrook, Choice of Avoidance Law, supra note 5, at 516; John K. Londot, Note, Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association's Concordat, 13 Bankr. Dev. J. 163, 173 (1996) (observing "[i]n secondary bankruptcy practice, a country distributes local assets to local creditors according to its own priority system, and delivers any remainder to the administrative forum for distribution to remaining creditors, according the administrative forum's priorities."). Back To Text

[18] See supra note 9 (discussing "grab rule" and prevalence of its application in cases involving international insolvency). Back To Text

[19] Courts are increasingly willing to enter into Protocols, agreements which set out the duties and powers of the administrators, liquidators or other court officials appointed to supervise the insolvency proceedings of the debtor in concurrent proceedings. See Richard A. Gitlin & Ronald A. Silverman, Dealing with Foreign Workouts and Insolvencies 1993: Practical Strategies for Lenders and Investors; The Role of the Examiner in the Maxwell Communication Corporation PLC International Insolvency, 671 PLI/Comm 229, 241 (1993); see also In re Maxwell Communication Corp., 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1992) (appointing examiner and approving agreement between examiner and joint administrator by final supplemental order). Back To Text

[20] There is a perception among some commentators that the current international insolvency system, under both modified territoriality or modified universality, is no longer adequate to deal with the insolvencies of complex multinational corporations such as Maxwell. See Buxbaum, Rethinking International Insolvency, supra note 10, at 34 (submitting "the growing tendency of courts to seek extra−regulatory solutions to international insolvencies suggests the increasing irrelevance of the current framework to the decisionmaking process."); infra Part III.C.3.b (providing fuller discussion of Maxwell case). Back To Text

[21] See Robert K. Rasmussen, A New Approach to Transnational Insolvencies, 19 Mich. J. Int'l L. 1 (1997) (espousing "contractual menu" approach to selecting insolvency law which would apply to debtor). The "contractual menu" approach offers the benefits of being simple, straightforward and predictable. However, it has problems. First, if a debtor decided to change its law later, would it be permitted to do so? Second, would creditors participate in the process? Back To Text

[22] These characteristics of the "optimal" choice of avoidance law rule have been gleaned from readings of Professor Jay Lawrence Westbrook's articles on the benefits of universality and from the importance of fairness and

expectations of insolvency parties in the Maxwell decision and general choice−of−law principles. See In re Maxwell Communication Corp. plc, 93 F.3d 1036, 1048 (2d Cir. 1996) (enumerating factors which must be considered by court in determining choice of law rule); Joel P. Trachtman, Conflict of Laws and Accuracy in the Allocation of Government Responsibility, 26 Vand. J. Transnat'l L. 975, 995 (1994) (describing tension in choice of law rules between predictability and accuracy, and fairness). Predictability would ensure uniformity, which is an important characteristic of law. The accuracy of applying one law to a particular set of facts, based on fairness and justice, might present an exception to a uniform legal rule, and thus distort predictability. Back To Text

[23] In fact, fears of "forum shopping" are a major concern for critics of the universality approach. See, e.g., Theodore Eisenberg & Lynn M. LoPucki, Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations, 84 Cornell L. Rev. 967, 968 (1999) (lamenting that "an embarrassing pattern of forum shopping has been developing in the highly visible world of big−case bankruptcy reorganization."); LoPucki, Resolving Transnational Insolvencies, supra note 1, at 720−23 (explaining debtors who anticipated filing bankruptcy could manipulate their attributes to assure jurisdiction over their cases in debtor−friendly countries). Back To Text

[24] An example would be a corporation that transferred most of its assets from the U.S. to another country with little, if any, ties to the U.S. and whose place of incorporation remained the U.S. Such an approach would be used by debtors who wanted to protect their assets from distribution to creditors. Another variation of this approach would be for a corporation to relocate its headquarters, as BCCI did when it moved its "brass place" headquarters from Luxembourg to Abu Dhabi on the eve of filing bankruptcy. Back To Text

[25] The Reform Act of 2000 incorporates the provisions of the Model Law in its new chapter 15, which addresses ancillary and cross−border cases. The Model Law was drafted by the United Nations Commission on International Trade Law (UNCITRAL) and was adopted at UNCITRAL's 30th session in May of 1997. See UNICTRAL Model Law on Cross−Border Insolvency: Report of UNCITRAL on the Work of its Thirtieth Session, U.N. GAOR, 52d Sess., Annex I, at 68−78, U.N. Doc. A/52/17 (1997). Back To Text

[26] See infra Part IV (discussing "center of main interests" and "home" country of debtor). Back To Text

[27] See infra Part III.C.b (discussing aspects of Maxwell case). Back To Text

[28] This approach would ensure uniform and predictable choice of avoidance law rules in concurrent proceedings. "Concurrent" refers to the existence of two or more plenary, cross−border cases that are being conducted simultaneously by two courts. Often, as in the Maxwell case, the courts will engage in some form of cooperation. See Maxwell, 93 F.3d at 1053 (positing that, where dispute involving conflicting avoidance laws arises in context of parallel bankruptcy proceedings that have already achieved substantial reconciliation between two sets of laws, comity argues decidedly against risk of derailing cooperation by selfish application of our law to circumstances touching more directly upon interests of another forum); id. (noting "in the interest of the system as a whole" promoting friendly intercourse between sovereignties furthers self−interest in areas of international commerce and trade); see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987) (noting concept of international comity requires analysis of respective interests of both foreign nation and requesting nation). Back To Text

[29] Some commentators have perceived the U.S. Bankruptcy Code, specifically 11 U.S.C. § 109(a), as being overbroad and too far−reaching in its scope. Indeed, this section permits any person (or corporation) that "resides, or has a domicile [place of incorporation], place of business or property in the United States" to commence a plenary ("full") case in the U.S. This "all−encompassing" concept of eligibility might impede international cooperation and harmony. See Jeremy V. Richards, How Well Does the U.S. Bankruptcy Code Support the Emerging Standards of Comity in Cross−Border Insolvencies?, 16 Am. Bankr. Inst. J. 20 (1997) (questioning "all−encompassing" concept's ability to advance these goals). But see Maxwell, 93 F.3d at 1036 (limiting all−encompassing embrace of section 109 through partial abstention by abstaining from applying some of substantive provisions of Bankruptcy Code on basis of "comity" when failing to do so would result in overreaching application of U.S. law). Back To Text

[30] See Goodman, Use of United States Bankruptcy Law, supra note 14, at 28 (stating liquidators of Axona (Hong Kong corporation) commenced plenary case, under 11 U.S.C. § 303(b)(4), principally in order to use U.S. avoidance law, an option that would not have been available to liquidators under ancillary proceeding, under 11 U.S.C. § 304); see also In re Axona Int'l Credit & Commerce Ltd., 88 B.R. 597, 601 (Bankr. S.D.N.Y. 1988) (noting options available to liquidators were considered to secure preservation and protection of Axona's U.S. property by use of U.S. avoidance law), aff'd, 115 B.R. 442 (Bankr. S.D.N.Y. 1990), appeal dismissed, 924 F.2d 31 (2d Cir. 1991); infra Part II.C.3.a (providing more expansive discussion of Axona case). Back To Text

[31] A few articles on choice of avoidance law in international insolvencies have been written in the last decade. See, e.g., Samuel A. Caulfield, Fraudulent and Preferential Conveyances of the Insolvent Multinational Corporation, 17 N.Y.L. Sch. J. Int'l & Comp. L. 571 (1997). Back To Text

[32] Commentators have unanimously agreed on the "primitive and chaotic" current international insolvency legal framework. See Richard A. Gitlin & Rona R. Mears, International Loan Workouts and Bankruptcies 308 n.8 (1989) (suggesting tension surrounding resolution of international insolvencies stems from fact that most countries contemplate universal recognition of their domestic insolvency proceedings, yet afford limited recognition to foreign proceedings); Tandi Armstrong Panuska, The Chaos of International Insolvency−−Achieving Reciprocal Universality Under Section 304 or MIICA, 6 Transnat'l Law 373, 375−76 (1993) [hereinafter Panuska, The Chaos of International Insolvency] (explaining lack of any coherent framework for resolving multinational insolvencies has contributed to "inconsistent outcomes in individual cases, [and] mounting costs of piecemeal administrations."). Back To Text

[33] See Buxbaum, Rethinking International Insolvency, supra note 10 (noting choice of law and choice of forum are interchangeable concepts in international insolvency, with few exceptions, e.g., choice of avoidance law). Back To Text

[34] 159 U.S. 113 (1895). Back To Text

[35] See id. at 163. Back To Text

[36] Id. at 163−64 (establishing classic definition of comity). Back To Text

[37] See id. at 205, 210. The U.S. Supreme Court observed that, despite the fact that French procedures were different from those of the U.S., for instance, one of the plaintiffs was not permitted to testify under oath and was not subject to cross−examination by the defendants, this difference, by itself did not warrant impeachment of the foreign judgment. This comparison of foreign and U.S. law was to later form the basis of decisions to recognize foreign insolvency proceedings under 11 U.S.C. § 304. However, the decision not to extend comity due to lack of reciprocity still poses a problem in analysis of section 304. See, e.g., Douglass G. Boshkoff, United States Judicial Assistance in Cross−Border Insolvencies, 36 Int'l & Comp. L.Q. 729, 734 (1987). Back To Text

[38] As will be discussed in Part II (B), comity continues to play an important role in courts' determination to defer to a foreign proceeding under section 304(c)(5). Just prior to enactment of section 304, the Commission on Bankruptcy Laws added a sixth factor, comity, to the section 304(c) factors. This addition was the codification of the legislative statement directing that "[s]ection 304(c) is modified to indicate that the court shall be guided by considerations of comity in addition to the other factors specified therein." See 124 Cong. Rec. 32, 394 (1978). Back To Text

[39] See In re Maxwell Communication Corp. plc, 170 B.R. 800 (Bankr. S.D.N.Y. 1994) (noting doctrine played key role in court's decision to apply English law to avoid transfers); see also infra Part II.C.1.b (providing full discussion of this case). Back To Text

[40] See John Honsberger, Conflict of Laws and the Bankruptcy Reform Act of 1978, 30 Case W. Res. L. Rev. 631, 635 (1980). Back To Text

[41] For a more detailed description of the case, see Becker, International Insolvency: The Case of Herstatt, 62 A.B.A. J. 1290 (1976) [hereinafter Becker, International Insolvency] (discussed further in following paragraphs). Back To Text

[42] 9 U.S. 289 (1809). Back To Text

[43] The U.S. Supreme Court upheld the Supreme Court of Wisconsin's decision to uphold a U.S. creditor's attachment of property in Wisconsin over a foreign creditor's prior attachment. In this case, a German Bank, Disconto Gesellschaft, garnished money owed to it by a German citizen, Terlinden, who had fled to Wisconsin earlier. A U.S. citizen, Umbreit, who was also owed money, garnished Terlinden's account after Disconto's garnishment. The German trustee, appointed by German bankruptcy court, attempted to recover Disconto's garnishment but the court refused, stating that to do so would be against the "public policy of Wisconsin, which forbade such discrimination as against a citizen of that State." The U.S. Supreme Court upheld the decision, essentially because to allow the recovery by the German Bank would have harmed the rights of U.S. creditors. See Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908). Back To Text

[44] This case reveals the tension between protection of local creditors from the inconvenience of litigating their claims in foreign forum, under a potentially unfavorable foreign law, and the need for cooperation among courts. To this day, this conflict exists, as seen in the debate between territoriality and universality. Back To Text

[45] The benefits of a universality approach are clear: under an ancillary or plenary proceeding, the German court would have been able to recover the amount garnished and distribute it equally to all creditors. See Kurt H. Nadelmann, Legal Treatment of Foreign and Domestic Creditors, 11 Law & Contemp. Probs. 696, 700 (1946). Back To Text

[46] In Gebhard, the U.S. Supreme Court recognized a foreign insolvency proceeding (a Canadian composition, equivalent to a U.S. reorganization) and determined that two U.S. creditors (bondholders of a Canadian railway corporation) should litigate their claims in a Canadian forum. Although the Court acknowledged the fact that the creditors would not enjoy the same priority they would have under U.S. law, it stated that "every person who deals a foreign corporation, impliedly subjects himself to the laws of the foreign government…" See Can. Ry. Co. v. Gebhard, 109 U.S. 527 (1883). Back To Text

[47] In re Maxwell Communication Corp. plc, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (citing Gebhard for proposition that creditor should reasonably expect to be subject to foreign law when dealing with foreign creditor). Back To Text

[48] See, e.g., Clarkson Co. v. Shaheen, 544 F.2d 624 (2d Cir. 1976) (narrowly construing exceptions to comity, and refusing to permit U.S. creditors in U.S. court to collaterally attack Canadian judgment for obtaining records in U.S.); Waxman v. Kealoha, 296 F. Supp. 1190 (D. Haw. 1969) (extending comity to Canadian proceeding, in light of fact that no U.S. creditors were prejudiced). Back To Text

[49] For a full description of Herstatt, see Becker, International Insolvency, supra note 40, at 1292 (noting issue in Herstatt was whether section 4(b) of U.S. Bankruptcy Act, which excluded banks from Act, applied to foreign bank). Although the Herstatt court did not decide the issue, it was addressed in a similar case, In re Israel−British Bank (London) Ltd., No. 74−B−1322 (Bankr. S.D.N.Y. 1974), appealed, In re Israel−British Bank (London) Ltd. v. Federal Deposit Ins. Corp., 536 F.2d 509 (2d Cir. 1976). In IBB, the Court of Appeals held that a foreign bank that did not conduct business in the U.S. was not excluded from the U.S. Bankruptcy Act, under section 4(b); see also In re Banque de Financement, S.A., 568 F.2d 911, 913 (2d Cir. 1977) (describing events which led to U.S. filings). Back To Text

[50] Bankruptcy Act § 2(a)(22) provides that a U.S. court has jurisdiction "to [e]xercise, withhold, or suspend the exercise of jurisdiction, having due regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States," and Bankruptcy Act § 2(a)(1) provides that a U.S. court may "exercise jurisdiction over [entities which] have property within the [U.S.]." See 11 U.S.C. §§ 11(a)(1), 22 (1970), reprinted in Matthew Bender, Collier on Bankruptcy §§ 1−4 Ch. I−III, 200−17 (14th ed. 1974). Bankruptcy Rule 119 is derived from section 2(a)(22). Section 2(a)(22) is the precursor of sections 304 and 305 of the U.S. Bankruptcy Code (1978). Back To Text

[51] See Finabank, 568 F.2d at 917−19 (permitting foreign representatives to use U.S. avoidance law in avoiding U.S. preferential attachments); IBB, No. 74−B−1311, ¶ 3 (Conclusions of Law) (observing Judge Galgay went further than Finabank, and that U.S. Bankruptcy Act "could be invoked by IBB for the specific purpose of avoiding preferential attachments..."). Back To Text

[52] See id. Back To Text

[53] As discussed in further detail in Part II(C), the differences under plenary and ancillary proceedings and the use of U.S. versus foreign avoidance powers have only been appreciated, to some extent, in later cases, such as Metzeler, under the 1978 Bankruptcy Code. See generally In re Metzeler, 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987) (recognizing avoidance powers created by foreign law under section 304); In re Toga Mfg., Inc., 28 B.R. 165, 165 (Bankr. E.D. Mich. 1983) (involving ancillary proceeding and foreign law). Back To Text

[54] See Charles D. Booth, A History of the Transitional Aspects of United States Bankruptcy Law Prior to the Bankruptcy Reform Act of 1978, 9 B.U. Int'l L.J. 1, 34 (1991) (stating Finabank court "drew no conclusions regarding these alternatives (ancillary and plenary cases), [and]...the proposal that the U.S. Bankruptcy Court should serve in either a primary or ancillary role was later adopted in Sections 303(b)(4) and 304 of the U.S. Bankruptcy Code, respectively."). See generally Finabank, 568 F.2d at 911 (drawing no conclusions about ancillary and plenary cases). Back To Text

[55] See Finabank, 568 F.2d at 918 (observing Bankruptcy Act section 2a(1) "fosters. . . equal distribution among [foreign and domestic] creditors."); see also IBB, 536 F.2d 509, 511 (2d Cir. 1976) (discussing distribution to creditors). Back To Text

[56] See id. Back To Text

[57] See id. at 921 (explaining section 2a(22) was "designed to avoid needless duplication of effort by courts and creditors in those cases where an ancillary proceeding in this country could be coordinated or entirely dismissed in favor of a proceeding abroad."); Goerg v. Parungao (In re Goerg), 844 F.2d 1562, 1568 (11th Cir. 1988) (asserting section 2a(22) authorizes courts to use discretion in their exercise of jurisdiction where bankrupt has also been adjudicated bankrupt in foreign jurisdiction). Back To Text

[58] See infra Part II.C (providing fuller discussion of "forum shopping" and "section shopping"). Back To Text

[59] This argument, based on fairness principles, was proposed by commentators. See, e.g., Jeremy V. Richards, How Well Does the U.S. Bankruptcy Code Support the Emerging Standards of Comity in Cross−Border Insolvencies, Oct. 1997 Am. Bankr. Inst. J. 20 (1997), and was adopted by Chemical Bank in the Axona case. See In re Axona Int'l Credit & Commerce Ltd., 88 B.R. 597, 607 (Bankr. S.D.N.Y. 1988) (alluding to Chemical's hopes not to allow foreign party to institute full bankruptcy case in United States); see also infra Part II.C.3.a (discussing issues relating to availability of U.S. law to foreign debtors). Back To Text

[60] As will be discussed in Part II(C), the Maxwell court adopted this notion. See generally Maxwell Commun. Corp. PLC by Homan v. Societe Generale PLC (In re Maxwell), 186 B.R. 807, 807 (Bankr. S.D.N.Y. 1995) (discussing relevant choice of law issues). Back To Text

[61] This argument is based on the notion that statutes should be read, if possible, so as not to render other provisions void or mere surplusage. Consequently, some distinction between sections 303(b)(4) and 304 should be made by courts. Back To Text

[62] See 11 U.S.C. §§ 303(b)(4), 304−306 (1994) (setting forth procedure for handling foreign insolvencies). Back To Text

[63] 11 U.S.C. § 304(b), in complete form, provides as follows:

Subject to the provisions of subsection (c) of this section, if a party in interest does 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 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

11 U.S.C. § 304(b) (1994). Back To Text

[64] The principal purpose of section 304 is to allow "foreign bankrupts to prevent piecemeal distribution of assets in this country by filing ancillary proceedings in domestic bankruptcy courts." See In re Lines, 81 B.R. 267, 271 (Bankr. S.D.N.Y. 1988) (citing Victrix Steamship Co. v. Salen Dry Cargo, A.B., 825 F.2d 709, 713−14 (2d Cir. 1987)); see also S. Rep. No. 989, reprinted in 1978 U.S.C.C.A.N. 5787, 5792; H.R.Rep. No. 595, reprinted in 1978 U.S.C.C.A.N. 5963, 6281. Back To Text

[65] In an ancillary proceeding, courts should be principally guided by what will "best assure an economical and expeditious administration of the estate" consistent with factors of section 304(c). This guidance was provided in both the legislative history and is part of the statutory language. See H.R. Rep. No. 595, reprinted in 1978 U.S.C.C.A.N. at 6281; S.Rep. No. 989, reprinted in 1978 U.S.C.C.A.N. at 5281; see also 11 U.S.C. § 304(c) (1994) (same). Back To Text

[66] Id. § 303(b)(4) (setting forth ways in which foreign debtor's estate may commence bankruptcy proceedings against foreign debtor); see also Goodman, Use of United States Bankruptcy Law, supra note 14, at 22−24 (explaining section 303(b) of Code). Back To Text

[67] See id. at 22−24 (explaining section 303(b) of Code); see also In re Axona Int'l Credit & Commerce Ltd., 88 B.R. 597, 607 (Bankr. S.D.N.Y. 1988) (explaining differences between sections 303 and 304 of Code). Back To Text

[68] A majority of courts have interpreted comity to be the overarching principle in a section 304(c) analysis. See, e.g., In re Culmer, 25 B.R. 621, 621 (Bankr. S.D.N.Y. 1982) (granting comity to Bahamian proceeding); see infra Part II(B) (discussing range of judicial interpretations of comity and section 304); see also Charles D. Booth, Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts, 66 Am. Bankr. L.J. 135, 172−84 (1992) [hereinafter Booth, Recognition of Foreign Bankruptcies] (describing comity as one of most important principles in such proceedings); see also Cunard Steamship Co. v. Salen Reefer Services, 773 F.2d 452, 452 (2d Cir. 1985) (granting comity to Swedish bankruptcy proceedings and vacating attachment in U.S.); In re Brierley, 145 B.R. 151, 151 (Bankr. S.D.N.Y. 1992) (recognizing English bankruptcy proceeding). Back To Text

[69] See Buxbaum, Rethinking International Insolvency, supra note 10, at 30 (concluding "[u]nfortunately, section 304 contains no choice−of−law rule to guide judicial decisionmaking."); see also Kurt H. Nadelmann, Legal Treatment of Foreign and Domestic Creditors, 11 Law & Contemp. Probs. 696, 696 (1946) (stating lack of any express reciprocity provision in section 304 has been attributed to "inadequate representation from experts in the field of international conflicts of law," and criticizing bill for not addressing conflicts of law issue, treating it instead as "merely ancillary to

some other subject."). Back To Text

[70] Commentators have unanimously agreed on the "primitive and chaotic" current international insolvency legal framework. See, e.g., Anne Nielsen, et. al, Int'l Law Symposium: Article: The Cross−Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies, 70 Am. Bankr. L.J. 533, 533 (1996) (suggesting weaknesses in international insolvency law and proposing resolution of those issues); Panuska, The Chaos of International Insolvency, supra note 31, at 375−76 (1993) (suggesting lack of any coherent framework for resolving multinational insolvencies has contributed to "inconsistent outcomes in individual cases [and] mounting costs of piecemeal administrations."). Back To Text

[71] See Buxbaum, Rethinking International Insolvency, supra note 10, at 26 (reasoning that, in determining which forum should administer assets of debtor, court is implicitly choosing which law will apply to distribution of assets and other issues; but not necessarily applying this rationale to choice of avoidance law); see also Ian F. Fletcher, The European Union Convention on Insolvency Proceedings: Choice−of−Law Proceedings, 33 Tex. Int'l L.J. 119, 121 (1998) (discussing conflicts of law issues in international insolvency cases). Back To Text

[72] Some courts have adopted an approach that gives greater weight to the comity factor under section 304(c)(5). See, e.g., In re Culmer, 25 B.R. 621, 621 (Bankr. S.D.N.Y. 1982) (adopting more pro−universality approach); Cunard S.S. Co. v. Salen Reefer Services AB, 773 F.2d 452, 452 (2d Cir. 1985) (adopting more pro−universality approach as well). Other courts have given equal weight to all the factors in section 304(c). See, e.g., In re Hourani, 180 B.R. 58, 70 (Bankr. S.D.N.Y. 1995) (dismissing Jordanian representative's section 304 petition on grounds it violated sections 304(c)(1), (2), (3) and (4)); In re Papeleras Reunidas, 92 B.R. 584, 594 (Bankr. E.D.N.Y. 1988) (criticizing Culmer court for wrongfully subordinating other factors to comity); see also In re Toga Mfg. Ltd., 28 B.R. 165, 165 (Bankr. E.D. Mich. 1983) (discussing flexibility of factors provided in section 304); In re Lineas Aereas de Nicaragua, 30 B.R. 1,1 (Bankr. S.D. Fla. 1983). Back To Text

[73] As most commentators seem to agree, certain factors of 304(c) favor protection of U.S. creditors, whereas other factors favor deference to foreign proceedings. See Booth, Recognition of Foreign Bankruptcies, supra note 67, at 168 (explaining that factors (1) and (3) are universality factors which favor deference to foreign proceedings, whereas factors (2), (4) and (6) are territoriality concerns which favor protection of U.S. creditors); Melissa S. Remel, American Recognition of International Insolvency Proceedings: Deciphering Section 304(c), 9 Bankr. Dev. J. 453, 456 (1992) (discussing both universality and territoriality approaches of factors of section 304). Back To Text

[74] See 11 U.S.C. §§ 304(c), 304(c)(2) (1994) (explaining how to determine whether to grant relief); In re Banco Nacional de Obras y Servicios Publicos, S.N.C., 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988) (explaining purpose of relief granted under section 304). Back To Text

[75] See In re Culmer, 25 B.R. at 633 (observing principle of comity favors single proceeding); Jeremy Smith, Approaching Universality: The Role of Comity in International Bankruptcy Proceedings Litigated In America, 17 B.U. Int'l L. J. 367, 382 (stating single proceeding is generally more efficient than multiple proceedings). Back To Text

[76] See Canada S.R. Co. v. Gebhard, 109 U.S. 527, 539 (1883) (suggesting parties working with foreign corporation subject themselves to that jurisdiction); In re Culmer, 25 B.R. at 632 (arguing parties subject themselves to foreign jurisdictions by contracting with foreign corporations). Back To Text

[77] See id. at 629. The term "public policy" is elusive. One commentator, however, has provided some insight into its meaning. See Buxbaum, Rethinking International Insolvency, supra note 10, at 55−58 (stating public policy implicates fundamental rights of U.S. creditors however difficult to define and calls into question issues such as whether to keep same priority or simply obtain adequate notice of proceedings and have right to an equitable subordination claim). In my opinion, this clause simply provides an "escape clause" for courts, an exception. The "public policy" exception, however, is a very useful device that will be discussed again later in the context of choice of avoidance law and the UNCITRAL provisions. Back To Text

[78] See Booth, Recognition of Foreign Bankruptcies, supra note 67, at 177 (observing "[h]ow one interprets Culmer ultimately depends on whether one believes that in a 304 case the law to be applied is the law of the foreign proceeding."). The law to be applied is the law where the debtor has its principal place of business. This premise is implicit in the Culmer case. In re Culmer, 25 B.R. at 621; see also In re Metzeler, 78 B.R. 674, 674 (Bankr. S.D.N.Y. 1987) (reasoning similarly). Back To Text

[79] The Culmer court stressed the fact that Bahamas was a "sister common law jurisdiction" and that Bahamian law incorporated certain aspects of fairness and due process such as: requiring supervision of the liquidators by the Bahamian courts, limiting creditors to claims in liquidation, avoiding preferences and fraudulent conveyances, not preferring claims of domestic creditors over foreign creditors, allowing a right of appeal to creditors from a bankruptcy court decision, requiring court approval for liquidator to make payment to class of creditors. See In re Culmer, 25 B.R. at 630−31. The Overseas Inn case provides an example of public policy violation. See Overseas Inns S.A. P.A. v. United States, 685 F. Supp. 968, 968 (N.D.Tex. 1988) (finding public policy was violated because foreign bankruptcy order did not accord priority treatment to U.S. taxes owed by foreign debtor). Back To Text

[80] See In re Culmer, 25 B.R. at 630. This was an unusual interpretation of 304(c)(3), because generally courts consider (c)(3) in determining the fairness of the foreign avoidance law. See, e.g. In re Papeleras Reunidas, S.A., 92 B.R. 584, 591 (Bankr. E.D.N.Y. 1988). Back To Text

[81] English law, for example, requires a subjective intent to prefer one creditor. See Insolvency Act 1986 §§ 239(4)(b), (5) (U.K. law); see also Re M.C. Bacon Ltd. [1990] BCC 76 (stating "[t]he subjective intention of the debtor is crucial"). Back To Text

[82] Todd Kraft & Allison Aranson, Transnational Bankruptcies: The Section 304 and Beyond, 1993 Columb. Bus. L. Rev. 329, 342−43 (1992) [hereinafter Kraft & Aranson, Transactional Bankruptcies] (explaining section 304(c)(3) instructs the court to consider foreign avoidance law before turning assets over to the foreign proceeding: "Naturally, the desire is to protect the United States creditors in the way that they would be protected in the United States".). Back To Text

[83] See In re Brierley, 145 B.R. 151, 166 (Bankr. S.D.N.Y. 1992). Back To Text

[84] 773 F.2d 452 (2d Cir. 1985) (granting comity to a Swedish proceeding and vacating an attachment in the United States). Back To Text

[85] Id. at 459. Back To Text

[86] Id. at 454. Back To Text

[87] Not surprisingly, the Second Circuit followed a very similar approach again in the later case of Maxwell, in affirming the lower courts. See In re Maxwell, 186 B.R. 807, 807 (Bankr. S.D.N.Y. 1995). Back To Text

[88] See supra note 71. Back To Text

[89] See In re Toga Mfg. Ltd., 28 B.R. 165, 165 (Bankr. E.D. Mich. 1983); In re Lineas Aereas de Nicaragua, 13 B.R. 779, 779 (Bankr. S.D.Fla. 1981). Back To Text

[90] See In re Lineas Aereas de Nicaragua, 13 B.R. at 780−81. Back To Text

[91] Id. at 169. Back To Text

[92] See In re Lineas Aereas de Nicaragua, 13 B.R. at 780−81. Back To Text

[93] As one commentator has observed: "If each proceeding under section 304 invites a courtroom battle, foreign creditors will seldom use the section." See Kraft & Aranson, Transactional Bankruptcies, supra note 81, at 342. Back

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[94] See In re Cunard, 773 F.2d 452, 455−56 (2d Cir. 1985) (describing instance where comity extended despite not filing 304 petition). Cf. Refco F/X Assocs., Inc. v. Mebco Bank S.A., 108 B.R. 29, 31 (Bankr. S.D.N.Y. 1989) (holding section 304 petition is "preferable" in dealing with case than as attachment action in district court). Back To Text

[95] See 11 U.S.C. § 109(a) (1994). Back To Text

[96] See, e.g., In re Maxwell, 186 B.R. 807, 819 (Bankr. S.D.N.Y. 1995). Back To Text

[97] See 11 U.S.C. § 541 (1994) (stating estate property constitutes property "wherever located and by whomever held"). This section has been interpreted to extend the U.S. court's jurisdiction to property located overseas, under a universality approach. See, e.g., In re Simon, 153 F.3d 991 (9th Cir. 1998) (extending automatic stay protection to foreign debtor's assets located in Hong Kong and enforcing this protection through its jurisdiction over the creditor's U.S. assets). Back To Text

[98] See 28 U.S.C. § 1410 (1994). However, pursuant to section 304(b), a U.S. Bankruptcy Court would have authority to mold relief in "near blank check fashion" and stay all actions against the debtor in the U.S., thus reducing the need for commencing an action in each district in which the debtor's assets are located. See In re Culmer, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982). Back To Text

[99] See supra note 80; see also In re Axona Int'l Credit & Commerce, 88 B.R. 597, 620 (Bankr. S.D.N.Y. 1988) (stating plain language of Code permits trustee to use U.S. avoidance law in plenary case). Back To Text

[100] The U.S. counsel for the Hong Kong liquidators of Axona recommended such a strategy, embodied in the "Cleary memo," which later became the center of the controversy in the Axona case. Back To Text

[101] See In re Metzeler, 78 B.R. 674, 674 (Bankr. S.D.N.Y. 1987) (asserting foreign representative in ancillary proceeding is limited to use of foreign avoidance powers). Back To Text

[102] The costs generally are high litigation costs, longer length of time and possible loss of control over administration of case. Whereas the benefits are simply defined as the amount of assets recoverable in an avoidance action commenced in the U.S., under U.S. avoidance law. Back To Text

[103] Under 11 U.S.C. § 305(a), the U.S. court can, sua sponte or upon request, dismiss, abstain or suspend a case at any time, if it deems this necessary for the "economical and expeditious" administration of the estate, after an analysis of the factors under section 304(c). Back To Text

[104] It seems that this possibility was not considered by the drafters of section 303(b)(4). The legislative history of section 303(b)(4) does not add anything to the statutory language. See generally 11 U.S.C. § 303(b)(4) (1994) (stating involuntary case may be started by foreign representative of estate in foreign proceeding); Westbrook, Choice of Avoidance Law, supra note 5, at 525 (discussing possible choice of avoidance rules, and noting that, in recent cases, transactions are avoided if avoidable under either "home−country or local law"). Back To Text

[105] The eligibility requirements under section 303(b)(4) are straightforward. The debtor must satisfy section 109(a) and have a "domicile," a place of business or property in the U.S. to be a debtor under this title [11]. However, the eligibility requirements for a section 304 proceeding are disputed. Some courts find that section 109(a) must be satisfied. See In re Metzeler, 78 B.R. at 680 (holding foreign preference and fraudulent transfer actions to recover property in United States were basis upon which to ground section 304 petition). Other courts find that a foreign debtor is not a "debtor" under title 11, and thus does not need to satisfy section 109(a). The latter approach is universalist, and more in keeping with the flexible nature of section 304, whose purpose is simply to assist a foreign proceeding. See In re Gee, 53 B.R. 891, 899 (Bankr. S.D.N.Y. 1985) (stating section 304 petitioner need not show debtor's eligibility for chapter 11 relief). Back To Text

[106] See In re Maxwell, 186 B.R. 807, 819 (Bankr. S.D.N.Y. 1995) (explaining district court correctly found drafters of sections 109, 304 and 305 failed to contemplate both choice of avoidance law issues and situations in which plenary bankruptcy cases were pending in courts of two nations); see also In re Axona Int'l Credit & Commerce Ltd., 115 B.R. 442, 447 (Bankr. S.D.N.Y. 1990) (observing section 304(b) leaves bankruptcy court with discretion to determine whether to grant comity to foreign bankruptcy law). See generally Booth, Recognition of Foreign Bankruptcies, supra note 67, at 227 (asserting bankruptcy court, not foreign representative, must weigh section 304(c) requirements to decide whether to grant relief). Back To Text

[107] A "concurrent" proceeding refers to commencement of full cases in the U.S. under either section 301 or section 303(b)(4) during which time a foreign bankruptcy proceeding is pending in another country. See generally 11 U.S.C. § 301 (1994) (providing voluntary case is commenced when debtor files petition with bankruptcy court). Back To Text

[108] See, e.g., In re Maxwell, 186 B.R. 807 (Bankr. S.D.N.Y. 1995); In re Axona Int'l Credit & Commerce Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), aff'd, 115 B.R. 442 (Bankr. S.D.N.Y. 1990), appeal dismissed, 924 F.2d 31 (2d Cir. 1991); see also infra Part II.C.3.a (providing full discussion of Axona case). Back To Text

[109] See In re Metzeler, 78 B.R. 674, 675 (Bankr. S.D.N.Y. 1987). Back To Text

[110] Under West German law, the court appoints the trustee subject to confirmation by the creditors committee. See KONKURSORDNUNG (KO) §§ 79−80, 110 Reichsgesetzblatt [RGB 1] (W. Germ.). Back To Text

[111] See Metzeler, 78 B.R. at 678. Back To Text

[112] See In re Metzeler 66 B.R. 977, 979 (Bankr. S.D.N.Y. 1986). Back To Text

[113] See id. Back To Text

[114] See In re Metzeler 78 B.R. 674, 675 (Bankr. S.D.N.Y. 1987). Back To Text

[115] See id. Back To Text

[116] See id. at 676 (quoting Victrix Steamship Co. v. Salen Dry Cargo AB, 825 F.2d 709, 714 (2d Cir. 1987)). Back To Text

[117] See 11 U.S.C. § 304(c) (1994) (providing court should grant relief based on scenario which will best assure economical and expeditious administration of such estate). See generally In re Bd. Of Dirs. of Hopewell Int'l Ins. Ltd., 238 B.R. 25, 54 (Bankr. S.D.N.Y 1999) (explaining ancillary proceeding lends "helping hand" to foreign court by enabling foreign representative's action in United States). Back To Text

[118] See In re Metzeler, 78 BR. at 677 (quoting Gitlin & Flaschen, The International Void in the Law of Multinational Bankruptcies, 42 Bus. Law. 307, 319 (1987)). Back To Text

[119] Although the court did not specifically mention this alternative option, it was implicit under the "plain reading of the statute." See 2 Collier Bankruptcy Practice Guide, ¶ 19.07, 1 (1987). Back To Text

[120] See In re Metzeler, 78 B.R. at 677 (discussing In re Toga Mfg, Ltd. where parameters of the estate were based on foreign law using Canadian law to determine whether accounts receivable constituted property of the estate). See In re Toga Mfg., Ltd. 28 B.R. 165, 166−67 (Bankr. E.D. Mich. 1983). Back To Text

[121] See In re Metzeler, 78 B.R. at 677. Back To Text

[122] See id. Back To Text

[123] See 11 U.S.C. § 109(a) (1994) (explaining who may be debtor). The court thus acknowledged that the foreign debtor must qualify as a debtor under the U.S. Bankruptcy Code because in order to be considered a debtor, section 109(a) must be satisfied. This assumption, which is not necessarily correct, will be discussed later. Back To Text

[124] See In re Metzeler, 78 B.R. at 678. Back To Text

[125] This theory relied on the landmark U.S. Supreme Court case of Whiting Pools in which the concept of property under section 541(a) was enlarged to include "any property made available to the estate by other provisions of the Code," ("other provisions" presumably referring to preferences). See U.S. v. Whiting Pools, 462 U.S. 198, 205 (1983) (stating "several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced."). Back To Text

[126] See In re Metzeler, 78 B.R. at 678; see also 28 U.S.C. § 1410(b) (1994) (providing case may be commenced under section 304 to require turnover of property of estate only in district court for district in which such property is found) (emphasis added). Back To Text

[127] See In re Metzeler, 78 B.R. at 679. Back To Text

[128] This reasoning is quite similar to the court's decision in In re Lineas Aereas de Nicaragua, under which the court could broadly mould any 'blank check' relief under section 304(b)(3). In In re Lineas Aereas de Nicaragua, the court appointed an independent trustee under section 304(b)(3) to determine whether any value could be obtained from the debtor's sole remaining asset−a Certificate from the Civil Aeronautics Board to operate within the U.S. In addition, the court allowed a very limited turnover of U.S. assets, because it conditioned the turnover on full payment to U.S. creditors in advance and prohibited any encumbrance, assignment or abandonment of U.S. assets. Pivotal in the court's decision was the fact that the court believed that section 304(c)(2) would be violated by forcing U.S. creditors to "look for Nicaragua for payment." See In re Lineas Aereas S.A., 10 B.R. 790 (Bankr. S.D. Fla. 1981). Back To Text

[129] In re Metzeler 78 B.R. at 679−80 (stating, under this rationale, U.S. creditors and foreign creditors should be subject to equal treatment, and, consequently, that same avoidance law should apply to all transfers). It would not be fair to recover U.S. assets under U.S. avoidance law, but apply German avoidance, and not recover German assets from creditors located in Germany. See id. Back To Text

[130] See In re Gee 53 B.R. 891, 904 (Bankr. S.D.N.Y. 1985) (acknowledging foreign liquidation proceedings in Cayman Islands satisfied criteria of section 304); see also In re Culmer 25 B.R. 621, 627 (Bankr. S.D.N.Y. 1982) (determining liquidation proceedings were more properly subject to foreign avoidance law). Back To Text

[131] U.K. "preference" law is more restrictive than U.S. preference law. See supra note 80. Other countries' preference laws are generally stricter than U.S. preference provisions. Compare 11 U.S.C. § 547(b)(4) (1994) (providing U.S. preference period is 90 days prior to filing of insolvency petition), with HASANHO [BANKRUPTCY LAW], art. 72(4), translated in 2 E.H.S. LAW BULLETIN SERIES LU 1 (1986) (maintaining preference law in Japan covers only 30−day period before suspension of payment or petition of case). Back To Text

[132] See In re Metzeler, 78 B.R. at 680. Bouchard was relying on the literal meaning of "prevention"; one can only prevent a future transfer. Back To Text

[133] See id. (emphasizing literal wording of section 304 would be pointless if it applies only to transfers after petition is filed). Back To Text

[134] Id. (observing "[i]t... seems clear that Congress intended that foreign preference and fraudulent transfer actions seeking to recover property located here are a sufficient basis on which to ground a section 304 petition..."). Back To Text

[135] For example, in one of the earlier cases the court simply allowed the representative to bring a 547 action pursuant to section 304(c)(3). See In re Egeria Societa Per Azioni di Navigazione, 26 B.R. 494, 497 (Bankr. E.D.Va. 1983). In

a previous case, the U.S. Bankruptcy Court of the Southern District of Florida, assumed without discussion that section 547 was applied and controlled in a section 304 case. See In re Comstat Consulting Services, 10 B.R. 134 (Bankr. S.D. Fla. 1981). Back To Text

[136] These two cases stand for the proposition that there is a possibility that different jurisdictions may apply different laws, in the context of section 304. The law of the Cayman Islands was used in In re Gee, 53 B.R. 891, 903 (Bankr. S.D.N.Y. 1985) and the avoidance law of the Bahamas was used in In re Culmer, 25 B.R. 621, 630 (Bankr. S.D.N.Y. 1982). Back To Text

[137] See Buxbaum, Rethinking International Insolvency, supra note 10 at 30 (commenting that, "[u]nfortunately, section 304 contains no choice−of−law rule to guide judicial decisionmaking"); see also Nadelmann, supra note 68 (suggesting lack of any express reciprocity provision in section 304 may be attributable to "inadequate representation from experts in the field of international law."). Back To Text

[138] 11 U.S.C. § 304(c) (1994). See, e.g., Kojima v. Grandote Int'l Ltd. Liab. Co. (In re Grandote Country Club Company, Ltd.), 252 F.3d 1146, 1150 (10th Cir. 2001) (explaining "such proceedings may utilize foreign law to recover property located in the United States when application of foreign law will 'best assure an economical and expeditious administration' of the bankruptcy estate."). Back To Text

[139] Delay would be inevitable because a full case is lengthier than an ancillary proceeding. In addition, the costs of a plenary case are greater than an ancillary proceeding. Furthermore, this would result in clogging up the court system and wasting judicial resources. See generally Goodman, Use of United States Bankruptcy Law, supra note 14, at 22−25 (discussing issues and strategies arising from Axona litigation). Back To Text

[140] See H.R.Doc No. 93−137, part II, at 71 (1973). Back To Text

[141] In re Metzeler, 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987) (quoting Gitlin & Flaschen, The International Void in the Law of Multinational Bankruptcies, 42 Bus. Law. 307, 319 (1987)). Back To Text

[142] If the representative could use U.S. avoidance law in the 304 proceeding, and German law for other elements of the case such as distribution and priority arrangements, this would essentially lead to inequitable results. See generally Eric A. Henzy, Resolving Conflicts Under Section 304 of the Bankruptcy Code: In re Metzeler, 3 Conn. J. Int'l L. 439, 465 (1988) [hereinafter Henzy, Resolving Conflicts]. Back To Text

[143] However, the transactions would be similar in all respects, save the nationality of the creditors. Thus, this would lead to inequitable treatment of U.S. creditors who would in effect be disadvantaged solely because of nationality. Especially in a universality regime, this would lead to violation of the bankruptcy principle that requires similar treatment of similarly situated creditors. Nonetheless, one could just as easily argue that the German creditors are not similarly situated with U.S. creditors and that the application of different avoidance laws is therefore valid. Mr. Henzy has remarked that U.S. creditors would enjoy greater distribution of assets than German creditors if different avoidance laws were used. However, this is not necessarily true. Mr. Henzy assumes that the representative would avoid U.S. transfers and that after recovering the assets in the 304 proceeding, the assets would be distributed to U.S. creditors. However, it seems that the assets would be recovered under U.S. avoidance law and transferred to German court to be distributed to all creditors worldwide. Thus, the effect of recovering U.S. assets under U.S. avoidance law would be simply to increase the distribution to all creditors. See id. at 465−66 (explaining that, in effect, some representatives would recover assets of U.S. creditors, but not those of German creditors as result of difference in avoidance law). Back To Text

[144] See id. at 466 (defining protocol as agreement between courts which addresses main issues in bankruptcy, such as which priority scheme will apply, which procedures will be followed, how claims should be filed and other bankruptcy matters). See, e.g., Maxwell Comm. Corp. v. Barclays Bank (In re Maxwell) 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994) (lamenting that, to date, protocols have not addressed which avoidance law is to be used). Back To Text

[145] See Henzy, Resolving Conflicts, supra note 141, at 467 (asserting that "[o]nce a court determines that the foreign proceeding passes muster under section 304(c), the resolution of the case is left to the foreign proceeding."). See generally Ulrich Huber, Creditor Equality in Transnational Bankruptcies: The United States Position, 19 Vand. J. Transnat'l L. 741, 753 (suggesting foreign law should govern as long as requirements of section 304 (c) are fulfilled). Back To Text

[146] Shoichi Tagashira, Intraterritorial Effects of Foreign Insolvency Proceedings: An Analysis of 'Ancillary' Proceedings in the United States and Japan, 29 Tex. Int'l L.J. 1, 32−33 (1994) [hereinafter Tagashira, Intraterritorial Effects]. Back To Text

[147] One of section 304's goals can be described as protecting U.S. creditors from prejudice, inconvenience and discrimination in litigation claims in foreign courts. Although this policy is not the only factor considered by courts under section 304(c) (namely, section 304(c)(2)), it has nonetheless played a pivotal role in some decisions. See, e.g., In re Hourani, 180 B.R. 58, 68 (Bankr. S.D.N.Y. 1995) (finding section 304(c)(2) requirement was violated in Jordanian main proceeding because Jordanian law only permitted notice of bar date by publication alone, whereas U.S. law, under U.S. Bankruptcy Code, prohibited notice by publication alone, and required mailing notice to all creditors); In re Toga Mfg. Ltd., 28 B.R. 165, 170−71 (E.D. Mich. 1983) (declining to recognize Canadian proceeding because it violated 304(c)(2) by not according lower priority to U.S. creditor than he would have enjoyed under U.S. law). Back To Text

[148] An important element of handling U.S. assets in accordance with U.S. law and policy is protecting U.S. creditors from prejudice, discrimination and inconvenience in pursuing claims abroad, in a foreign forum. Back To Text

[149] For example, in In re Sanko, a foreign trustee of a corporate reorganization case commenced in Japan was permitted to commence a 304 proceeding in the U.S. This was permitted despite the fact that the cooperation and assistance to the Japanese main proceeding would be very limited (if any) due to the fact that the effect of Japanese proceedings was restricted to Japanese territory (territorial approach to international insolvency). See Dow Chemical Pacific, Ltd. v. Rascator Maritime S.A., 640 F. Supp. 882 (Bankr. S.D.N.Y. 1986); see also Makoto Ito, Report for Japan, in Cross−Border Insolvency: National and Comparative Studies 178, 180−201 (Ian F. Fletcher ed., 1992). Back To Text

[150] See Westbrook, Choice of Avoidance Law, supra note 5, at 534−35 (applying home−country avoidance law will "sometimes require the local courts to understand and apply a very difficult and technical area of foreign law."). Back To Text

[151] See 11 U.S.C. § 304(c)(3) (1994); see also In re Egeria Societa Per Azioni di Navigazione, 26 B.R. 494, 497 (Bankr. E.D. Va. 1983). Back To Text

[152] See, e.g., supra note 130 and accompanying text (discussing benefits which may arise from application of U.S. avoidance law). Back To Text

[153] This theory was inspired by the Maxwell decision. See supra note 105, at 814−17. There, Judge Brozman, under comity principles, analyzed several factors found in the Restatement of Foreign Relations Law of the United States (3d), §§ 401−16 (1987), and concluded that the U.K. had a "greater interest" in the "controversy" (preferential transfer dispute) than did the U.S. Back To Text

[154] See Maxwell Communication Corp. plc v. Barclays Bank (In re Maxwell), 170 B.R. 800, 817−18 (Bankr. S.D.N.Y. 1994) (discussing most significant factors under Maxwell analysis); see also Romero v. International Terminal Operating Company, 358 U.S. 354, 383 (1959) (stating controlling consideration is "the interacting interests of United States and foreign countries."); Restatement (Second) of Conflict of Laws § 6 (1971) (listing main factors in conflict of law issues as need for interstate and international systems, relevant policies of forum, relevant policies of interested states, protection of justified expectations, basic policies underlying field of law, uniformity and predictability of results, and ease in determination and application of law). Back To Text

[155] See supra note 21 and accompanying text (raising dual goals of most choice of law systems: predictability and accuracy (fairness). Back To Text

[156] 88 B.R. 597 (Bankr. S.D.N.Y. 1988), aff'd, 115 B.R. 442 (Bankr. S.D.N.Y. 1990), appeal dismissed, 924 F.2d 31 (2d Cir. 1991). Back To Text

[157] See Id. at 608; see also Hong Kong Banking Corporation v. Simon (In re Simon), 153 F.3d 991, 998 (9th Cir. 1988) (stating section 305 "allows a United States bankruptcy court to dismiss or suspend a domestic bankruptcy proceeding when there is a pending foreign proceeding, and the foreign representative seeks dismissal or suspension of proceedings in the United States."); In re Culmer, 25 B.R. 621, 629 (Bankr. S.D. N.Y. 1982) (observing that comity, in addition to factors listed in section 304(c), is considered in determining whether to transfer assets internationally for distribution). Back To Text

[158] See In re Axona, 88 B.R. at 599. Back To Text

[159] See id. Back To Text

[160] See id. at 599−600 (noting, although "Chemical Transaction" was loan requested and negotiated in Hong Kong, loan proceeds were disbursed to Axona's New York account on same day loan was requested). Although it would be difficult, under these circumstances, to characterize the transaction as occurring in either Hong Kong or the U.S., negotiations involved Hong Kong branch of both Chemical and Axona, two Hong Kong−based entities). Back To Text

[161] See id. at 600 (relating petition was filed with Supreme Court of Hong Kong, pursuant to section 179 of Hong Kong Companies Ordinance, seeking compulsory winding−up (liquidation) of Axona). Back To Text

[162] See id. at 600−01 (noting that liquidators sought advice from their U.S. counsel, Cleary, Gottlieb, Steen & Hamilton ("Cleary") as to alternatives available to them); see also Goodman, Use of United States Bankruptcy Law, supra note 14, at 28−29. Back To Text

[163] See In re Axona, 88 B.R. at 600−01. Back To Text

[164] See 11 U.S.C. § 1410 (1994) (providing that multiple proceedings may have to be commenced in light of requirement that foreign representative must commence proceeding in each district in which debtor's assets are located in order to enjoy protection of stay pending their recovery). This result, however, could theoretically be averted if a bankruptcy court enjoined the commencement of all actions, wherever pending, under section 304(B)(3) ("other appropriate relief"), which would essentially give courts "blank check" authority. See, e.g., In re Gee, 53 B.R. 891, 893 (Bankr. S.D.N.Y. 1985) (granting representative right to "discover" what happened to its assets in United States); In re Lineas Aereas de Nicaragua, 13 B.R. 779, 780 (Bankr. S.D. Fla. 1981) (appointing "independent trustee" to oversee protection and preservation of U.S. asset). However, in a plenary case, only one bankruptcy case is required to enjoy the broad protection of the automatic stay under 11 U.S.C. § 362(a). Back To Text

[165] Also, the stay provisions, under section 304(b), are not as broad as the automatic stay under section 362(a). See supra note 163 (discussing various aspects of venue). In addition, the Metzeler case, although lacking the force of statute, is nonetheless strongly persuasive precedent for limiting a foreign representative to the use of foreign avoidance powers. See Arnold M. Quittner, Maxwell Communications and Cross−Border Insolvency Issues, 752 PLI/Comm 647, at 658−62 (April, 1997); see also supra note 14 and accompanying text. Back To Text

[166] See In re Axona, 88 B.R. at 601. Back To Text

[167] See id. Back To Text

[168] See id. at 601−02. Back To Text

[169] See id. at 618−19. Back To Text

[170] One of Chemical's principal arguments was that the Liquidators were engaging in "forum shopping" by filing a plenary case in the U.S. and using U.S. avoidance law to recover assets. The reason was that Hong Kong law did not have provisions for avoiding set−off preferential attachments and, furthermore, followed English law in that it required a subjective intent on the part of the debtor to prefer one creditor over another. See id. at 606; see also H.K. Bankruptcy Ordinance, section 49 (repealed as of 1996 under Hong Kong Bankruptcy Ordinance 1996 (section 76 of 1996) (providing creditor must have "dominant intention to prefer the creditor" as one of requirements for avoidance). See generally Charles D. Booth & Phillip St. J. Smart, The New Avoidance Powers under Hong Kong Insolvency Law: A Move from Territoriality to Extraterritoriality, 34 Int'l. Law. 255, 260 (2000) [hereinafter Booth & Smart, The New Avoidance Powers] (discussing recent modifications of Hong Kong Bankruptcy Ordinance). Back To Text

[171] The greatest problem in Axona was that a foreign representative could potentially apply U.S. avoidance law in a scenario in which the "contacts" (i.e. the location and expectations of parties, the location of the transfer, and the place in which the loan was negotiated) with the U.S. could be almost non−existent. The problem with this approach is that, while the choice of avoidance law might be predictable (because the U.S. avoidance law would apply consistently to all plenary cases filed in the U.S.), it would risk being "unfair" or rather "inaccurate" due to lack of sufficient contacts with the U.S. Back To Text

[172] See In re Axona, 88 B.R. at 613−15 (discussing "Jurisdictional Challenge"); see also id. at 608 (arguing comity should not be granted to Hong Kong proceeding because "comity would not permit the use of the Code's avoiding powers for the benefit of foreign creditors where the transaction could not be avoided under applicable foreign law."); id .(arguing dismissal under section 305(a) should not be granted once Code's avoiding powers have been exercised). Back To Text

[173] See In re Axona, 88 B.R. at 599. Back To Text

[174] See Id. at 613−14 (finding case was properly commenced and administered pursuant to section 303(b)(4), and, relying on "plain reading" of Code under 28 U.S.C. § 1334(d), concluding "existence of property of the Debtor is sufficient to invoke this Court's jurisdiction under 303(b)(4)."). Section 1334(d) provides the district court, where a bankruptcy case is pending, with exclusive jurisdiction over all property of the debtor and its estate. In addition, the court looked to section 109(a), which permits commencement of a case under title 11, provided the debtor has property located in the United States. See 11 U.S.C. § 109(a) (1994). Back To Text

[175] For purposes of comparison, courts have struggled over what jurisdictional requirements must be met for a foreign representative to file a case under section 304. Earlier decisions had held that a debtor's ability to commence an ancillary proceeding hinged on its eligibility to have commenced a case under title 11, and thus satisfy section 109(a). See, e.g., In re Lines, 81 B.R. 267, 273 (Bankr. S.D.N.Y. 1988) (permitting ancillary proceeding to take place in foreign jurisdiction); see also Angulo v. Kedzep Ltd., 29 B.R. 417, 419 (Bankr. S.D. Tex. 1983) (finding section 304 flexible provision which permits ancillary proceeding for purpose of discovery). Some courts, such as Metzeler, broadened the definition of "property" under section 109 to encompass preferential transfers that had not yet been recovered. See supra note 125. More recent decisions, however, have held, first, that the debtor need not qualify as a "debtor" under section 109(a) because a foreign debtor is not considered a "debtor" for purposes of title 11, and second, that this reading comports with the flexible nature of ancillary proceedings. See In re Brierley, 145 B.R. 151, 158−61 (Bankr. S.D.N.Y. 1992). Interestingly the arguments in In re Brierley might presuppose some connection between the purpose of a proceeding, whether it be ancillary or plenary, and eligibility requirements. Back To Text

[176] There is no statutory language or legislative history in section 303(b)(4) which contemplates when a full proceeding, as opposed to an ancillary proceeding, should be permitted to be filed. Back To Text

[177] See In re Axona, 88 B.R. at 603 (proposing foreign representative may commence full case only when (1) foreign debtor had business presence in U.S. and American creditors had dealt with it in U.S. regarding that business, (2) creditors who had dealt with debtor in its domicile had flouted foreign court orders, or (3) foreign representative seeks to recover transfers in U..S. which are avoidable under foreign law). Back To Text

[178] It must be remembered that the pre−1978 cases specifically allowed a foreign representative to file plenary cases for the sole purpose of recovering assets. See supra note 50. However, this was before ancillary proceedings had been introduced. Back To Text

[179] See In re Berthoud, 231 F. 529, 532−33 (S.D.N.Y. 1916) (resting jurisdiction on alleged bankrupt's bank account in absence of residence, domicile, or principle place of business within jurisdiction). See, e.g., In re Global Ocean Carriers, 251 B.R. 31, 37−39 (Bankr. D. Del. 2000) (holding debtor's interest in escrow funds for retaining counsel was sufficient); In re McTague, 198 B.R. 428, 430−32 (Bankr. W.D.N.Y. 1996) (defining "property" under section 109 broadly, and finding $194 in bank account was sufficient). Back To Text

[180] One commentator has suggested that eligibility requirements for a plenary case should be restricted. See Jeremy V. Richards, How Well Does the U.S. Bankruptcy Code Support the Emerging Standards of Comity in Cross−Border Insolvencies?, 16−OCT Am. Bankr. Inst. J. 20 (1997) (stating "[the] all−encompassing concept of eligibility under Section 109 does not appear to be a very promising start in advancing the concept of international harmony and cooperation."). In addition, other limits exist to counterbalance section 109(a). For example, a judge can dismiss a full case, either chapter 7 or 11, if it is filed in bad faith; that is, if assets were moved to U.S. immediately before filing, or if assets were taken out of U.S. and only a nominal amount was left in order to be able to file in U.S. See, e.g., In re McTague, 198 B.R. 428, 432−33 (Bankr. W.D.N.Y 1996) (observing foreign debtor could leave some small asset in U.S. in order to create jurisdiction but transfer most of its assets out of U.S. prior to filing bankruptcy, and that such case could be dismissed for "bad faith" under section 707 or section 305(a)(2)). But see In re World of English, 23 B.R. 1015, 1023 (Bankr. N.D. Ga.1982) (finding there was "no evidence that the bank account was transferred from Japan to California merely to create jurisdiction for future bankruptcy proceeding." and that debtors had satisfied eligibility requirements of section 109). Back To Text

[181] See supra note 170 (discussing "unfair" or "inaccurate" use of U.S. avoidance laws). Back To Text

[182] This approach was inspired by the Chemical arguments. See supra note 171 and accompanying text. Back To Text

[183] See In re Maxwell Communication Corp. plc, 170 B.R. 800, 815 (Bankr. S.D.N.Y. 1994) (exemplifying this approach under presumption against extraterritoriality doctrine). But see Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (stating, in dicta, that presumption does not generally bar extraterritoriality where failure to extend scope of statute will result in adverse effects within United States); id. at 531 (noting additional exception to rule of presumption against extraterritoriality exists when conduct Congress seeks to regulate occurs largely within United States). Back To Text

[184] See 11 U.S.C. § 305(a)(2) (1994) (authorizing court to suspend or dismiss U.S. case, ancillary or plenary, if factors in section 304(c) have been satisfied); see also id § 304(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 claims 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.

Id.; see also In re Taylor, 176 B.R. 903, 907, n.9 (Bankr. C.D. Cal. 1995) (noting "section 305 grants the court wide discretion on abstention issues, and expressly incorporates the factors specified in section 304(c) as a possible basis for such abstention."). Back To Text

[185] See In re Axon Int'l Credit and Commerce Ltd., 88 B.R. 597, 607 (S.D.N.Y. 1988) (addressing Chemical's argument "that suspension [of case] in accordance with § 305(a) should not be granted once the Code's avoiding powers have been invoked."). Back To Text

[186] See id. at 607−13 (discussing Chemical's arguments with respect to section 305). In its determination of whether to dismiss the case and transfer the assets to a foreign proceeding, the court was properly guided by the factors in 304(c). In this determination, the court, adhering to "economical and expeditious" considerations, found that dismissing the case avoided increased costs of dual administration, would not prejudice or inconvenience American creditors, and would not offend comity, and thus granted the dismissal request. Again, we return to the interpretation of 304(c), however, in the context of section 305 relief. Back To Text

[187] Cunard Steamship Co. Ltd., v. Salen Reefer Serv. AB, 773 F.2d 452, 456 (2d Cir 1985). Back To Text

[188] See 11 U.S.C. § 304(c) (1994) (providing "the court shall be guided by what will best assure an economical and expeditious administration" of estate when making determination as to whether to grant relief under section 304(b)); Interpool, Ltd. v. Certain Freights of M/VS Venture Star, 878 F.2d 111, 112−13 (1989) (observing "[s]ection 304(c) provides that the touchstone in determining whether to grant any requested relief is 'what will best assure an economical and expeditious administration of [the] estate,' consistent with six enumerated criteria."); see also H.R. Rep. No. 95−595, at 324 (1977) (to accompany H.R. 8200, 95th Cong. (1977)):

These guidelines are designed to give the court the maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments 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.

Id. Back To Text

[189] See In re Culmer, 25 B.R. 621, 621 (Bankr. S.D.N.Y. 1982); see also Interpool, Ltd. v. Certain Freights of M/V Venture Star, 102 B.R. 373 (Bankr. D.N.J. 1988) appeal dismissed, Interpool, Ltd. v. Certain Freights of M/V Venture Star, 878 F.2d 111 (3d Cir. 1989). There, while KKL, an Australian company was subject to liquidation proceedings in Australia, the liquidator commenced a 304 proceeding. The U.S. creditors, however, filed a chapter 7 involuntary petition. The court examined Australian law, under section 304(c) in determining whether to defer to the foreign case, and found that Australian law did not provide adequate notice to parties in interest and also did not have any provision similar to the equitable subordination provision under U.S. law. As a result, the 304 petition was dismissed and the chapter 7 case was allowed to proceed. Back To Text

[190] 53 B.R. 891, 894−95 (Bankr. S.D.N.Y. 1985) (discussing discovery which encompassed turnover of records and books, and injunctions against officers of debtor from disposing of assets). Back To Text

[191] Id. at 894. Back To Text

[192] Id. at 895−96. The debtor contended that the chapter 11 filing was an effort to protect the assets of the estate and to seek an alternative forum to contest the winding−up proceeding under the Cayman Islands court. Back To Text

[193] Id. at 900 (noting "[e]very 304 case could be defeated without the intervention of the court by the simple expedient of the filing of a chapter 11 case."). Back To Text

[194] Id. at 904 (quoting Banque de Financement S.A. v. First National Bank of Boston, 568 F.2d 911, 921 (2d Cir. 1977)). Back To Text

[195] Id. at 905 (clarifying that chapter 11 petition is not necessarily precluded by existing foreign liquidation, "but rather that where, as here, the court is recognizing a case filed ancillary to that foreign proceeding as a means to effectively deal with American assets and creditors, if any, a competing chapter 11 petition should be dismissed under section 305."). Back To Text

[196] Examples of situations where a plenary case would be required are the large transnational insolvencies such as Maxwell, BCCI, Olympia and York, and Maruko. In Maxwell, for example, the debtor had roughly 80% of its total assets located in the U.S. and had principal place of business in the U.S. as well. See In re Maxwell, 170 B.R. 800

(Bankr. S.D.N.Y. 1994). Back To Text

[197] 241 B.R. 829 (Bankr. S.D.N.Y. 1999). Back To Text

[198] Id. at 833 (observing motive for filing in U.S. was not "the reorganization of Ionica's business which was 'admittedly defunct,' but [r]ather… to take advantage of favorable United States bankruptcy law to challenge the secured and unsecured claims of [Ionica's parent corporation] either through equitable subordination or substantive consolidation."). Back To Text

[199] Id. at 838 (granting Group's and Nortel's motion to dismiss chapter 11 petition). Judge Bernstein held that, under the comity factor, the English proceedings were consistent with U.S. concepts of due process and impartiality, and that, in addition, the other factors were met because English law did not discriminate in favor of English creditors or foster preferential dispositions of property. Id. Back To Text

[200] Id. at 836. Furthermore, the court opined that English law did have remedies in the form of claims for "wrongful trading." Id. at 839 (discussing remedies available to creditors under English law). Back To Text

[201] Id. at 832 (explaining Ionica's only assets in U.S. were pledged U.S. treasury securities in amount of $ 56.6 million). In addition, Ionica did not have a viable chance of reorganization. The administrators, in fact, admitted that the business was "defunct," and merely wanted to take advantage of favorable U.S. law. See id. at 833. Back To Text

[202] See Goodman, Use of United States Bankruptcy Law, supra note 14, at 29−30 (discussing choice of avoidance law). Back To Text

[203] Id. Back To Text

[204] See Booth & Smart, The New Avoidance Powers, supra note 169, at 260 (examining issues relating to territoriality and forum shopping). Although, at the time, Hong Kong avoidance law did not apply extraterritorially, recent amendments provide that HK avoidance law does apply extraterritorially). Back To Text

[205] See Booth, Recognition of Foreign Bankruptcies, supra note 67, at 229. Where foreign avoidance law is not extraterritorial in its application, then the foreign representative's only option in order to avoid preferences and fraudulent conveyances would be to file a plenary case in order to use U.S. avoidance law. However, where the foreign insolvency law is extraterritorial in its application, then the foreign representative should be limited to the foreign avoidance law, and thus only an ancillary proceeding should be permitted. A similar rationale was propounded by Chemical Bank in the Axona case in its proposals for minimum eligibility requirements for filing a plenary case but they were rejected by the court. See In re Axona Int'l Credit & Commerce Ltd, 88 B.R. 597, 603 (Bankr. S.D.N.Y. 1988). Back To Text

[206] See Tagashira, Intraterritorial Effects, supra note 145, at 19−21 (referring to Axona as full proceeding of ancillary nature); see also In re Axona Int'l Credit & Commerce, Ltd, 88 B.R. 597, 606 (Bankr. S.D.N.Y. 1988) (stating foreign debtor is given same treatment as domestic debtor). Back To Text

[207] This approach was suggested by Professor Jay Lawrence Westbrook. See Westbrook, Choice of Avoidance Law, supra note 5, at 531 (discussing "home" avoidance law rule). Back To Text

[208] See Goodman, Use of United States Bankruptcy Law, supra note 14 (explaining limitations of ancillary cases commenced under section 504); see also In re Metzeler, 78 B.R. 674, 680 (Bankr. S.D.N.Y 1987) (noting filing of section 304 petition does not automatically give courts ability to stop debtor from making transfer in U.S.). Back To Text

[209] This approach was used in Maxwell Communication Corp. plc v. Barclays Bank (In re Maxwell Communication Corp. plc), 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (asserting traditional federal choice of law rule requires application of law of jurisdiction having greatest interest in controversy)), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd,

93 F.3d 1036 (2d Cir. 1996); see also In re Koreag, Controle et Revision S.A., 961 F.2d 341, 351 (2d Cir. 1991) (choosing New York law over Switzerland law because New York has superior interest in fair and efficient distribution of debtor's estate). Back To Text

[210] Under this approach, the court would have also taken into consideration the fact that there was no counterpart to U.S. avoidance law for setoffs under Hong Kong law. See In re Am. Metrocomm Corp., No. 01−00058, 2002 Bankr. Lexis 11, at *43 (D. Del. Jan. 7, 2002) (listing various factors taken into consideration in choice of law pursuant to section 188 of Restatement Second of Conflicts of Laws); see also Restatement (Second) Conflict of Laws § 188, cmt. B, at 576 (stating choice of law factors are to be evaluated according to their relative importance with respect to issue involved). Back To Text

[211] See generally Jay Lawrence Westbrook, The Lessons of Maxwell Communication, 64 Fordham L. Rev. 2531 (1996) [hereinafter Westbrook, Lessons of Maxwell] (discussing how Maxwell decided which law to apply to pre bankruptcy transactions in transnational insolvency cases that might be avoidable as fraudulent or preferential to creditors); see also In re Maxwell Communication Corp. plc, 170 B.R. at 801 (explaining and resolving dilemma of choice of law on issue of avoidance powers in transnational insolvencies). Back To Text

[212] See Buxbaum, Rethinking International Insolvency, supra note 10, at 33 (discussing choice of law in transnational insolvencies). See Generally Frederick Tung, Symposium: Global Trade Issues in the New Millennium: Fear of Commitment in International Bankruptcy, 33 Geo. Wash. Int'l L. Rev. 555, 555 (2001) (discussing various theories relating to conflict of laws in transnational insolvencies). Back To Text

[213] See Westbrook, Lessons of Maxwell, supra note 210, at 2540−41 (suggesting application of home−country rule will work best in transnational cases); see also In re Maxwell Communication Corp. plc, 170 B.R., at 816−17 (commenting on Professor Westbrook's "home country rule"). Back To Text

[214] Memorandum of Law in Opposition to the Motion of Barclays Bank and National Westminster Bank to Dismiss; see also In re Maxwell Communication Corp. plc, 170 B.R. 800 (Bankr. S.D.N.Y. 1994). Back To Text

[215] See id.. Back To Text

[216] Together, these two assets represented Maxwell's "crown jewels" and constituted 80% of its total asset pool. See id. at 801−02. Back To Text

[217] See id. Back To Text

[218] A U.K. administration order is equivalent to a chapter 11 petition. See id. at 802. Back To Text

[219] The U.K. court appointed three administrators in the English proceeding and the U.S. court, under Judge Brozman, appointed an examiner (Gitlin) whose duty was to coordinate the two proceedings and to permit a reorganization under U.S. law which would maximize the return to U.S. creditors. See Id. Back To Text

[220] The protocol recognized the administrators as the "corporate governance" of MCC, yet did not limit the jurisdiction of the U.S. court, and, more significantly, did not address choice of avoidance law. See Id. at 802. Back To Text

[221] Accordingly, assets of both jurisdictions were combined into a "pot" from which a single distribution could be made. In addition, creditors could file a claim in either court which would suffice for participation in the plan and scheme. Id. at 802−03. Back To Text

[222] See In re Maxwell Communication Corp. plc, 170 B.R. at 803−07. MCC had established overdraft accounts at both Barclays and NatWest, two English banks. In order to repay the amounts drawn down from both banks, MCC sold some of its U.S. assets, namely two subsidiaries, QUE and MacMillan Directories (the amounts involved in both transfers was considerable, $30 million for Barclays and approximately <Pounds Sterling> 29 million for Natwest). The transfer to SocGen, a French bank, was inferred to arise from the sale of U.S. assets as well. One of the creditors,

Barclays, sought to enjoin MCC from commencing a preference suit in a U.S. court. However the English court refused this request, noting that the decision whether to allow the suit rested in the hands of the U.S. judge. Back To Text

[223] See generally Maxwell Communication Corp. plc v. Barclays Bank (In re Maxwell Communication Corp. plc), 170 B.R. 800 (Bankr. S.D.N.Y. 1994) (positing presumption against extraterritoriality prevents utilization of section 547 to avoid transfer where foreign debtor makes preferential transfer to foreign transferee and center of gravity is over seas), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2d Cir. 1996); see also EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (explaining that, absent clear intent in statute itself that it applies extraterritorially, court must presume that statute was intended to address only domestic conditions). Back To Text

[224] See Maxwell Communication Corp. plc v. Barclays Bank (In re Maxwell Communication Corp. plc), 186 B.R. 807, 818 (S.D.N.Y. 1995) (holding presumption against extraterritoriality prevents use of section 547 to avoid preferential transfers). Back To Text

[225] See Maxwell Communication Corp. plc v. Barclays Bank (In re Maxwell Communication Corp. plc by Homan) 93 F.3d 1036, 1048 (2d Cir. 1996) (explaining comity as doctrine taking into account interests of U.S., interests of foreign states and those mutual interests that "family of nations" have in efficiently functioning rules of international law); see also In re Blackwell, 270 B.R. 814, 828 (Bankr. W. D. Tex. 2001) (stating "comity" has historically been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."). Back To Text

[226] See In re Maxwell Communication Corp. plc, 170 B.R. at 800 (quoting Aramco, 499 U.S., at 248) (asserting presumption doctrine "serves...to protect against unintended clashes between our laws and those of other nations which could result in international discord.") Back To Text

[227] See id. at 808 (stating both laws promote equality of distribution of debtor's assets by preventing one creditor from receiving payment ahead of other creditors); see supra note 80 (differentiating between English and U.S. preference law). Back To Text

[228] See id. at 809 (citing Kollias v. D & G Marine Maintenance, 29 F.3d 67, 70−71 (2d Cir. 1994) (taking into account whether the transaction's "center of gravity" was overseas or domestic). Back To Text

[229] See id. Back To Text

[230] See id. Back To Text

[231] See id. Thus it would be possible for a transaction that had domestic parties, but that occurred abroad to be considered domestic, while a transaction with foreign parties that occurred in the U.S. could be considered extraterritorial. Back To Text

[232] See In re Maxwell Communication Corp. plc, 170 B.R. at 810−11 (looking to both statutory language and legislative history, and basing its decision on two U.S. Supreme Court cases, E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991), and Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549 (1993)). See generally Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1948) (listing criteria used by Maxwell court). Back To Text

[233] See In re Maxwell Communication Corp. plc, 170 B.R. at 811 (observing administrators and examiner urged court to interpret Code as whole, whereas Banks argued for interpretation regarding specific section isolated from entire statute). See generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 589 (1992) (reading entire statute to determine Congressional intent regarding foreign application of statute); United States v. Javino, 960 F.2d 1137, 1142 (2d Cir. 1992) (noting Congress legislates with belief courts have presumption against extraterritoriality). Back To Text

[234] See In re Maxwell Communication Corp. plc, 170 B.R. at 811 (looking to section 547 first, then expanding inquiry to include entire statute). See, e.g., Sale v. Haitian Ctrs. Council, 509 U.S. 155, 184 (1993) (focusing on specific statutory section to determine Congressional intent). But see Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 674 (2d Cir. 1991) (analyzing entire statute to determine Congressional intent). Back To Text

[235] In re Maxwell Communication Corp. plc, 170 B.R. at 811 (asserting "transfer", as defined in section 101(54), although broad, did not reference extraterritoriality, and that boilerplate language is insufficient); see also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19 (1963) (refusing to apply statute extraterritorially because both Act and legislative history lacked specific language promoting such reach); New York C. R. Co. v. Chisholm, 268 U.S. 29, 31 (1925) (declining to grant statute extraterritorial effect because it lacked "words" disclosing such intent). Back To Text

[236] See 11 U.S.C. § 541(a) (1994); see also In re Maxwell Communication Corp. plc, 170 B.R. at 811 (restating argument advanced by administrators). But see Robert K. Rasmussen, A New Approach To Transnational Insolvencies, 19 Mich. J. Int'l L. 1, 10 (1997) (noting limited reach of section 541 when foreign courts refuse to enforce United States Bankruptcy laws). Back To Text

[237] Surprisingly, this view of property of the estate had received different treatment in the Metzeler court. There, the court, interpreted the Supreme Court case of Whiting Pools to mean that Congress changed the concept of property in enacting section 541(a) to "include in the estate any property made available to the estate by other provision of the Bankruptcy Code." See In re Metzeler, 78 B.R. 674, 676 (Bankr. S.D.N.Y. 1987). The Metzeler court reasoned that estate property would therefore include property recoverable under section 547 and 548 (the U.S. avoidance provisions). The court used this reasoning to determine that the term "property" in section 109(a) included avoidable transfers, thus allowing the foreign representative to commence an ancillary proceeding despite the lack of tangible assets in the U.S., other than the transfers. The inconsistency of the Maxwell court and the Metzeler court should be resolved in favor of Maxwell. First, Maxwell was decided after Metzeler, and was affirmed by both the District Court and the Second Circuit. Second, Metzeler's assumption that the foreign debtor must comply with the Code's definition of a debtor under title 11, and section 109(a) probably misreads the Bankruptcy Code and section 304. See In re Gee, 53 B.R. 891, 898−99 (Bankr. S.D.N.Y. 1985) (stating foreign debtor is not "debtor" within meaning of Code because "debtor" only arises when "case" has been commenced under Code); Henzy, Resolving Conflicts, supra note 141, at 470. However, an ancillary proceeding does not qualify as a "case commenced under the Code," thus, there is no "debtor," only a foreign debtor who must comply with the foreign eligibility requirements. Not only is this analysis technically correct, but it also comports with the fundamental policy of section 304 which is to promote flexible cooperation with a foreign proceeding. Consequently, looking at the Metzeler decision, the court's granting of relief under 304 did not rely on a finding that the term property included recoverable property under avoidance provisions, but rather depended simply on a finding that the foreign representative was properly appointed in the foreign proceeding and that a foreign proceeding had properly commenced. As a result, the Metzeler decision to grant relief, although proper, does not rely on stretching the Whiting Pools view of section 541(a). Ultimately then, the Maxwell finding that recoverable property is not included in the estate should be favored. Back To Text

[238] See Suzanne Harrison, The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?, 12 Bankr. Dev. J. 809, 838 (1996); see also Steele v. Bulova Watch Co., 344 U.S. 280, 285−86 (1952) (holding U.S. law applies to actions outside country because applying law did not infringe upon rights of other nations); Environmental Defense Fund v. Massey, 986 F.2d 528, 531(D.C. Cir. 1993) (stating presumption against extraterritorial reach is abandoned when failure to allow extended reach would result in adverse effects within U.S.). Back To Text

[239] See In re Maxwell Communication Corp. plc, 170 B.R. at 812 (presenting administrators arguments concerning dismissal pursuant to section 305); see also 11 U.S.C. § 305 (1994):

The court, after notice and a hearing, may dismiss a case under this title [11 U.S.C. §§ 101 et seq.], or may suspend all proceedings in a case under this title [11 U.S.C. §§ 101 et seq.], at any time if: (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or (2) (A) there is pending a foreign proceeding; and there is pending a foreign proceeding; and (B) the factors specified in section 304(c) of this title [11 U.S.C. § 304(c)] warrant such dismissal or suspension.

Id.; Central Mortgage & Trust, Inc. v. Texas, 50 B.R. 1010, 1021 (Bankr. D. Tex. 1985) (noting decision to abstain is within sound discretion of Bankruptcy court and is unreviewable). Back To Text

[240] See In re Maxwell Communication Corp. plc, 170 B.R. at 812 (interpreting Code in this manner does not violate presumption against extraterritoriality and is consistent with sections 109 and 303); see also 11 U.S.C. § 109(a) (1994) (defining debtor); id § 303(b)(4) (establishing ability of foreign representative to commence proceedings). Back To Text

[241] See supra note 225. Such an inflexible theory, although predictable, would necessarily lead to unfair applications of U.S. avoidance law to transfers which had no connection to the U.S. and would eventually conflict with the sovereignty and the laws of other countries. See McCulloch v. Sociedad Nacionale de Marineros de Honduras, 372 U.S. 10, 20−22 (1963) (stating presumption doctrine "serves… to protect against unintended clashes between our laws and those of other nations which could result in international discord."); In re Maxwell Communication Corp. plc, 170 B.R. at 809 (quoting presumption doctrine presented in McCulloch v. Sociedad Nacional de Marineros de Honduras). Back To Text

[242] See id.. at 802 (demonstrating number of assets involved and complexity of estate); see also supra note 195 (discussing difficulties courts may face in determining whether plenary case should be dismissed in favor of ancillary proceeding). Back To Text

[243] See Henzy, Resolving Conflicts, supra note 141, at 465−66 (explaining plan and scheme for ancillary proceedings is beyond scope of limited 304 proceedings, restricted by expense and length of time); see also 11 U.S.C. § 304 (1994) (describing scope of section 304 proceeding). Back To Text

[244] See Environmental Defense Fund, Inc., v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (listing adverse effects within United States and conduct occurring largely within United States as two bases for overcoming presumption); In re Maxwell Communication Corp. plc, 170 B.R. at 813 (noting instances exist where presumption against extraterritorial enforcement will not apply). See, e.g., Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984) (observing foreign nations have interest in governing transactions which occur within their borders). Back To Text

[245] See In re Maxwell Communication Corp. plc, 170 B.R. at 813−15 (distinguishing cited cases from instant situation); see also Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (opining conduct of U.S. citizen in Mexico in attempting to evade U.S. antitrust law, although extraterritorial, had substantial effect within U.S. territory). These cases relied on an intention to evade U.S. law or some other result that would have substantial effect within the U.S. In Maxwell, the preferences could not have been intended to have an effect within the U.S. because there was no insolvency proceeding at the time of the transfers and a chapter 11 case in the U.S. was not foreseeable at the time of the transfers. Back To Text

[246] See Arnold M. Quittner, Maxwell Communications and Cross−Border Insolvency Issues, 752 PLI/Comm 647, at 679 (Apr. 1997) (noting Court of Appeals in Maxwell case identified equality of distribution as one of Code's principal aims). Back To Text

[247] See Maxwell Communication Corp. plc v. Barclays Bank, 186 B.R. 807, 820 (S.D.N.Y. 1995) (describing different positions occupied by United States and foreign creditors). Back To Text

[248] See In re Maxwell Communication Corp. plc, 170 B.R. at 814 (describing second canon used in Hartford Fire Ins. Co. v. California); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (asserting acts of Congress, whenever possible, should not be interpreted in such manner as to infringe upon laws of other nations); Murray v. The Schooner Charming Betsy, 6 U.S. 64, 80 (1804) (establishing rule used in Hartford Fire). Back To Text

[249] See In re Maxwell Communication Corp. plc, 170 B.R. at 814 (discussing Restatement of Foreign Relations); Restatement (Third) of Foreign Relations Law of the United States §§ 401−416 (1987) (listing factors courts should consider under reasonableness test). Back To Text

[250] Koreag, Controle et Revision, S.A. v. Refco F/X Associates, Inc., 961 F.2d 341, 350 (2d Cir. 1992) (discussing court's consideration of various contacts that each jurisdiction had with controversy, and its application of law of jurisdiction whose policies were most implicated by action); In re Maxwell Communication Corp. plc, 170 B.R. at 816 (stating federal choice−of−law rule). Back To Text

[251] Id.. at 816−17 (acknowledging arguments made in amicus brief presented to court). Back To Text

[252] See Jay Lawrence Westbrook, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum, 65 Am. Bankr. L.J. 457, 462 (1991) [hereinafter Westbrook, Choice of Law and Choice of Forum]; see also Westbrook, Choice of Avoidance Law, supra note 5, at 504−07 (1991) (providing overview of avoidance rules). Back To Text

[253] See In re Maxwell Communication Corp. plc, 170 B.R. at 812 n.17 (remarking, "[w]hereas [Westbrook's] rationale (application of 'home' avoidance law) can be utilized to some extent in ancillary bankruptcy cases under section 304...I have difficulty embracing his approach across the board.") (referring to concurrent cases). Back To Text

[254] See id. at 817 (reasoning "home" avoidance−law rule would entail more than simply looking for place of incorporation of debtor, and asserting, especially in "age of multinational corporations," other factors would have to be used, such as location of headquarters and creditors, and where business is primarily located). Thus, Westbrook's approach and Restatement approach would be somewhat similar. This observation also would diminish benefit of "predictability" touted by universalists in "home" avoidance−law rule. Back To Text

[255] See id. at 817−18 (restating factors used in Restatement approach). Back To Text

[256] See id. (choosing application of English law). Back To Text

[257] See id. In comparison, other choice of law rules place particular emphasis on location of the occurrence of the controversy, such as the location of injury for torts or the place where the contract was entered into for contracts. However, the choice of law analysis for avoidable transfers is more complicated due to the interests of several parties in bankruptcy. See Westbrook, Choice of Law and Choice of Forum, supra note 251, at 519. In addition, choice of avoidance law is even more complicated than other bankruptcy issues because it involves a greater amount of factors to consider. For example, the court must look at place of transfer, as well as the identity of parties and their expectations, whereas another bankruptcy−specific issue such as distribution law, will look at the identity of parties principally. Back To Text

[258] See Maxwell Communication Corp. plc v. Barclays Bank (In re Maxwell Communication Corp. plc), 186 B.R. 807, 824 (S.D.N.Y. 1995). The only significant difference in the District Court's decision was the fact that it refused to disallow the creditors' claims under 11 U.S.C. § 502(d) because they had not filed claims in the U.S. court. The court reasoned that had the creditors filed claims in the U.S., it would have disallowed the claims unless the transferee had turned over the voidable transfer to the estate. See 11 U.S.C. § 502(d) (1994) (providing in relevant part that "the court shall disallow any claim of any entity from which property is recoverable under section…550…or that is a transferee of a transfer avoidable under section … 57 of this title…unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section… 550…of this title."). Back To Text

[259] Maxwell Communication Corp. plc v. Societe Generale (In re Maxwell Communication Corp. plc by Homan), 93 F.3d 1036, 1044−46 (2d Cir. 1996) (basing their argument on section 10.01 of plan which states, "notwithstanding confirmation and consummation …(e) to determine any and all avoidance or similar actions brought, or which may be brought under the US Bankruptcy Code by or on behalf of the company…", administrators' claim plan which was made binding upon all creditors by confirmation order, vested exclusive jurisdiction in bankruptcy court to decide avoidance actions); see also 11 U.S.C. § 1141(a) (1994) (stating "the provisions of a confirmed plan bind the debtor…and any creditor…whether or not such creditor…has accepted the plan."). On its face, this statue seems to help administrators' argument. Back To Text

[260] See In re Maxwell Communication Corp. plc by Homan, 93 F.3d at 1044−46 (explaining while section 10.01 of plan has preclusive effect, content of reorganization plan and confirmation order limits effect in plan and order do not address avoidance actions, which is specific issue presented). A related argument raised by the administrators was that a clause in the scheme of arrangement allowed the administrators to object to creditors claims in either court. This argument did not permit the administrators to select which court to object in, however, and certainly did not allow choice of law. The clause was, at best, vague and ultimately, the authority to decide these issues was entrusted to the courts' discretion. Back To Text

[261] See id. at 1047−49. This extension of section 304 was not improper because there was no alternative statutory authority or precedential caselaw to interpret concurrent proceedings, and, in addition, both section 304 proceedings and concurrent proceedings share characteristics of cooperation with foreign courts. See 11 U.S.C. § 304 (1994) (governing cases filed in bankruptcy court that are ancillary to foreign proceedings). Back To Text

[262] In re Maxwell Communication Corp. by Homan, 93 F.3d at 1047; see also Luritzen v. Larsen, 345 U.S. 571, 577 (1953) (indicating comity is exercised with respect to prevalent doctrines of international law). Interestingly, the court interpreted "international comity" to describe two distinct doctrines: (1) a canon of construction to shorten the reach of a statute (presumption against extraterritoriality) and (2) a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign court. The court did not differentiate between the two doctrines for purposes of this case, as the Bankruptcy Court had done under Judge Brozman. Back To Text

[263] See In re Maxwell Communication Corp. plc by Homan, 93 F.3d at 1055. Back To Text

[264] See id. (observing transaction occurring in U.S. and involving foreign parties could be deemed extraterritorial). Back To Text

[265] In re Maxwell Communication Corp. plc, 170 B.R. at 807 (asserting predictable rule that English avoidance law should govern cases and, therefore, cases should be dismissed). Back To Text

[266] See Booth, Recognition of Foreign Bankruptcies, supra note 67, at 229 (arguing Axona decision is insufficient, and that further guidance is needed to assist foreign representatives in choosing between sections 303(b)(4) and 304, the problem of "section shopping"). Interestingly, if parties wish to sidestep the authority of courts to decide choice of avoidance law, they may select, ex ante, the governing choice of avoidance law in the contract (of the loan). This option, however, is risky. See In re Eagle Enter's., Inc., 223 B.R. 290, 298−99 (Bankr. E.D. Pa. 1998) (finding rights of trustee as third party could not be compromised by selection of German law in contract). There, non−debtor, German company, sold equipment to U.S. company, Eagle Enterprises. Subsequently, Eagle filed bankruptcy in the U.S. and trustee asserted that the contract created a "disguised security interest," that this interest had not been perfected properly and thereafter sought to avoid these interests under its "strong arm powers." The court held German law did not apply to characterize these security interests, despite the existence of a choice of law clause in the contract. The court, under Pennsylvania's choice of law principles, applied UCC law. This rationale could apply to choice of avoidance law as well. Back To Text

[267] Another more recent case which has followed the reasoning of Maxwell is Official Comm. Of Unsecured Creditors v. Transpacific Corp. (In re Commodore Int'l, Ltd.), 242 B.R. 243, 260 (Bankr. S.D.N.Y. 1999) (noting court, under Judge Garrity, followed same choice−of−law analysis expounded in Maxwell in determining whether U.S. or Bahamas had greater interest in applying its avoidance law to transfers at issue), aff'd, 2000 WL 977681, at *3−4 (S.D.N.Y. July 17, 2000). Back To Text

[268] There are important differences between the choice of law approach in ancillary proceedings and the concurrent proceedings. A court's decision to defer to a foreign proceeding is based on analysis of 11 U.S.C. § 304(c). As the landmark decisions in this area demonstrate, the U.S. courts will focus on a comparison between foreign law and U.S. law in an effort to determine whether foreign law will substantially protect the basic rights and interests of U.S. creditors. See In re Hourani, 180 B.R. 58, 70 (Bankr. S.D.N.Y. 1995) (concluding petition by liquidation committee from Jordan to turn over all Petra Bank funds in U.S. to Jordan could not be granted, as resolution did not meet American notions of justice); In re Culmer, 25 B.R. 621, 627 (Bankr. S.D.N.Y. 1982) (granting section 304(c) petition

which allows transfer of all Bahamian company's assets located within district to Bahamas to be dispersed as part of Bahamian liquidation of company). This is principally a comparison of legal frameworks and looks at substantive and procedural law. In contrast, the choice of law analysis under comity/Restatement, as in Maxwell, with respect to concurrent proceedings, will focus on which country has the greatest interest in applying its law to the transfer, and will look to the connections between the activity and the jurisdiction and other "contacts" analysis in a traditional choice−of−law approach. These different approaches reflect the different purposes of both proceedings. The ancillary proceeding presumes that the law of the foreign court should apply, however it seeks to determine whether U.S. creditors would be protected under that law. The concurrent proceeding, on the other hand, does not presume that the foreign court has a greater right to administer and apply its law to the proceeding. Rather, both courts have equal standing to conduct the proceeding and a greater amount of cooperation is required due to the increased complexity of having two plenary and simultaneous proceedings. The choice of avoidance law, in this context, adds another measure of complexity, which can only be determined by looking at various factors indicating the connection between an activity/transfer and the country. Back To Text

[269] See Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001) (proposing Bankruptcy Reform Act which includes addition of chapter 15 entitled "Ancillary and Other Cross Border Cases"); see also 11 U.S.C. § 625 (1994) (presenting table which shows where sections of former title 11 have been incorporated into revised title 11); National Bankruptcy Review Commission Report at 351 (Commission Report) Back To Text

[270] See supra note 21 (discussing meaning of term "optimal"). Back To Text

[271] See Panuska, The Chaos of International Insolvency, supra note 31, at 375−76 (reflecting on "primitive and chaotic" state of affairs in international insolvency); Booth, Recognition of Foreign Bankruptcies, supra note 67, at 136 (noting inconsistencies among international insolvency law). Back To Text

[272] See Claudia Tobler, Managing Failure in the New Global Economy: The U.N.C.I.T.R.A.L. Model Law on Cross−border Insolvency, 22 B.C. Int'l & Comp. L. Rev. 383, 385−87 (1999) [hereinafter Tobler, Managing Failure] (explaining need to harmonize effects of insolvency proceedings initiated in one state on assets located in another). Back To Text

[273] See id.; see also In re Lykes Bros. Steamship Co., Inc., 207 B.R. 282, 284 (Bankr. M.D. Fla, 1997) (asserting principles of bankruptcy include desire to maximize benefit to creditors, to promote equal distribution among all creditors and to avoid break up of debtor's assets). Back To Text

[274] See Tobler, Managing Failure, supra note 271, at 387 (noting standing and title of liquidation, administrator or trustee of bankruptcy is uncertain); Jay Lawrence Westbrook & Jacob S. Ziegel, The American Law Institute NAFTA Insolvency Project, 23 Brooklyn J. Int'l L. 7, 12 (1997) (discussing different legal cultures of United States, Mexico and Canada and their varied treatment of debtors and creditors). Back To Text

[275] See Booth, Recognition of Foreign Bankruptcies, supra note 67, at 229−30 (indicating inconsistencies among U.S. cases); Westbrook, Lessons of Maxwell, supra note 210, at 2531−32 (acknowledging Maxwell rule is to be applied on case−by−case basis). The Maxwell litigation over choice of preference law could have been avoided, along with its costs and potential to disrupt the ongoing cooperation between the English and American courts, had a clear and fair choice of law rule been adopted beforehand. Back To Text

[276] See Tobler, Managing Failure, supra note 271, at 386 (explaining effects of proposed moratorium); Jay Lawrence Westbrook, Developments in Transnational Bankruptcy, 39 St. Louis U. L.J. 745, 754 (1995) (stating "[g]enerally, the moratorium halts lawsuits and other legal actions against the debtor and its property, although secured creditors and other favored parties are allowed to proceed in some jurisdictions."). Back To Text

[277] See Tobler, Managing Failure, supra note 271, at 388 (lamenting, "[a]t present, there is no uniform set of rules of practices relating to court assistance in cross−border insolvencies."). Back To Text

[278] This was one of the reasons that the Herstatt German liquidator did not appear in U.S. court. See Becker, International Insolvency, supra note 40, at 1292; see also Tobler, Managing Failure, supra note 271, at n.25 (asserting, "[i]n fact, this very issue was one of the precipitating factors of U.S. adoption of section 304 of the Bankruptcy Code.") Back To Text

[279] Are the foreign representative's original powers under the foreign main proceeding transferable to the local proceeding? This problem involves whether the representative can use the foreign avoidance powers or U.S. avoidance powers. Back To Text

[280] See Thomas M. Gaa & Paula E. Garzon, International Creditors' Rights and Bankruptcy, 31 Int'l Law. 273, 281 (1997) (explaining how issues relating to method and timing of notice which must be given to foreign creditors at beginning of bankruptcy proceeding are inconsistent between local and foreign jurisdictions); Tobler, Managing Failure, supra note 271, at 389 (observing "[t]he greatest challenge to creditor involvement in cross−border insolvencies stems from the differential treatment of local and foreign creditors, often to the foreign creditor's detriment."). Back To Text

[281] See id. at 390−91 (explaining that choice of law asks what "national body of law will…govern the financial consequences of the default," while choice of forum asks "what public institution in one or more countries will govern the default."). Back To Text

[282] Indeed, sometimes thousands of employees and entire communities are at stake in resolution of bankruptcies of corporations. This is particularly true in the case of large multinational firms, which, by nature, employ employees from different states and have operations spread throughout several states. In addition, bankruptcy law implicates private contracts, and parties and also can border on governmental issues, especially if the government is a party to the contracts with the debtor. Again, this is especially true in the case of multinational firms. Back To Text

[283] See LoPucki, Case for Cooperative Territoriality, supra note 9, at 2219 (stating "[t]erritoriality is currently the international law of bankruptcy."); see also Frederick Tung, Global Issues in the New Millennium: Fear of Commitment in International Bankruptcy, 33 Geo. Wash. Int'l L. Rev. 555, 557 (2001) (examining universality theory as alternative to "piecemeal" and potential value destroying impact of territoriality theory). Back To Text

[284] See E. Bruce Leonard, Multijurisdictional Insolvencies and Reorganizations, 10 Comm. Insol. Rep. 49 (1998), reprinted in 1998 CCIR Lexis 9, at *49 (discussing UNCITRAL's efforts towards realizing higher levels of cooperation in international insolvency). Back To Text

[285] See M. Cameron Gilreath, Comment, Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad, 16 Bankr. Dev. J. 399, 406−09 (2000) (referring to universality approach as "antithesis" of territoriality approach); see also Tung, supra note 211, at 557 (contrasting two approaches to international insolvency). Back To Text

[286] See Commission Report, supra note 268, at 351 (discussing potential impact of proposed chapter 15 on choice of avoidance law issues). Back To Text

[287] See id. at 352. Back To Text

[288] Id. Back To Text

[289] Id. Back To Text

[290] Id. Back To Text

[291] Id. Back To Text

[292] See M. Cameron Gilreath, Comment, Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad, 16 Bankr. Dev. J. 399, 407−13 (2000) (noting Model Rule's preference for universality approach). Back To Text

[293] See Report of the United Nations Commission on Int'l Trade Law on the Work of its Thirtieth Session, U.N. GAOR, 52d Sess., Supp. No. 17, at 5, par. 16, U.N. Doc. A/52/17 (1997) [hereinafter UNCITRAL 30th Sess.]. Back To Text

[294] Report of the United Nations Commission on Int'l Trade Law on the Work of its Thirtieth Session, U.N. GAOR, 52d Sess., Supp. No. 17, Annex I, U.N. Doc. A/Res/52/158, Preamble (1998) [hereinafter Model Law]. Although these are worthy goals, courts might be confused as to which goal should have preeminence. In effect, just as U.S. courts have been faced with ambiguity of 304(c), the same result can occur in this instance. Back To Text

[295] See Matthew T. Cronin, Comment, UNCITRAL Model Law on Cross−Border Insolvency: A Procedural Approach to a Substantive Problem, 24 Iowa J. Corp. L. 709, 713−14 (1999) (observing "[t]he Model Law provides for fair, quick, and predictable access, in part by requiring recognition of a foreign proceeding upon the completion of simple ministerial tasks aimed mostly at ensuring the existence of a bona fide foreign proceeding".); see also Andre J. Berends, The UNCITRAL Model Law On Cross−Border Insolvency: A Comprehensive Overview, 6 Tul. J. Int'l & Comp. L. 309, 321 (1998) (asserting "[t]he general idea behind the Model Law is that there are only three things that are important in a cross−border insolvency: speed, speed, and more speed."). Back To Text

[296] See Model Law, supra note 293, at art.17:

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:

   (a) the foreign proceeding is a proceeding within the meaning of article 2(a); (b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d); (c) the application meets the requirements of article 15(2); and (d) the application has been submitted to the court referred to in article 4.

2. The foreign proceeding shall be recognized:

   (a) as a foreign main proceeding if it is taking place in the State where the debtor has the center of its main interests; or (b) as a foreign non−main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time. (4) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Id. Back To Text

[297] See UNCITRAL Model Law on Cross−Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross−Border Insolvency, 1997 XXVIII UNCITRAL Y.B., ¶ 174, U.N. Doc. A/CN.9/442, reprinted in 6 Tul. J. Int'l & Comp. L. 415, 475 (1998) [hereinafter Guide to Model Law] (discussing competing principles of universality and territoriality); see also Bob Wessels et al., The International Scene: European Union Regulation on Insolvency Proceedings, 2001 Am. Bankr. Inst. J. Lexis 207, at *14−15 (2001) (commenting "[t]he model law is quite generally seen as the world standard for fair regulation of cross−border insolvency cases, recognizing the need for cooperation between courts, institutions and liquidators and for the recognition of foreign judgments.") (emphasis added). Back To Text

[298] See Model Law, supra note 293, art.14:

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. (2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required. (3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

a. indicate a reasonable time period for filing claims and specify the place for their filing; (b) indicate whether secured creditors need to file their secured claims; and (c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Id. Back To Text

[299] Id., art. 13:

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State. (2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non−preference claims, while providing that a foreign claim is to be ranked lower than the general non−preference claims if an equivalent local claim (e.g. claim for a penalty or deferred−payment claim) has a rank lower than the general non−preference claims].

(b) The enacting State may wish to consider the following alternative wording to replace article 13(2):

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under identify laws of the enacting State relating to insolvency or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than identify the class of general non−preference claims, while providing that a foreign claim is to be ranked lower than the general non−preference claims if an equivalent local claim (e.g. claim for a penalty or deferred−payment claim) has a rank lower than the general non−preference claims.

Id. Back To Text

[300] Id., art. 32 (providing creditor's recovery will take into account all distributions, so as to ensure that it does not recover more than its fair share):

Article 32. Rule of payment in concurrent proceedings Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Id. Back To Text

[301] Id., art. 20:

Article 20. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign proceeding that is a foreign main proceeding,

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) execution against the debtor's assets is stayed; and (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(2) The scope, and the modification or termination, of the stay and suspension referred to in paragraph (1) of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article]. (3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. (4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

Id. Back To Text

[302] Id., art. 22:

Article 22. Protection of creditors and other interested persons

(1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. (2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate. (3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief. Back To Text

[303] In the same vein, Article 6 allows a local court, on the vague grounds of "public policy" to not recognize a foreign proceeding. This provision provides an "escape clause" for courts, very similar to the "fundamental fairness and due process" analysis in Cunard. Thus, the Model Law could theoretically incorporate section 304 case law. Back To Text

[304] See Model Law, supra note 293, at art.17(2) (providing all proceedings shall be recognized as either "main" or "non main"). Back To Text

[305] See id., at art. 17 (2)(a) (asserting "main proceeding" takes place in State where debtor has center of its main interests, and noting that there is presumption it is place of incorporation of debtor). This definition was taken directly from the European Convention on Cross−Border Insolvency (EU Convention). See supra note 2. It is important to note that the court can disregard the presumption upon sufficient evidence that the center of main interests is located in another State. See Model Law, supra note 293, at art. 16(3) (stating "[i]n the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."). Back To Text

[306] See Guide to Model Law, supra note 296, at ¶126. A certain number of non−transitory assets and some managerial presence are required. The Guide to Model Law requires an economic activity of a somewhat permanent nature that employs people in the Enacting State. Back To Text

[307] See Model Law, supra note 293, arts. 21(1)(a), 23(b). The automatic stay applies in the main proceeding, but under a non−main proceeding, the court has discretion to apply the stay. In addition, under a main proceeding, the representative has standing to bring U.S. avoidance actions, whereas in a non−main proceeding, the court has discretion to give standing. Back To Text

[308] See supra note 253. Especially in the age of multinational corporations, determining the center of main interests could be difficult. Back To Text

[309] See Model Law, supra note at 293, art. 29 (stating deference exists whether or not local proceedings were commenced before or after foreign proceeding). Back To Text

[310] See id., art. 23 (noting that, under proposed chapter 15, this article provides foreign representatives access to U.S. avoidance provisions, namely sections 547 and 548 of U.S. Bankruptcy Code). Back To Text

[311] See id., art. 23(a), (b) (enumerating measures available to avoid acts detrimental to creditors). Back To Text

[312] The problem with this rule is that all the potential ambiguity in courts' interpretation of section 304(c) would be incorporated, by reference, into Article 23. Back To Text

[313] See Guide to Model Law, supra note 296, ¶166. Back To Text

[314] See Model Law, supra note 293, art. 23(a). Back To Text

[315] See Guide to Model Law, supra note 296, ¶166. Back To Text

[316] See Model Law, supra note 293, ch. V (Concurrent Proceedings) (asserting insolvency laws of enacting state must be identified). Back To Text

[317] The Maxwell factors include considerations relating to nationality of parties, location of transfer, location of loan, expectations of parties. Of particular note, it should be remembered that Congress codified the flexible, universalist approach adopted by the IBB and Finabank courts under sections 304, 303(b)(4), 305 and 306. Perhaps the same result could occur in this instance, inspired by the Maxwell analysis. See In re Banque de Financement, S.A., 568 F.2d 911, 920 (2d Cir. 1977) (asserting where procedure lacks explicit support in Act or Rule, bankruptcy court should determine whether to use equitable powers); In re Israel−British Bank (London) Ltd. v. Federal Deposit Ins. Corp., 536 F.2d 509, 513 (2d Cir. 1976) (suggesting starting point is assumption that foreign corporation with assets in U.S. is generally amenable to bankruptcy in U.S.). Back To Text

[318] See generally Martin N. Flics & Michael J. Ireland, Bankruptcy and the Problems of Multi−Jurisdictional Workouts, 592 PLI/Comm. 415 (Oct. 1991); Model International Insolvency Cooperation Act reprinted in Ian Fletcher, Cross−Border Insolvency: Comparative Dimensions, 12 United Kingdom Comparative Law Series at 287 (1990) [hereinafter MIICA]. Back To Text

[319] See Kraft & Aranson, Transactional Bankruptcies, supra note 81, at 351 (observing various parts of Act were derived from English case law, Australian Bankruptcy Act, Canadian Bankruptcy Act, and United States Bankruptcy Code section 304); Westbrook, Choice of Law and Choice of Forum, supra note 251, at 461 (noting multinational distribution creates inconsistent adjudications and losses distributed in ways considered unfair under domestic laws of most involved countries). Back To Text

[320] See MIICA, supra note 317, at 287 § 1(a) (1989). Back To Text

[321] See Kraft & Aranson, Transactional Bankruptcies, supra note 81, at 353 (suggesting courts could create choice of forum rules consistent with choice of law rules, to provide for a choice of forum); Donald T. Trautman, Foreign Creditors in American Bankruptcy Proceedings, 29 Harv. Int'l L.J. 49, 57 (1988) (commenting that judges treat foreign proceedings as central proceeding and, therefore, apply foreign law). Back To Text

[322] See Kraft & Aranson, Transactional Bankruptcies, supra note 81, at 354 (stating ancillary remedy issues must defer to first court making decisions about proceeding). Back To Text

[323] See id. (hypothesizing that, if Olympia & York (OY) had filed bankruptcy in Canada, result would have been inefficient because OY had its principal place of business and most of its creditors in England, not Canada). Back To Text

[324] Interestingly, the commentator, Mr. Kraft, mentions that factors such as principal place of business and expectations of the parties, i.e. Gebhard case, are important. The same reference to Gebhard, as reflecting the expectations of the creditor, was used in Brozman's analysis of choice of avoidance law. See Kraft & Aranson, Transactional Bankruptcies, supra note 81, at 318; see also In re Maxwell, 170 B.R. at 817 (asserting term "foreign proceeding" encompasses proceeding pending in any foreign country in which debtor's domicile, residence, principal place of business, or principal assets were located at commencement of case). Back To Text

[325] Factors such as principal place of business, or place of incorporation. See Kurt H. Nadelmann, Bankruptcy Treaties, 93 U. Pa. L. Rev. 58 (1944) (asserting courts of state in which debtor is domiciled should be given exclusive bankruptcy jurisdiction). Back To Text

[326] Report on the Committee J Cross−Border Insolvency Concordat, presented to the Council of the International Bar Association Section on Business Law, Sept. 17, 1995 [hereinafter Concordat]. Back To Text

[327] See Concordat, supra note 325, at 2 (stating Concordat was not designed for use as treaty, but rather as "interim step" until treaties or other laws were adopted by nations). Back To Text

[328] David H. Culmer, The Cross−Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?, 14 Conn. J. Int'l. L. 563, 563−64 (1999) [hereinafter Culmer, Cross−Border Insolvency Concordat] (observing Concordat was designed to provide courts and international practitioners with guidance as to best means to achieving fair, predictable, and efficient results, which also tend to increase value of companies in liquidation or reorganization). Back To Text

[329] See Concordat, supra note 325, at 5 (noting Principle 1 provides "nerve center" (headquarters) should be principal forum). Back To Text

[330] See id. at 7 (referencing Principles 2(B) and (C)). Back To Text

[331] See Id. Back To Text

[332] See Id. at 5−6 (referencing Principle 3(C)). Back To Text

[333] The European Convention, for example, has specific, restrictive rules on choice of avoidance law, and, in general, only permits the use of the "opening states"' (main proceeding) insolvency law in ancillary proceedings. See EU Convention, supra note 2, art. 4(2)(m). Back To Text

[334] See Concordat, supra note 325, at 7. In the Maxwell case, assume the dispute revolved around whether the executory contract law of England or the U.S. applied, and U.S. law allowed the rejection of an executory contract but English law did not. Under these facts, the Concordat would allow the representative to pick U.S. law and reject the contract, even though English law would not. Back To Text

[335] See Concordat, supra note 325, at 7 (asserting "[s]ubject to Principle 8, the Official Representatives may exercise voiding rules of any forum."). Back To Text

[336] See Concordat, supra note 325, at 22; see also Culmer, Cross−Border Insolvency Concordat, supra note 327, at 585−86 (stating "[p]rinciple 7 is intended to 'maximize recoveries' by allowing the use of the most liberal voiding rules available."). See, e.g., Nakash v. Zur (In re Nakash), 190 B.R. 763, 767−68 (Bankr. S.D.N.Y. 1996) (allowing parties to apply avoiding laws of Israel or U.S.). Back To Text

[337] See Concordat, supra note 325, at 22; see also In Matter of Axona Int'l Credit & Commerce Ltd, 924 F.2d at 33 (2d Cir. 1991) (stating facts of case); Anne Nielsen, et. al, The Cross−Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies, 70 Am. Bankr. L .J. 533, 552−53 (1996) [hereinafter Nielsen, The Cross−Border Insolvency Concordat] (describing example given in "Rationale"). Back To Text

[338] See Concordat, supra note 325, at 22 (discussing circumstances under which Official Representative from country (i.e. Hong Kong) may use avoidance laws of another country (i.e. U.S.) creating benefit for estate); see also Nielsen, Cross−Border Insolvency Concordat, supra note 336, at 552 (observing that, "[i]n addition, there is no unfairness because the banks should have expected United States law to apply."). Back To Text

[339] This is not an absurd fact pattern. As global business structures become increasingly more complex, such a scenario may arise for any number of tax and/or employment reasons. Back To Text

[340] See supra notes 155 and 210, and accompanying text. This approach reflects the current U.S. choice of avoidance law framework in plenary cases, as demonstrated in Axona and Maxwell. Back To Text

[341] Interestingly the European Convention protects against the avoidability of transactions, whereas the Concordat makes it easier to avoid transactions. Back To Text

[342] See Draft EEC Bankruptcy Convention of 1970, EC Doc. III/72/80 (1990). Back To Text

[343] See Ian F. Fletcher, International Insolvency: A Case for Study and Treatment, 27 Int'l Law. 429, 441 (1993) (noting EC's first convention failed because it neglected fundamental principle of equal treatment for all creditors). See generally Ian F. Fletcher, The Proposed Community Convention on Bankruptcy and Related Matters, 2 Euro. L.R. 15 (1977) (providing detailed discussion of EC's first failed attempt to develop insolvency laws to govern EC member states); Dominik Lasok & Peter Stone, Conflict of Laws in the European Community, ch. 10 (1987) (analyzing Draft EEC Bankruptcy Convention of 1970). Back To Text

[344] See European Convention on Certain International Aspects of Bankruptcy (Istanbul Convention), opened for signature, June 5, 1990, 30 I.L.M. 165 (1991). Back To Text

[345] See id. Arts. 4(1), 17. The secondary forums would coordinate with the principal forum. For example, the local creditors could file in the secondary forum to participate in the principal forum. Back To Text

[346] See Leslie A. Burton, Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty, 5 Ann. Surv. Int'l & Comp. L. 205, 215−16 (1999) (addressing weaknesses of Istanbul Convention which led to its ultimate rejection); see also Ian F. Fletcher, The European Union Convention on Insolvency Proceedings: An Overview and Comment with U.S. Interest in Mind, 23 Brooklyn J. Int'l L. 25, 29 (1997) (noting reasons for failure of Istanbul Convention). Back To Text

[347] See Istanbul Convention, supra note 343, art. 40. Back To Text

[348] See id. Back To Text

[349] See EU Convention, supra note 2, arts. 3, 4. There is a presumption that the principal forum is where the registered office (place of incorporation) of the debtor is located. This can be rebutted, however, by a showing that substantial assets, operations or management of the debtor are actually located in another country (such was the case in BCCI, where the place of incorporation was Luxembourg, but the principal headquarters were located in England). Back To Text

[350] See id. Back To Text

[351] See id., art. 5(1); 35 I.L.M. at 1227, art. 7(2); 35 I.L.M. at 1228, art.10; see also Fletcher, supra note 345, at 39−40 (listing issues for which EU Convention "creates special rules allowing for the determination of particular issues in

accordance with a law other than that of the state of the opening of proceedings."). Back To Text

[352] See EU Convention, supra note 2, Art 4 (establishing general rule by which opening State governs avoidance and related insolvency issues); see also Manfred Balz, The European Convention on Insolvency Proceedings, 70 Am. Bankr. L. J. 485, 512 (1996) (discussing establishment of general conflicts rule in order to provide certain types of transactions special protection from exportation of avoidance laws). Back To Text

[353] See EU Convention, supra note 2, art.13 (providing general conflicts rule, which limits applicability of avoidance law). Back To Text

[354] See id. Back To Text

[355] See id. Back To Text

[356] See id. Back To Text

[357] See Westbrook, Choice of Avoidance Law, supra note 5, at 512 (claiming "[t]he most important determinant of the distributional result of an avoidance action in a transnational insolvency case is the type of distributional system to which the avoiding court is committed."). See, e.g., John D. Honsberger, The Canadian Experience, 12 U.K. Comparative Law Series 27, 33 (Fletcher ed. 1990) (providing example in which Canada applied lex fori in distribution); Ulrich Drobnig, Report for Germany, 12 U.K. Comparative Law Series 95, 102 (Fletcher ed. 1990) (same). Back To Text

[358] See Westbrook, Choice of Avoidance Law, supra note 5, at 515 (claiming, in reality, universality results in "primary proceeding in a debtor's 'home' or domiciliary country, with 'ancillary' proceedings in other jurisdictions where the presence of assets or other matters require local assistance to the primary court."); see also Jan Dalhuisen, 1 Dalhuisen on International Insolvency and Bankruptcy, Part III, § 2.03[3] nn.49−51 (1986); Hans Hanish, Survey Over Some Laws on Cross−Border Effects of Foreign Insolvency Procedures on the European Continent, in 12 U.K. Comparative Law Series 149, 159 (Fletcher ed. 1990). Back To Text

[359] See Westbrook, Choice of Avoidance Law, supra note 5, at 514 (observing that under universality, law of main forum should apply to all ancillary proceedings and "main" proceeding is generally determined to be where principal assets/headquarters of debtor are located); see also In re Ionica PLC, 241 B.R. 829, 834 (Bankr. S.D.N.Y 1999) (remarking about use of universality and territoriality approaches to transnational bankruptcies). Back To Text

[360] For a brief explanation of universality and territoriality and their variants, refer to the Introduction section. Back To Text

[361] See supra note 358 and accompanying text(discussing territoriality and universality approaches to transactional bankruptcies); see also Westbrook, Choice of Law and Choice of Forum, supra note 251, at 470 (noting importance of choosing single law). The "home" of the debtor can be identified in many different ways, including the "nerve center" analysis used by the Concordat, or the "center of main interests" definition under Uncitral and the European Convention. Back To Text

[362] See id. at 464 (presenting case for universalism). Back To Text

[363] See id. at 464−65 (describing "rough wash" approach). Back To Text

[364] See id. Back To Text

[365] See id. at 466 (describing transactional gain approach). Back To Text

[366] See id. Back To Text

[367] See id. Back To Text

[368] See id. (describing transactional gain approach); see also Perkins, A Defense of Pure Universalism, supra note 5, at 804 (stating "a universal rule would be more efficient."). Back To Text

[369] See Westbrook, Choice of Avoidance Law, supra note 5, at 531−32 (stating benefits of universalist rule). Back To Text

[370] See id. Back To Text

[371] See Perkins, A Defense of Pure Universalism, supra note 5, at 805 (observing territoriality can lead to distortion of capital allocation decision); see also Westbrook, Choice of Avoidance Law, supra note 5, at 529−30 (same). Back To Text

[372] Interestingly, Professor Westbrook points to the Axona case as an example of the weakness of using local avoidance law. Axona was praised as an example of cooperation between courts, yet the decision to apply U.S. avoidance law to a transfer which probably had greater contacts in Hong Kong was not the best long−term choice of avoidance law solution. See Westbrook, Choice of Avoidance Law, supra note 5, at 531. It is probable that, had the Maxwell analysis been applied to Axona's facts, the result would have been application of Hong Kong law, however, this result is not certain. Indeed, the loan was negotiated in Hong Kong, between Chemical Hong Kong (a subsidiary of Chemical, a U.S. corporation) and a Hong Kong debtor. The only connection with the U.S. was that the loan was restructured in the U.S. and setoff against the Chemical bank account of Axona in New York. It is debatable what law would ultimately apply, even under the Maxwell approach. See generally In re Axona Int'l Credit & Commerce, Ltd., 115 B.R. 442 (Bankr. S.D.N.Y. 1990). Back To Text

[373] See LoPucki, Resolving Transnational Insolvencies, supra note 1, at 709−13 (finding problems with universalism). This argument plays a prominent role in Professor LoPucki's arguments in support of a cooperative territoriality approach. Back To Text

[374] See id. For example, a transfer made in the U.S. by a foreign debtor to a U.S. creditor, involving a U.S. loan, negotiated and made in the U.S., should not be avoided under foreign law, especially when the parties expected U.S. law to apply. Back To Text

[375] See Westbrook, Choice of Avoidance Law, supra note 5, at 534−35. Back To Text

[376] See id. at 537. Back To Text

[377] See LoPucki, Resolving Transnational Insolvencies, supra note 1, at 713−18 (observing "[u]niversalists concede that it is difficult to state a precise rule for determining a debtor's home country."). Back To Text

[378] See Westbrook, Choice of Avoidance Law, supra note 5, at 514. Back To Text

[379] See LoPucki, Resolving Transnational Insolvencies, supra note 1, at 719−20 (noting example where home country of parent was used). Back To Text

[380] See id. If the debtor is the parent, then the same rule applies. Back To Text

[381] See EU Convention, supra note 2, art. 13 (Detrimental Acts). The Convention's approach preserves some predictability for the majority of cases by using the avoidance law of the main center of interests of the debtor, similar to the "home country" rule of Professor Westbrook. However, it permits a court to use the local avoidance law in the special circumstances where the local law would apply, and the transfer would not be avoided under local law. This result thus comports with the expectations of the parties and preserves a measure of fairness. Admittedly, the Convention's complex choice of law rules were specifically drafted for a fairly homogeneous group of countries, who are tightly−knit politically and benefit from coherent judiciary oversight under the European Court of Justice. It might

therefore be difficult to transpose such a choice of law system to other groups of countries. However, such a choice of avoidance law rule would provide clearer, fairer and more predictable rules than those found in the chapter 15 (UNCITRAL) provisions. Back To Text

[382] The reason that an approach similar to ancillary proceedings should not be adopted is that a concurrent proceeding should not presumptively defer to a foreign proceeding. Rather, both courts have equal right to administer the assets of the debtor. These situations are rare, and thus a case−by−case approach would not be unfair or affect predictability too much. In addition, due to the rather substantial assets found in both countries (thus resulting in the need for concurrent proceedings, rather than one main proceeding and another ancillary proceeding), it would seem that considerations of fairness should outweigh, to a certain extent, predictability. Back To Text