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*457 THEORY AND PRAGMATISM IN GLOBAL INSOLVENCIES: CHOICE OF LAW AND CHOICE OF FORUM [FNa]

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The surging growth of transnational enterprise presents the prospect of capitalism writ large, with all its benefits and terrors. One inevitable consequence is the emergence of worldwide defaults. Numerous legal frameworks have been constructed or are abuilding to scaffold the creation of transnational business, but we have failed utterly to fashion the legal structures necessary to manage the consequences of cross-border defaults. That task is the subject of this paper. The subject is of growing importance. Transnationals like Campeau and the Bond group have been going bust at an increasing rate, and the Leveraged Buy Out phenomenon of the Eighties will likely keep transnational lawyers busy with default cases throughout the Nineties. Many of these cases are quite literally global. Yet we must manage these worldwide defaults through a political system of nation states. [FN1] Pragmatism dominates the worldwide effort to find a solution to the problem of transnational business bankruptcy. That pragmatism is admirable and necessary, but it has tended to deflect close analysis of the issues involved. This paper addresses the most important analytical problem, which is a failure to distinguish carefully two closely related issues, choice of law and choice of *458 forum. That analysis is essential to identifying the costs and benefits of "universalism," the resolution of the financial difficulties of a multinational commercial enterprise [FN2] in one proceeding. The analysis is also crucial to understanding the characteristics that reform proposals must have if they are to be successful. We often think of intellectual theory and pragmatism as competing approaches, but a pragmatic program is most likely to be successful when it clearly identifies (a) the key changes necessary to reform; and (b) the costs and benefits of those changes. My central theme is that adoption of a universalist regime requires both the achievement and the acceptance of rough justice. That is, reform proposals must achieve an approximation of equality and fairness across a range of cases, while yielding economic benefits sufficiently great to command acceptance of universalism despite the prejudice to local interests in particular cases. My central proposition is that universalist reform must have certain characteristics to be accepted. These characteristics include an explicit acceptance of outcome differences, cooperation among nations with a rough

similarity of bankruptcy laws, a generalized system of certifying that legal similarity, and some degree of reciprocity.

I. INTRODUCTION TO THE PROBLEM

At present the legal treatment of troubled multinationals is primitive and chaotic. Even the nations of the European Community ("EC") have been unable to make substantial progress in this field. [FN3] This deplorable situation increases the costs of all transnational business activity, and imposes on claimants against such enterprises serious burdens of expense, delay, and injustice. An amelioration of these difficulties is essential to the progress of regional economic integration and to a robust growth in transnational enterprise generally, but the obstacles are complex and intractable. Almost all nations with substantial market economies have laws that address the problem of general financial default by a commercial enterprise. [FN4] Generally *459 these laws provide comprehensive systems for dealing with defaults. On the other hand, there are no multinational treaties or institutions governing general defaults and little prospect for such agreements in the foreseeable future. [FN5] Thus the threat of a general default by a multinational enterprise requires a legal response by each of the sovereign states whose interests are implicated. Each state must make two threshold decisions: the identification of a national body of law that will govern the financial consequences of the default, and selection of public institutions in one or more countries that will manage the process. That is, the requirements are for a choice of law and a choice of forum. Oddly enough, the need for two distinct choices--choice of law and choice of forum--is not often articulated, perhaps because of an implicit assumption that they will always lie in the same jurisdiction. One result has been some ambiguity and confusion in recent proposals for reform. A multinational default will routinely require multiple choices of law and multiple fora. Multiple choices of law, depending on the issue, are commonplace in commercial law. An example is the traditional brace of contract rules, place of making and place of performance. [FN6] The general default of a multinational will raise many legal issues necessarily implicating the laws of more than one jurisdiction and requiring multiple choices of law. The four great categories of choice-of-law issues will be (a) formal as against informal resolution of the *460 financial crisis; (b) liquidation as against reorganization of the troubled company; (c) distribution of benefits; (d) avoidance of transactions. [FN7] Management of a cross-border default will also require multiple fora, because assets in various jurisdictions cannot be managed without the assistance, or at least the acquiescence, of a local authority (most often judicial) in each jurisdiction. These questions are presently governed, in practice and often in theory as well, by the "grab rule." [FN8] That is, creditors who use local procedures to seize assets or to initiate local insolvency proceedings will be routinely favored over all other creditors. [FN9] Local procedures control without regard to any reasoned choice of law analysis of the sort usually applied in commercial cases. Cooperation with other fora is limited to the rare case where local assets more than satisfy local claimants. One consequence is that creditors will receive widely differing distributions of benefits depending on the location of valuable assets at the moment of crisis, creditors' sophistication and resources in pursuing assets around the world, and perhaps inside information or relationships with the debtor. [FN10] Another consequence is that reorganization (rescue), whether formal or informal, is

impossible for most multinationals except in the rare case of near unanimity among creditors. There are two major categories of costs imposed by the current primitive regime. The most important is the inability to predict the results of default, which adds to the cost of every international transaction, especially international financings. The total expense of these millions of increments must dwarf even the substantial losses experienced in specific cases of default. The second type of cost arises in the insolvency process itself. The present incoherent system destroys values that would otherwise be available to claimants in the enterprise, including commercial creditors, employees, tort victims, customers and shareholders. [FN11] *461 The destruction of values affects both reorganization and liquidation. The use of reorganization to maintain going concern values is almost impossible. Even in cases doomed to liquidation, the piecemeal dismemberment of the enterprise, without regard to natural economic units of sale, greatly lessens the prices obtained for assets and lowers the return available to claimants. [FN12] Injustice aggravates economic loss. Not infrequently the overall result of a multinational default is significantly inconsistent with the declared policies of virtually every nation with a plausible interest in the affairs of the multinational. Losses are distributed in ways that would be considered unfair under the domestic laws of most involved countries, and inconsistent adjudications of similar cases are commonplace. This disgraceful state of affairs continues in the face of nearly unanimous agreement across the world that the financial difficulties of a multinational should be resolved in one central forum, the "universalist" principle. [FN13] Under that principle, all of the assets and debts of the enterprise would be administered through one central proceeding in the "home" country, and courts in all other countries would act ancillary to and in aid of the home country court. Perhaps no other principle of choice of forum has been so generally accepted for so long. [FN14] Yet this principle is rarely applied in practice.

II. ANALYSIS OF THE PROBLEM

The general agreement on the principle of universalism in the management of default has perhaps served to deflect close analysis of the elements of that principle. Its frustration in practice has encouraged a pragmatism in the approach to reform that is sensible, but is itself a deterrent to precise analysis. I think that even those of us who agree that a pragmatic approach is needed will be more effective if we become a bit more rigorous in our thinking about the pieces of the multinational default puzzle.

A. CHOICE OF LAW AND CHOICE OF FORUM

The most obvious point is also the most easily overlooked: there is a difference between choice of forum, the explicit focus of the universalist rule, and choice of law, a result of universalism often implicitly assumed. Suppose general default by a U.K. multinational with many of its assets in the Republic of X. *462 X, a former British colony, has a choice of law rule that would apply British law to every aspect of any administration or insolvency proceeding. In that case, deferral to an insolvency proceeding in X [FN15] by the British courts requires only that they view the X courts as a fair and practical forum, that grant "national treatment" [FN16] to British creditors and use procedures that permit those creditors to claim and collect in an economical way. Because the X courts' choice of law

rule will apply the same law as would the U.K. courts and thus should produce the same substantive outcomes, the only concern of the U.K. courts is procedural fairness. [FN17] On the other hand, if the courts of X would apply X's law for most purposes, then it is almost certain that differences between British law and X's law will produce different results for creditors, notwithstanding complete procedural fairness and national treatment in both courts. Outside the purely theoretical case where the two bodies of commercial and corporate law are identical in all material respects, that will always be true. Thus the choice of law rule will always be outcome determinative, whereas the choice of forum in principle need not be. Courts in the position of the U.K. courts in this example will be much more reluctant to accept X management of the default, unless it appears that the two laws are very similar. In the distinction between law choice and forum choice lies "the rub" in most current efforts to rationalize transnational treatment of insolvency. My primary focus is choice of law.

B. MULTIPLE CHOICES OF LAW

The reason this distinction is not much discussed seems to be an assumption that choice of law follows from choice of forum. This assumption will often hold up, as in the fact that a home-country court will likely apply its own rules of priority in distribution to unsecured creditors. But there are many crucial points in any default proceeding where the insolvency forum law is not necessarily the proper choice. One example is a U.K. secured creditor's right to a receiver. The case would arise where a U.K. bank has made a loan to the British branch of a company based in X (the "X company"), which loan is secured by a floating charge over all the company's U.K. assets. British law permits a secured party with a floating charge over substantially all the debtor's assets to contract for the right on default to appoint a receiver who acts with very broad powers to realize on the *463 assets for the primary benefit of the secured party. [FN18] If the company goes into an insolvency proceeding in X, the X court would be the home-country court to which the U.K. courts would defer under a universalist regime. Would the X court apply British law to the U.K. assets by authorizing the appointment of a receiver to control those assets for the benefit of the bank? [FN19] If not, then the rights of the bank and the other creditors will be greatly affected by the decision of the U.K. court to defer to the X court or to refuse deference. Another example is the law to be applied to possible recovery of a payment to a creditor during the year or so before a formal insolvency proceeding was commenced, when the payment would be a voidable "preference" under the laws of some interested countries (for example, home-country and principal-asset country), but not of others (for example, country of payment and country of creditor domicile). It is not self-evident that a home-country rule should always control the recovery of such a payment, although a plausible case can be made for that rule. [FN20] A concrete example is the bankruptcy of a U.S. company in the U.S., together with a creditor's petition for winding up of the company's U.K. operations in the U.K. A very large payment was made to a U.K. creditor five months before bankruptcy with intent to prefer that creditor. [FN21] Assuming the creditor was not an insider, U.S. law would not permit recovery of the payment as a preference, while U.K. law would. [FN22] There are many possible choices of law rules as to preferences. Even if both countries adopted a "principal place of business" (or siege social) test, there are two plausible variations: the debtor's home country or the transferee-

creditor's home country. If the U.S. and U.K. courts both apply the law of the debtor's country, the transaction cannot be avoided. If both adopt the British creditor's home law, the payment can be avoided. If each chooses a different rule, there will be importantly different results. When questions of security and liens are included, the likelihood of non-forum law applying is even more clear. For example, the "perfection" of a security *464 interest in tangible personal property [FN23] will probably be held to be governed by the law of the place where the property is physically located, [FN24] even if the law governing its avoidance as "unperfected" is the forum insolvency law. Using the example of X company, the validity of the charge (lien) on the U.K. assets would likely be governed by U.K. law, while the effect of invalidity would be governed by the law of X. A similar sort of issue may arise as to the validity in the home-country proceeding of foreign judicial liens obtained before and after the home-country case began. Such liens will raise the same kind of mixed boundary issues, where the court may apply two laws to the one issue and may have several available for each role. [FN25] In a major multinational insolvency, tens of millions of currency units may hang on the answers to these sorts of questions. The identity of the forum chosen by a universalist rule will obviously have a great practical impact on the likely decisions made about choice of law. But the two problems are distinct, and both analysis and pragmatic reform are ill- served by confounding them. If some group of philosopher-kings were to adopt for all countries a clear and complete set of choice-of-law rules for general defaults, the remaining choice of forum problems would be relatively easy to solve. The reason is that choice of law determines outcomes.

C. THE CASE FOR UNIVERSALISM

Under present circumstances, given the lack of an agreed set of choice-of-law rules, the case of X company likely would be resolved by each court, in the U.K. and in X, applying its own rules to questions of administration and distribution. As to questions like transaction avoidance and security interests, each would apply its own choice of law rules, which would often be different. Thus a change to a universalist regime--the choice of the U.K. or X as a universal forum--will invariably change the outcomes for some or all claimants. In those circumstances we have to ask what arguments would persuade the legislators or judges of the U.K. and X to accept the change in outcomes implied by deference to the other forum--that is, by a universalist rule. There are two principal arguments, the "Rough Wash" and the "Transactional Gain." Of the two, the Rough Wash is the smaller, more specific point, because it operates within the universe of default situations, and ignores benefits *465 to commerce generally. The central argument for the Rough Wash is that a universalist rule will roughly even out benefits and losses for local creditors, who will gain enough from foreign deference to the local forum in one case to balance any loss from local deference to the foreign forum in another. [FN26] However, there is a low incentive to construct a universalist regime merely to produce the same net results, so the Rough Wash argument depends equally on a second assertion, that a universalist rule would so increase values available for all local claimants in all general defaults as to offset by far the losses that particular local claimants might suffer in some cases. That assertion is persuasive, because the preservation of going concern values and the maximizing of liquidation values by integrated sales will likely increase returns to creditors greatly. [FN27] If gains and losses even out, sharing in a much bigger pie will

produce great benefits for local claimants overall. [FN28] The economic benefits of universalism can be seen even in the simplest example, the liquidation of X company in our prior example. Suppose it had an integrated manufacturing, distribution and marketing system in several countries, divided into divisions by product type. The assets are evenly distributed in X, the U.S., and the U.K., but the asset/local-debt ratio is greatest in the U.S., so that U.S. creditors would do better in a local distribution at any given level of return from sale of assets or businesses. Sale of assets will bring US$33 million in each country. Sale of the divisions across national lines as going concerns will bring $200 million worldwide, in part because of trademarks that have much greater value on a worldwide basis. The example is not unrealistic, because this difference between asset value and going-concern value is closer to routine than extraordinary. If the local asset/local-debt ratio is sufficiently skewed to the U.S., it will be in the interest of U.S. creditors to press for local distribution despite the lower returns on piecemeal sale of assets. If the grab rule were applied in the U.S., the U.S. courts would favor that local interest. In the next case, the U.K. creditors would be in that position and in the third one the X creditors. The *466 result will be a lower return for creditors as a whole in all three countries. Obviously this situation is merely the international version of the problem of collective action [FN29]--the "Prisoner's Dilemma"--that has been solved by the adoption of collective insolvency proceedings in almost every country. Universalism internationally would provide the same benefit of maximization of asset values for creditors and other parties across the range of cases. The larger argument, Transactional Gain, rests upon the benefits to local citizens from the increased flow of trade at lower transaction costs that would result from a coherent system of transnational management of default. The assertion is that the increased predictability of the results of default would significantly reduce the costs of borrowing and other credit for multinationals. The reductions in cost for many millions of transactions would benefit the local citizens of any given country far more than any net loss they might suffer in particular defaults. There is a third argument for a universalist system that applies to all countries and has the appeal of altruism. A universalist system would be far more fair, and produce more equality of distribution among creditors. Because equality of distribution is a central principle of default management in every country, universalism would serve a global notion of fairness. [FN30] This argument of fairness is most often the leading argument for a universalist principle. Unfortunately, the fairness argument has two serious and inherent weaknesses. The first is that every country honors equality of distribution primarily in the breach. Every enactment is riddled with exceptions for secured parties, landlords, grain farmers, the revenue authorities--the list is long and varies from country to country. [FN31] As a result, a universalist rule will only make unequal distributions somewhat less unequal and will produce results contrary to some interested country's distribution policies in every case. The second weakness of the fairness argument is that in this wicked world it is unlikely to succeed if in conflict with perceptions of self-interest. [FN32]

*467 D. IMPORTANCE OF RECIPROCITY AND ROUGH SIMILARITY OF LAWS

1. Reciprocity

There are two prerequisites to the benefits of Rough Wash and Transactional Gain. The first is that some degree of reciprocity is crucial to both. Many of the leading scholars in

private international law have been resistant to reciprocity requirements, and for good reason. In transnational insolvency law, the commanding figure has been Professor Riesenfeld, who successfully resisted inclusion of a reciprocity requirement in s 304 of the Bankruptcy Code. I have little doubt that he was right, given the ground-breaking role of s 304. Nonetheless, reciprocity will have some role to play in the evolution of transnational insolvency beyond its present, nascent stage. [FN33] The extent of reciprocity required for a particular type of international cooperation can vary greatly, although the literature largely ignores the distinctions. For present purposes, I suggest that reciprocity can be "universal" (everyone cooperates), "general" (most countries cooperate), "multilateral" (many countries cooperate), or "bilateral" (two countries cooperate). Within the category of multilateral reciprocity, I want to identify a sub-category, "critical-mass reciprocity," by which I mean merely an extent of multilateral cooperation sufficient to convince each cooperating state that enough other states have joined in reciprocal relationships to ensure the obtaining of the benefits expected to flow from a particular sort of cooperation. Critical-mass reciprocity is essential to the Rough Wash argument because no country will achieve a Rough Wash if it defers when in a surplus position as to assets, [FN34] but does not benefit from deference when it is in deficit. While in theory the increase in value realizations might overbalance the resulting loss, the case for universalism becomes much more difficult to make without the Rough Wash assumption, which depends on reciprocity. Critical-mass reciprocity is also central to the Transactional Gain argument. Obviously, the predictability that produces Transactional Gain premises that most important commercial countries will adopt predictable universalist rules. It would be very hard for any one country to increase predictability in a way that would benefit its citizens without corresponding action by other economically significant nations. *468 Although critical-mass reciprocity will be essential to the development of full international cooperation in insolvency, a reciprocity requirement is full of dangers and pitfalls, which is the very good reason scholars of private international law have often opposed such a requirement in various contexts. These concerns deserve an article of their own, but the present discussion will be served by one introductory point. The taxonomy of reciprocity has another dimension, in addition to the categorizations suggested just above, that has received little attention. That is the distinction between what I will call "positive" and "negative" reciprocity. Positive reciprocity requires that another jurisdiction have affirmatively cooperated before this jurisdiction will do so, while negative reciprocity permits this jurisdiction to cooperate until there is clear evidence that the other jurisdiction will not. Positive reciprocity creates an Alphonse and Gaston impasse ("After you." "No, no, after you."). Negative reciprocity invites cooperation, especially if it is generously understood to assume reciprocal treatment until noncooperation is clearly demonstrated. Most of the evils associated with reciprocity are traceable to the positive variety. Because reciprocity is both important and risky, the reciprocity element creates a difficult problem of timing. Imposition of a reciprocity requirement may block the initiation of international cooperation. For that reason, the drafters of s 304 were probably correct in ignoring reciprocity. Yet the foregoing analysis suggests that reciprocity must enter the process if it is to proceed beyond fairly limited cooperation. It is in response to this problem of timing that my suggestions for reform include "common unilateralism" as a possible solution. [FN35]

2. Similarity of Laws

The second prerequisite to obtaining the benefits of universalism is general similarity of laws. Similar laws about distributions, avoidance, and the like are not in principle necessary to the acceptance of universalism, but in practice similarity is very important. The benefits of Rough Wash and Transactional Gain are difficult or impossible to measure empirically. Insofar as the Rough Wash assumption might not hold true for a particular country, the risks of its acceptance are mitigated by similarity of laws. It is easier to accept the risk that another country's law will be more often applied if that law produces outcomes roughly similar to those under local law. By the same token, the inevitable imperfections of the predictability necessary to Transactional Gain are reduced *469 to the extent choice of different laws will produce not too dissimilar results. Thus the uncertainties of Rough Wash and Transactional Gain are more acceptable the more similar the laws of the nations involved. At the same time, the probable improvement represented by Rough Wash and Transactional Gain mean that great benefits can be derived from universalism notwithstanding fairly sharp variations in the details of the default laws of these countries. The result is a need for similar, but not necessarily identical, laws if the universalist rule is to be adopted. That in fact is the standard that some proposals have pragmatically adopted, but without a clear articulation of the reasons why that standard will benefit all the countries concerned. Other proposals have ignored the problem of similarity. [FN36] If rough similarity is necessary, it would seem to follow that only countries with roughly similar laws will be able to form a community of countries cooperating in default matters. A general invitation to cooperation issued to all countries, regardless of similarity of laws, may not be realistic. That proposition will not be popular in many quarters, but I think it is correct. An analogy is GATT, where not all nations are in a position to adopt all of the GATT rules and countries are not invited to be full members unless they have reached that point. One must fully respect the position of a country that feels unable to adopt an insolvency system roughly similar to that of others, because such a system may be inappropriate for that society. But that country may have to pay the price of foregoing participation in the benefits of international cooperation in matters of general default.

E. IMPORTANCE OF CHOOSING A SINGLE LAW

Transactional Gain has another important implication for universalism. Because that benefit turns on predictability, it depends in substantial part on adoption of a universalist choice of law rule that chooses the home-country law, the law of the forum chosen by the choice of forum rule, to the maximum reasonable extent. Although I will not go through the full analysis here, the reason is that one body of law must be applied to the maximum extent if relative default priorities are to be predicted accurately. The home-country law is the one law that can be most reliably predicted in advance. [FN37] So, for example, if counsel knows at the time of a loan that the law of the country of the debtor's principal place of business will control as to distribution and avoidance, then an opinion can be given that a particular credit structure will with reasonable reliability yield an anticipated range of default results. Note that *470 this state of affairs does not automatically result from a universalist choice of forum. It requires the further step of a general adoption of a home-country choice of law rule for distribution and avoidance. [FN38] On this point it might seem fair to charge me with marching up the hill and then back down again. How

can I reconcile my assertion of the importance of unbundling choice of law problems from choice of forum with an insistence that they be united as much as possible? The answer is that the unbundling and reuniting are analytically necessary, because, for the reasons noted earlier, no system can promise a single body of law applicable to every aspect of a worldwide default. [FN39] We have to draw lines demarcating matters governed by home-country bankruptcy rules and those to which we must apply the rules of other countries. The point is that a clear home-country rule that permits creditors to anticipate that one law will control most aspects of a default will greatly benefit predictability and contribute to Transactional Gain. Because we cannot always apply the home-country rule, we must settle for a strong presumption in its favor as we consider each choice-of-law problem. An example is the problem of registration of title and security-title in a debtor's property. Immovables (real property) provide the strongest instance for applying situs rules. If the home country of the debtor is the U.K., but it owns valuable real estate in X, the validity of its X real estate interest must be determined by X law. Any other result, given current conditions, would render the real estate law of X incoherent, a price X will not be willing to pay for the benefits of universalism. The case of tangible moveables (personal property) is a closer one, but we will probably be stuck with a physical- location choice of law rule for such property for the foreseeable future, although that rule will likely be subject to steady erosion by adoption of home-country rules for highly mobile property (for example, shipping containers). Choice of law for intangible property (for example, debts) will probably continue to be confused and uncertain, but there is growing pressure toward a home-country rule, which would greatly improve predictability. [FN40] For the purposes of this paper, two points emerge, with some tension between them. One is that it will not be possible to apply the home-country law to all aspects of a company's insolvency. We will stifle reform at the outset if we refuse to recognize that fact. On the other hand, the enormous benefits *471 of Transactional Gain can be realized only if we apply the home-country law as often as possible.

F. SUMMARY

From what has been said, several conclusions stand out. The first is that a universalist rule will be outcome-determinative in every specific case. That being true, it will be attractive on the basis of self-interest only insofar as policymakers find plausible the Rough Wash and the Transactional Gain. That perception is most likely to be achievable only among cooperating nations that have three characteristics: (a) they believe they will have a mixed surplus and deficit status across the run of defaults; (b) they have laws that are roughly similar, although not necessarily identical in detail; and (c) they offer each other reciprocal treatment. Another factor of great importance to the Transactional Gain benefit is that a universalist regime adopt a choice of law rule and that this rule call out the home-country's law to the maximum feasible extent. These concepts provide a framework within which to analyze recent cases that exemplify specific obstacles to reform.

III. RECENT CASES

Two cases, Interpool, Ltd. v. Certain Freights [FN41] in the United States and Felixstowe Dock & Railway Co. v. U.S. Lines, Ltd. [FN42] in the United Kingdom, reflect the current difficulties.

A. INTERPOOL AND SECTION 304

1. Section 304

The Americans can claim to have taken the first concrete step toward universalism, [FN43] thanks to the pioneering efforts of Professor Stephen Riesenfeld. Section 304 of the Bankruptcy Code represents a dramatic step beyond what any other national insolvency law has done, primarily because of its procedural provisions and because it has a legislative history that endorses universalism. It was the first explicit command by a legislature to its courts to cooperate in transnational insolvency matters, with procedures provided to assist in the *472 execution of that command. It provides that a foreign representative [FN44] may as a matter of right initiate an "ancillary" case in the United States. In such a case, the U.S. bankruptcy court may grant some or all of the following relief: (a) blockage of all collection efforts in the United States; [FN45] (b) turnover of U.S. property to the foreign representative; [FN46] and (c) dismissal or suspension of any U.S. bankruptcy case that creditors may have started against the enterprise. [FN47] There is also a general grant of discretionary authority to provide other sorts of relief, [FN48] and a provision protecting the foreign representative from being deemed to have submitted to general jurisdiction in the U.S. [FN49] The procedural accomplishment is considerable. The U.S. court is broadly empowered to serve a universalist regime. But standing against universalism is s 304(c), which gives a shopping list of factors for the court to consider in determining what, if any, relief to give in deference to the foreign proceeding. This section's enumeration of defenses against deference was no doubt essential to the adoption of s 304 in 1978. It is unlikely that Congress would adopt a deference procedure even today without similar hedges. We are far better off with s 304 than we would be without it. Nonetheless, it is important to understand that subsection (c) is a potentially fatal flaw in the statutory scheme. Subsection (c)(4) is especially troubling, because it explicitly refers to distribution of proceeds in a way "substantially in accordance" with U.S. notions. Other sections also refer or can be read to refer to outcome differences. [FN50] These provisions can easily be construed to prevent deferral in every case that matters. Furthermore, the listing of "comity" as one of the factors to be considered, [FN51] although doubtless intended to reinforce the policy of deference, can have the perverse effect of making comity seem just one more factor to be weighed. *473 Section 304(c) demonstrates that Congress has utterly failed to come to grips with the problem of outcome differences. Section 304 simply proclaims universalism and local preference in the same breath and leaves it to the courts to fashion something worthwhile from its conflicting motives. [FN52] The result has been a mixed bag of judicial results. Most often the U.S. courts have shown a willingness to defer, [FN53] but there are several examples of nondeference. [FN54] Furthermore, the utter failure of international cooperation in the U.S. Lines case, among others, may cause the U.S. courts to lose their enthusiasm for international cooperation and to use the statutory confusion to back away from deference. [FN55] Section 304 contains no choice of law rule, which is consistent with its failure to face outcome differences squarely. Another weakness is that it does not permit the U.S. courts to use an ancillary case to avoid transfers under U.S. law. It is not clear whether it permits such use as to transfers avoidable under foreign law. [FN56] It does have a very "friendly" choice of forum rule. It permits selection of a home-country on most generally

accepted bases, [FN57] with the notable and significant exception of country of incorporation. [FN58] The price paid is that the U.S. courts are not given a choice of forum rule in case of conflict among the permissible bases (for example, where the enterprise's principal place of business and principal assets are in different jurisdictions).

*474 2. Interpool

The tensions within Section 304 are well illustrated by a recent American case, Interpool, Ltd. v. Certain Freights. [FN59] The debtor, "KKL," was an Australian liner company that had extensive dealings with several Hong Kong ship leasing companies owned by Wah Kwong. The president of Wah Kwong also sat on the board of directors of KKL. After a liquidator was appointed in Australia at the petition of Wah Kwong, the liquidator filed a petition in the U.S. seeking "ancillary" relief as to the U.S. assets under s 304 of the Bankruptcy Code. A second U.S. petition, for a regular liquidation of the U.S. assets under chapter 7 of the Code, was filed by U.S. creditors. Thereafter the Australian liquidator entered into a settlement with various Wah Kwong entities that affected, inter alia, assets within the control of the U.S. courts, including a large arbitration award against a U.S. company, Weyerhauser. The liquidator's settlement was approved by the Australian court. As explained earlier, s 304 permits a foreign representative to ask for dismissal of a U.S. bankruptcy case and deference to the foreign proceeding. The Australian liquidator sought just that relief. The U.S. bankruptcy court refused to dismiss the chapter 7 liquidation case. It thus declined to defer to the Australian proceeding, and retained the U.S. assets under the control of a local trustee.

3. Analysis

The principal grounds stated by the court for its decision were (a) the lack of any doctrine in Australian law for setting aside possible insider manipulation by Wah Kwong; and (b) the denial of an opportunity for U.S. creditors to be heard on the settlement with Wah Kwong, because Australian law permitted it to be approved ex parte. The court's decision can be criticized on at least four different grounds: (1) The central basis for the court's decision was the perceived difference between U.S. and Australian law with respect to third-party insiders like Wah Kwong. Australian law, as the U.S. judge understood it, did not permit the avoidance of transactions of a self-dealing and perhaps unfair nature with a third-party insider. It thus left Wah Kwong in the driver's seat and possibly explained the deal that the liquidator made. The judge may have regarded that deal as unfairly favorable to Wah Kwong, if viewed in the context of what U.S. law would have done to the transactions with Wah Kwong. If so, the case was decided on the ground of an outcome difference between the two legal systems. [FN60] That ground is apparently legitimated by s 304(c)(3) & (4). *475 Yet the outcome-difference provisions in s 304(c) cannot be read to deny cooperation whenever outcomes would be changed, because to do so would eliminate almost all deference to foreign proceedings, given the certainty that avoiding powers and distribution rules in even similar systems will vary in detail. Since Congress patently intended to encourage deference in at least a fair number of cases, it obviously left it to the courts to decide how much difference in avoidance mechanisms or distribution rules was too much. It can not have meant to say that any difference material to any given case is enough to defeat deference. Necessarily, s (c)(3) & (4) is meant to apply only where the foreign system lacks meaningful avoiding powers generally or where it has

distribution rules that are so different from U.S. principles as to be intolerable (for example, absence of national treatment for foreign creditors or distribution first-come, first-served). The court in Interpool found a sufficient difference in the supposed lack of an Australian remedy for insider manipulations equivalent to the U.S. doctrine of "equitable subordination." [FN61] If such a difference is sufficient, one must think that the same court would refuse to defer where British law would refuse to set aside a payment within 90 days of insolvency, because of a lack of preferential intent. [FN62] Similarly, a British judge might be offended by the unavoidability under American law of a clearly preferential payment made to an insider 366 days before bankruptcy. [FN63] If these sorts of differences are enough to prevent cooperation among us, then internationalism in default matters is undone. This reading of Interpool would make s 304 a dead letter. (2) The second rationale for the Interpool result is procedural unfairness in the ex parte approval of the liquidator's agreement with Wah Kwong. I must start with a strong suspicion that this ground was something of a makeweight. If the agreement had not already taken place, then the U.S. creditors' argument would have been that deference should be denied because Australian law *476 allowed for the possibility of an ex parte approval of disposition of assets, including assets located in the U.S. It strikes me as unlikely that a U.S. court would have denied deference on that mere possibility, especially since ex parte approvals are not unknown in U.S. law and were fairly common before the adoption of the Code just 12 years ago. In any case, it seems very likely that the liquidator on that state of the argument would have undertaken to give notice of any disposition of U.S. assets, and perhaps even offered to obtain an Australian court order requiring such notice. At that point U.S. refusal of deference on this procedural ground seems very unlikely. If, on the other hand, lack of notice is taken to be an important ground in Interpool, the result was wrong. [FN64] In any insolvency system there is a substantial trade-off between the accountability provided by requiring notice and hearings and the economy and speed of a system that largely relies on the probity of the liquidator or trustee. In the United States we have chosen to deplete the estate of some assets, and to risk losing desirable opportunities for sale of assets and settlement of disputes, for the sake of minimizing misappropriation and incompetence. In a number of other countries the costs and delay of notice and court supervision are not deemed worth the price of greater expense and loss of flexibility and speed in liquidating the estate. The Australian insolvency system is one that has opted for speed and economy over supervision and accountability. It operates on the basis of considerable independence conferred on an experienced liquidator. [FN65] In that regard, it is similar to the systems in the U.K. and many other Commonwealth countries. It strikes me as singularly parochial for us to assume that our weighing of the cost-benefit equation is the only one that is rational or fair. Furthermore, it is likely that the Australian court would have been open to requests from foreign creditors that they be given an opportunity to be heard on important issues. [FN66] When a commercial concern in the United States lends to a foreign company, it knows that default may require employment of local counsel in the country of the debtor's headquarters and action in that country's courts. [FN67] We are not required to take seriously a contention that the American concern relied upon finding satisfaction within the United States. The claimed reliance is neither sensible nor credible, especially as to adventitious assets like the Weyerhauser arbitration award in Interpool. Given the predictable *477 need for the American creditor to take part in the home-country proceeding, it should request the

opportunity to be heard in that proceeding early on, rather than lying back and hoping that differences in procedure will lure an American judge into disapproving the results in the debtor's home court. [FN68] That tactic should be especially unpersuasive in the hands of U.S. lenders and suppliers with offices and affairs all over the world. As one who spent many years as an advocate in U.S. courts, I much prefer a system that provides notice and an opportunity to be heard concerning any important issue in an insolvency case. But I am not so narrow-minded as to fail to see the powerful case (especially as to economy) for an independent liquidator system, nor so parochial as to assume that our Commonwealth friends would adopt a system that is unfair in practice. (3) The problem in Interpool may have arisen from a failure of proof or persuasion. Either the liquidator did not adequately show the court why the deal with Wah Kwong was a good one for creditors generally or the court did not accept the explanation proffered. The latter possibility may tie in to the first rationale for the decision: that is, the deal may have made economic sense to the liquidator because there was no basis in Australian law for avoiding the pre-existing arrangements, whereas the judge felt that American law would have offered the opportunity to challenge them and therefore get a better deal for other creditors. If that was the case, the decision seems wrong for the reasons given under the first heading above. If instead the reason was that the judge considered the liquidator's defense of the settlement inadequate, then the question is whether that was a good ground for refusing deference. Unless on the record the lack of a good explanation of the settlement was so striking as to suggest bad faith or fraud on the part of the liquidator, then I think it was not a good ground for refusal. The liquidator is far better placed to understand the rights of the parties and the likely outcome of litigation than the U.S. judge, and is also aware of a host of other factors (for example, potential disputes over more valuable assets elsewhere) that might make the deal with Wah Kwong a good one for creditors generally. Even if the liquidator made a strong effort to explain the factors leading to that conclusion, it is in the nature of international litigation that the judge might misunderstand and thus be unpersuaded. As Shaw would tell us, the fact of a similar language would be no guarantee of effective communication, especially on technical points of insolvency law. For the judge to substitute his judgment for that of the liquidator must be a mistake almost always. (4) There is a fourth possible basis for the decision, which would be illegitimate. That basis is that the U.S. creditors would be better off by refusing deference, *478 no matter how fair the Australian system or how sensible the deal with Wah Kwong from the perspective of creditors generally. That rationale would vitiate s 304 completely, and return us to the "grab rule" that s 304 was meant to replace. It seems to me that Interpool gives us some important lessons about the requirements for reform. Above all, it demonstrates that results will be at best erratic, if not negative, if outcome differences in specific cases are a ground for preventing deference to a substantially similar legal system. If we cannot cooperate with the Australians, with whom can we cooperate? We cannot jettison the grab rule unless legislators persuade themselves that local citizens will receive a net benefit from universalism that outweighs losses in particular cases. If they are so persuaded, they must tell the courts so, in no uncertain terms. That fact is emphasized by a second important point from Interpool: even judges in similar legal systems will often err in trying to understand the complex and technical details of another country's insolvency laws as applied to a particular case. Because differences in legal systems cannot be ignored-- that is, because a rough similarity is necessary for universalism to be accepted--it would be far

better for the comparisons to be made on a general basis, removed from specific cases, and by persons especially knowledgeable in bankruptcy and transnational law. One other point is especially evident on the facts of Interpool. If universalism is to serve predictability, and thus Transactional Gain, it must adopt the home-country law to the maximum sensible extent. Interpool presents the easy case. Any question of insider manipulation of this Australian company [FN69] should obviously be determined by Australian law. When KKL was getting credit during the good times, creditors evaluating its balance sheet could have calculated costs and risks far better had they been sure that its worldwide assets would be distributed largely, if not completely, according to Australian law. Most of the American creditors could easily have adapted to that expectation and powerful American caselaw would have warned them of that possibility, aside from the effect of s 304 itself. [FN70]

B. FELIXSTOWE

1. The Decision

The second case that illustrates the difficulties of reform was decided in London in 1987, Felixstowe Dock & Railway Co. v. U.S. Lines, Ltd. [FN71] It is the leading British case concerning deference to foreign insolvency proceedings. *479 It was one of many cases brought around the world in connection with the Chapter 11 bankruptcy in the U.S. of U.S. Lines ("USL"), a major ocean carrier. The British result was typical, in that local procedures and creditors acting under those procedures succeeded in blocking a universalist deference to the U.S. proceeding, even though it seems to have been conceded that the U.S. was the home-country jurisdiction for USL. There were similar results all over the world. In Felixstowe there were two English creditors and one Dutch creditor who had obtained Mareva injunctions restraining the removal of USL assets from England. [FN72] The debtor sought to have the injunctions lifted in deference to the U.S. chapter 11 case, and to permit the assets to be used in the reconstruction of its shipping business. Despite the efforts of the U.S. bankruptcy court, which included an offer to recognize any judgment obtained in England as well as a virtual treatise on U.S. bankruptcy law in the guise of an opinion, the English court held that the injunctions would stand. The decision can be divided into two parts. First the court concluded that comity did not require lifting the injunctions, so that it had only to balance equities as it would in any other injunctive situation. [FN73] Comity was not a controlling consideration, because the court found that U.S. courts would not have granted comity to a U.K. proceeding in similar circumstances. The judge also discounted the principal benefit of comity, a single worldwide case, on the ground that the recalcitrance of the French courts in another USL case demonstrated that those benefits were unobtainable. With comity eliminated as a factor, the usual balancing of the equities favored the European parties. The court found that the European creditors would be greatly prejudiced by lifting the injunctions, while USL would be little benefited. This prejudice to the creditors was that the assets would be dissipated in the business, while the judge felt that European creditors would receive short shrift in the U.S. case because of the company's plans to drop its businesses outside North America. The court felt there would be no great prejudice to USL in maintaining the injunctions, because the English assets represented such a small share of the company's worldwide assets and would remain available for ultimate distribution. The case presents many other features of great interest, but these are the key points for present purposes.

*480 2. Analysis

Felixstowe is another illustration of the obstacles any reform effort must overcome. The most important points are these: (1) the failure of policymakers to come to grips with differences in outcomes; (2) the importance of reciprocity and the need for critical-mass reciprocity; (3) the difficulty of understanding other insolvency systems and the consequent need for some institutionalized, nonadjudicatory mechanism for establishing rough equivalence; and (4) the serious outcome-difference problem presented by reorganization.

a. Outcome Differences

The Felixstowe opinion quotes the leading English authorities. In so doing, it reveals in English jurisprudence precisely the same mixed feelings and cross purposes found in s 304 of the U.S. Bankruptcy Code. For example, it quotes from In re English, Scottish, & Australian Chartered Bank: [FN74] One knows that where there is a liquidation of one concern the general principle is -- ascertain what is the domicile of the company in liquidation; let the Court of the country of domicile act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation -- the desire to act as ancillary to the Court where the main liquidation is going on -- will not ever make the Court give up the forensic rules which govern the conduct of its own liquidations. So, the court will act "as ancillary" to the principal court, but will "not ever" give up its own rules. As with subsection (c) of s 304 of the U.S. Bankruptcy Code, this statement is a magnificent vindication of the lawyer's power to think two inconsistent thoughts at the same time. Similar ambiguities are found within the other cases cited in Felixstowe and in the opinion's characterizations of those cases. The policymakers -- in Felixstowe a succession of learned English judges, in s 304 the U.S. Congress -- are attracted by universalism but repelled by outcome differences. So they embrace both and neither. Because judges are human, the inconsistent results that follow will more often favor the living, breathing creditors standing woeful before the bench than the abstract desirability of universalism. Furthermore, in the absence of a legislative finding that Rough Wash and Transactional Gain outbalance prejudice in specific cases, it is not clear that the judges would be justified in another result.

b. Reciprocity

The opinion also shows the importance of reciprocity. The court was *481 presented with two recent U.S. cases widely regarded as indicating a strong U.S. commitment to universalism. [FN75] Yet the court concluded that the U.S. courts would likely not defer to an English proceeding on similar facts. It appears that this lack of reciprocity was felt by the court to be an important prerequisite to withholding deference. Even more striking was the court's adoption of something approaching a requirement for "universal" reciprocity, [FN76] because it was strongly influenced by the failure of the French courts to defer to the U.S. proceedings in the USL case. Carried to its ultimate extent, this reasoning would require that all countries agree to universalism before any country will, which will surely mean no deviation from the grab rule anywhere. On the other hand, the court's concern about third-country cooperation was not entirely unreasonable. A

commitment by some fairly significant number of similarly situated countries, critical-mass reciprocity, is probably necessary before universalism makes self-interested sense for any of them. [FN77] Notwithstanding the close ties between the U.S. and the U.K., why should a British court run a risk of serious prejudice to the creditors before it if the U.S. case is doomed by the noncooperation of most other countries? It seems plausible that the court's decision might have been different if it had had the assurance of cooperation with the U.S. case by a number of other commercially important countries. [FN78]

c. The Risk of Error About Foreign Law

While the court's concern with reciprocity was understandable, its reading of American law was almost certainly wrong. As with Interpool, the difficulty is that a single judge in the midst of litigation is all too likely to err about questions of foreign insolvency law, including reciprocity. The Felixstowe opinion illustrates the difficulty of understanding other insolvency regimes, even those from relatively similar legal systems. [FN79] The English court noted that the two American cases deferring to foreign insolvencies had both said that a s 304 ancillary proceeding was preferable. [FN80] It interpreted those comments as meaning that the U.S. courts would have preferred to keep the American assets under seizure while somehow "acting ancillary" to the Swedish courts in those cases. It is clear to an American lawyer that the U.S. courts had nothing of the sort in mind. First, these two American cases were both in postures similar to that of Felixstowe: attempts to use *482 local procedures to freeze local assets without starting a local insolvency case. The comment that a local bankruptcy case would be preferable does not change the results in both cases: deference to the foreign insolvency. Further, a s 304 proceeding in the U.S. expressly contemplates the turnover of American assets to the appointed representative in the foreign case. [FN81] The U.S. courts in the two cited cases were referring to the desirability of having a single s 304 proceeding instituted by the foreign representative to resolve such questions in the most orderly and efficient way, presided over by a specialist bankruptcy judge. [FN82] In that way, all deference decisions could be resolved in one proceeding. They were not expressing any desire to hang onto assets while "deferring" to the foreign case with no more than a smile and a tip of the hat. This misreading of U.S. law by an experienced and expert commercial judge, whose court neighbors one of the world's most sophisticated financial centers, powerfully illustrates the great difficulty of understanding the subtleties of foreign insolvency cases. [FN83] As in Interpool, the difficulty may be even greater when judges and lawyers are considering sister legal systems, because the similarities may lead us to think we understand when we do not. We are more likely to realize the cultural and historical obstacles to understanding when we confront a decision in French or German. The ultimate point is that we will not make substantial progress toward universalism as long as we depend on finding reciprocity or similarity of outcomes on a case by case basis. The adjudicatory framework is not well-suited to the task and the focus is invariably too narrow. We should look for ways to generalize and institutionalize the necessary process of finding acceptable levels of similarity and reciprocity.

d. The Special Problem of Reorganization Cases

Finally, Felixstowe illustrates that reorganization as a procedure presents a very serious instance of outcome difference, and therefore universalism is most difficult to achieve in

the reorganization context. Chapter 11 is unique in concept and operation and seems quite bizarre to our friends around the world. (For example, "Who did you say is in charge of the bankrupt's affairs?") The very flexibility and emphasis on agreement that make the U.S. chapter 11 workable in salvaging companies means that foreign courts, used to liquidations, are unable to know what outcomes it may produce. At least two conclusions follow: (1) we may have to fashion different, and more limited, rules about universalism in the context of reorganization; and (2) an institutionalized system of *483 evaluating outcome differences (that is, determining rough similarity) is even more essential with respect to reorganization.

IV. CURRENT EFFORTS TOWARD REFORM [FN84]

A. MIICA

An important and very useful proposal for reform has been put forward by a committee of the International Bar Association, [FN85] the Model International Insolvency Cooperation Act ("MIICA"). The basic idea behind MIICA is adoption by a number of countries of a statute that directs each country's courts to cooperate with a foreign bankruptcy case, and to act ancillary to and in aid of that foreign jurisdiction. Section 304 of the U.S. Bankruptcy Code is the inspiration for MIICA, but its provisions differ from s 304 in several important ways. The most important difference is that MIICA adopts a universalist choice of law rule that requires the local court to apply the substantive law of the foreign court, albeit with some discretion to apply local law where it feels it must. [FN86] It is this feature of MIICA, the imposition of a universal choice of law principle governing the rights of the parties to a bankruptcy proceeding, that seems to me to be a vital advance over prior thinking. [FN87] Paradoxically, MIICA adopts a universalist choice of law principle without stating a rule that specifies the law to be chosen. That is, MIICA requires that a single law be applied to determine the substantive rights of the parties to a bankruptcy case, without specifying what country's law is to be so applied. [FN88] The reason there is no rule specifying the country whose law will be controlling is that the MIICA rule applies the law of the principal forum, but contains no rule for choosing a forum. [FN89] MIICA states the first part of a conflicts rule, that one law should govern most substantive rights, but does *484 not tell the courts which country's law to choose. [FN90] Presumably this absence of a choice of primary jurisdiction and of applicable law arises from a pragmatic concern. [FN91] Disagreements about the proper choice-of-country rule proved fatal to the U.S.-Canadian efforts at a bankruptcy treaty and have been a source of considerable difficulty in the EC discussions as well. [FN92] The drafters of MIICA may have assumed that specification of a home-country test might sink chances of MIICA's widespread adoption, while silence would permit cooperation in the great majority of cases in which it is obvious which country is the "home" country for bankruptcy purposes. MIICA also goes well beyond s 304 in acceptance of outcome differences. If the other country has adopted MIICA, deference to its courts and application of its laws are flatly required. [FN93] For all countries, regardless of reciprocity, the court has discretion to defer if it finds that a universalist administration is "in the overall best interests of the creditors" and the foreign court is a "proper and convenient forum." [FN94] That language seems a clear signal that localism is to be eschewed, although it leaves considerable room for a court offended by

foreign notions to refuse deferral. [FN95] MIICA thus represents a powerful universalist rule surrounded by important ambiguities. The MIICA provisions have been crafted by a group of people with a unique understanding of insolvency law and practice around the world, so it is certainly not for me to say that its ambiguities do not represent the best possible compromise between reform and political necessity. Yet as an academic I worry that its lack of clarity may be laying up trouble for the future. In particular, the lack of clear rules for choice of forum and choice of law will reduce predictability and therefore Transactional Gain. That problem, and the lack of a reciprocity requirement, may trouble legislators and may tempt judges, in whose hands the fate of legislation inevitably rests, to construe the Act in a parochial way. *485 I am also concerned by the fact that MIICA has no provision establishing a standard or a procedure testing similarity of laws. Each jurisdiction must defer to every country that has adopted the Act, regardless of the nature of their domestic insolvency systems. For reasons already discussed, it seems unrealistic to think that universalism will be accepted absent roughly similar laws. If an American or British judge is asked to defer to a proceeding in X country, but is told that X country distributes proceeds on the basis of district of birth, I suspect the learned judge will discover some reason that deference is not required. [FN96] And which of us will say the judge was wrong? Yet, that precedent established, the far narrower sorts of differences identified in Interpool can be used to justify nondeference and we are again undone. MIICA is very clear on one point: it is equally applicable to reorganization as to liquidation. As an American, I find that position very congenial. Whether it is realistic is one of the questions raised by a second current proposal.

B. THE BILATERAL TREATY

Mr. Peter Totty, a distinguished insolvency practitioner in London, has presented a very different approach, a model for a Bilateral Treaty that would be adopted by pairs of jurisdictions, creating a web of transnational agreement. [FN97] Totty feels that multilateral measures are very unlikely to succeed in the near future, even in the EC. For that reason, he proposes a series of bilateral treaties. These treaties would be based on substantially uniform terms, a draft of which he has published, but those terms provide for a unique agreement between each pair of nations by the scheduling of those bankruptcy laws of Country A that will be recognized in Country B. In that way, each pair of countries can tailor a treaty to those bankruptcy policies and results that it feels it can accept. To the extent that specific laws are scheduled, they will be directly enforced in the cooperating country when the other country is the chosen forum under the Treaty's choice of forum rule. One of the most interesting ideas in the Bilateral Treaty is the adoption of a distinction between "full insolvency" and "reconstruction." [FN98] The former *486 refers to a liquidation proceeding and the latter to a reorganization, administration, or composition type of case. The Bilateral Treaty permits much greater effect to be given to a full insolvency case in the home country, while a reconstruction case is given only very limited deference. [FN99] Totty is very well positioned by his experience and practice to make the judgment that other countries will simply not accept universalism to any great extent with regard to reorganization or administration procedures, and therefore we would be better off to make some progress as to liquidation. By the very nature of Totty's proposal, the Bilateral Treaty does not contain a choice of law rule, because the laws to be fully

enforced--that is, applied-- by the ancillary forum are to be negotiated by each pair of countries adopting this approach. Each outcome difference would be the subject of specific agreement, perhaps with some analogy to a GATT negotiation. Thus one cannot criticize the lack of a choice of law rule in the Bilateral Treaty without disagreeing with the fundamental approach of bilateralism. Totty may be exactly right in this approach. Perhaps the subject is so difficult that only bilateralism will work. But I have serious reservations. The time and effort required are daunting, to say the least. Another major problem is the risk of seriously inconsistent procedures applicable in the same default proceeding under different treaties. Totty's model is the tax treaty, and the analogy is original and suggestive. Yet the sorting out of tax liabilities simply does not involve the relative determinations (priority in distribution, surrender of benefits from avoidance, and the like) that inhere in default management. Even if the bilateral approach could attain greater results more quickly, which is not clear, I am unpersuaded that bilateralism can carry us nearly far enough in a world in which it is becoming routine that the interests of ten or twenty nations are importantly involved in a single multinational bankruptcy. Totty takes an insightful and potentially productive line on the choice-of-forum question. He ranks choice-of-forum rules, so that several can be used, in order of preference. This approach provides much of the flexibility of the s 304 scheme, [FN100] but gives the courts clearer direction in cases in which an enterprise has multiple "jurisdictional" locations (for example, principal place of business in one jurisdiction and principal assets in another). On the other hand, his top-ranked choice is place of incorporation, and I think that the U.S. is only one of the jurisdictions that would be very hesitant to permit the laws of some tax haven to govern the default of an enterprise whose commercial life was centered in New York, London, or Frankfurt. [FN101]

*487 C. THE STRASBOURG CONVENTION

For some years the nations of the Council of Europe have been discussing a draft proposal for international cooperation in insolvency matters, the Strasbourg Convention. [FN102] While this paper was in draft, the Convention got new life from the announcement that five nations had acceded to it on the basis of a new draft. I will not undertake here a full discussion of its provisions, but a few key points will indicate its place among current proposals.The Strasbourg Convention is a very modest approach to cooperation, which reflects the failure of the more elaborate Brussels Convention to win European support. [FN103] Its greatest advance on current law lies in chapter II, which permits a liquidator appointed in one member country to act as such in another. But its effect is greatly reduced by chapter III, which permits "secondary" bankruptcies in each country that controls assets of the debtor. These secondary proceedings would permit local distribution to priority ("preferential") creditors and secured creditors, [FN104] and would distribute any surplus to the main bankruptcy. [FN105] As in U.S. bankruptcies, there will rarely be much surplus to forward after priority claims are paid. [FN106] The Convention has no choice of law rule. Its choice-of-forum rule is the country of the debtor's "center of administration," which is rebuttably presumed to be its country of incorporation. [FN107] It has only a limited application to compositions or reorganizations. [FN108] Its principal virtue is the considerable administrative convenience of its provisions permitting liquidators to act in other jurisdictions without separate proceedings, in those cases where not enough is at

stake to encourage local creditors to resist. At this writing it seems unlikely that it will be accepted by all, or even most, of the leading commercial members of the Council of Europe.

V. SUGGESTIONS

There are distinguished practitioners concerned with these problems who are able to make far better judgments about what is politically possible than *488 I. Nonetheless, I believe the following are factors to be considered in future efforts at reform:

(1) There must be an explicit acceptance of outcome differences if we are to persuade judges to enforce a universalist regime. These in turn must be based upon policymakers' acceptance of the Rough Wash and the Transactional Gain, which requires that proposals emphasize (a) reciprocity; (b) rough similarity of laws; and (c) predictability, including a strong preference for applying the home-country law to as many issues as possible.

(2) Rather than seek adoption of the best possible choice-of-forum rule, we should urge flexible rules including all the generally accepted bases, because the great majority of cases will involve no conflict on this point and the attempt to fashion a general rule for the minority of cases can too easily stop us in our tracks.

(3) We should look for ways to achieve agreement and reciprocity without the necessity for treaties, a sort of "common unilateralism," while pursuing the treaty approach as well. MIICA represents a creative approach to common unilateralism, while the Bilateral Treaty provides a well-crafted start to the treaty process. Either approach must at least consider the argument that a certain critical mass of acquiescing countries may be necessary to make the scheme persuasive to legislators and workable in practice.

(4) In connection with common unilateralism, each nation might consider institutionalizing a process of determining rough similarity and reciprocity by an office established for that purpose. In the U.S., for example, the Administrative Office of the Courts or the Judicial Conference would be appropriate vehicles for establishment of a committee and secretariat. The committee should consist of judges, practitioners, and academics knowledgeable in transnational default problems. [FN109] Such an institution could certify to the judiciary those countries that are entitled to deference on the basis of both rough similarity and reciprocity. This general-certification approach would avoid the serious risk that outcome differences will be exaggerated in the cauldron of adjudication. *489 It could incorporate the idea of a critical mass of agreement, if that were thought desirable, by legislation that became effective in a given country upon deference certification as to a minimum number of other jurisdictions. Even prior to adoption of legislation, judicial offices could organize such an institution and provide certification to local judges on an advisory basis. It goes without saying that there are many difficult and important issues unaddressed in this paper. In particular, the realities of the transnational marketplace require that we open conversations about (a) the treatment of groups of companies, especially when only part of the group is the subject of a reorganization or insolvency petition; [FN110] and (b) the possibility of exempting from the universalist rule the claims of consumers and tort victims or of exempting all claims below a certain monetary amount. [FN111] Beyond these suggestions, beyond the analytical points that I hope will advance reform efforts, the largest theme of this paper is the need to accept rough justice in international insolvency matters. Rough justice may be the most universal of all insolvency

principles, even though it is rarely celebrated in the pages of insolvency treatises. Every bankruptcy system provides, in various ways, for abbreviated and summary procedures, for simplified litigation, for expedited relief. The rationale for this rough justice is the simple fact that insolvency requires economy. An imperfect dividend of 10% is preferable to a splendidly just dividend of 5%. A seriously flawed 50% payment is better than either. The principle of rough justice commands that lawyers, scholars and policymakers concerned about transnational default cease to haggle about details. As among countries with roughly similar insolvency systems and fair judicial procedures, equitable subordination is less important than a good price for the business. Realization of the value of a worldwide shipping concern is more important than the claim of a dockyard. Cooperation across a range of cases will return far more to the creditors of each such nation than they could ever "lose" by the application of a different rule for security interests in this case or a different priority scheme in that one. The time is approaching for summary agreement.

VI. CONCLUSION

We live in an extraordinary, exhilarating age. If the species has a run of luck, this time may be regarded as the beginning of an interregnum between the world *490 of warring nation states and the era of democratic supranational institutions. Commerce and enterprise have a central role to play in such a story, as the example of the EC so clearly demonstrates. In turn, the development of sensible and efficient management of commercial default is a crucial element of the integration of the world economy. A sense of that broad perspective will help us to take large steps.

[FNaa] Bernard J. Ward Professor of Law, The University of Texas at Austin. This article is a further development of a paper given at University College London in April, 1990, "Global Insolvencies In A World of Nation States" and published in the United Kingdom. Westbrook, Global Insolvencies In A World of Nation States, chapter in CURRENT ISSUES IN INSOLVENCY LAW (Sweet & Maxwell London 1991). It grew out of my teaching an LL.M. course in comparative and transnational insolvency at Queen Mary and Westfield College, London, as well as my practice in international business and bankruptcy at Surrey & Morse, Washington, D.C., 1969-80. I am grateful to my co-teacher, Harry Rajak of King's College London, and to Professor Roy Goode of St. John's College, Oxford, for their comments on certain aspects of the questions discussed. I am also grateful to Alison Clarke of University College for the invitation to lecture, as well as for many illuminating conversations about comparative bankruptcy and insolvency law. On the U.S. side, I especially appreciate the help given me by my colleagues Douglas Laycock, Louise Weinberg and Russell Weintraub, who always improve my work even when they disagree with it.

[FN1] Insolvency cases are part of the much larger problem of the regulation of transnational enterprise by a political system consisting of sovereign states. See Westbrook, Extraterritoriality, Conflicts of Laws, and the Regulation of Transnational Business, 25 TEXAS INT. L.J. 71 (1990).

[FN2] By a "multinational commercial enterprise" I mean one that has substantial assets in more than one sovereign state. I refer to financial difficulty rather than default or insolvency to make clear the point that questions of cooperation arise at the point of informal "workout" or "reconstruction" efforts, often well before a formal default or insolvency. I will use "bankruptcy" or "insolvency" more or less interchangeably and mean thereby to refer to both liquidations and reorganizations or administrations, unless the context otherwise requires.

[FN3] See, e.g., Nadelman, Clouds Over International Efforts to Unify Rules of Conflicts of Laws, 41 LAW & CONTEMP.PROBS. 54, 62-64 (1977). See also 3 Common Mkt. Rep. (CCH) pp 6101-6221 (Mar. 3, 1981). Concerning the Strasbourg Convention proposed by the Council of Europe, see infra text following note 102.

[FN4] See J. DALHUISEN, INTERNATIONAL INSOLVENCY AND BANKRUPTCY (1986) passim [hereinafter DALHUISEN]. The student of international bankruptcy is greatly indebted to two recent sources in particular. The first is the pioneering work of the International Business Bankruptcy Subcommittee of the Business Bankruptcy Committee of the American Bar Association. See American Bar Association, International Loan Workouts and Bankruptcy (1987) [hereinafter 1987 ABA]; R. GITLIN & R. MEARS, INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES (1989). The second is the outstanding seminar organized by Professor Ian Fletcher at Aberystwyth, Wales, in 1989. Cross-Border Insolvency: Comparative Dimensions, 12 UNITED KINGDOM COMPARATIVE LAW SERIES (I. Fletcher ed. 1990) [hereinafter Dimensions]. Each resulted in the publication of extremely helpful summaries written by practitioners and scholars knowledgeable about the bankruptcy laws of various nations. For an insightful recent commentary by the dean of U.S. international bankruptcy scholars, see S. Riesenfeld, Transnational Bankruptcies in the Late Eighties: A Tale of Evolution and Atavism, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY (1990) [hereinafter Late Eighties].

[FN5] See DALHUISEN, supra note 4, at vol. 1, Part III, s 2.01(4)(c); Baade, An Overview of Transnational Parallel Litigation: Recommended Strategies, 1 REV. LITIGATION 191, 194 (1981). See generally Miller & Rothenberg, Transnational Bankruptcy and Reorganization Cases--A Potential Growth Area, chapter in PRIVATE INVESTORS ABROAD--PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1988 (Mathew Bender 1988). See also infra text accompanying notes 106-08. For comparisons of the treatment of cross-border insolvency in various jurisdictions, see, e.g., Powers & Mears, Protecting a U.S. Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity, 10 N.C. J. INT. L. & COMM. REG. 303 (1985); Klocker, Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison, 20 TEXAS INT. L.J. 55 (1985); Woloniecki, Co-operation Between National Courts in International Insolvencies: Recent United Kingdom Legislation, 35 INT. & COMP. L. Q. 644 (1986) [hereinafter "Woloniecki"]; Grace, Law of Liquidations: The Recognition and Enforcement of Foreign Liquidation Orders in Canada and Australia--A Critical Comparison, 35 INT. & COMP. L. Q. 664 (1986); Taniguchi,

International Bankruptcy and Japanese Law, 23 STAN. J. INT. L. 449 (1987); Late Eighties, supra note 4.

[FN6] These traditional rules are no longer applied in many developed countries. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, s 188 (1969); R. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS ss 3.4, 7.3D (3d ed. 1986) [hereinafter WEINTRAUB]; European Communities Contract Convention, Art. 4, OJEC 1980, 19 I.L.M. 1492 (concluded 1980) (not in force). See also, e.g., Compagnie Europeenne des Petroles, S.A. v. Sensor Nederland, B.V., 22 I.L.M. 66, 68-69 (1982). Nonetheless, it is telling that even the traditional system required different choice of law rules for different aspects of the same contract. For a general discussion of depecage, the determination of different issues by the laws of different jurisdictions, See WEINTRAUB, supra, at ss 3.4-3.5.

[FN7] By "distribution" I mean the priority and sharing rules that govern dividends to creditors from the insolvency; by "avoidance" I mean the process of setting aside certain transactions like payments made prior to initiation of the insolvency or after a "cessation of payments."

[FN8] See Nadelman, Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Claims, 47 AM. BANKR. L.J. 147 (1973); Nadelman, Rehabilitating International Bankruptcy: Lessons Taught by Herstatt and Company, 52 N.Y.U.L.REV. 1 (1977); Honsberger, Conflict of Laws and the Bankruptcy Reform Act of 1978, 30 CASE W.RES.L.REV. 631, 659-75 (1980) [hereinafter Honsberger]; DALHUISEN, supra note 4, at Part III, s 2.06.

[FN9] It should be noted that the grab rule does not preclude "national treatment," because foreign creditors are often permitted to share in the benefits of using local procedures against local assets. See, e.g., In re McLean Indus., Inc., 68 B.R. 690, 76 B.R. 291 (Bankr. S.D.N.Y. 1987) (discussing use of procedures in other countries by nonlocal creditors); Felixstowe Dock & Ry. Co. v. U.S. Lines, Ltd., [1987] 2 Lloyd's Rep. 76 (Dutch creditor using British protective procedures). I use "national treatment" throughout this paper in the usual international sense to mean giving the same treatment to foreigners as to local citizens.

[FN10] See generally, Riesenfeld, The Status of Foreign Administrators of Insolvent Estates: A Comparative View, 24 AM. J. COMP. L. 288 (1976).

[FN11] Discussions of bankruptcy regimes usually speak only of the interests of creditors, even though the insolvency laws of most countries reflect considerable concern about other persons with a relationship to the defaulting enterprise, especially employees. See, e.g., Warren, Bankruptcy Policy, 54 U.CHI.L.REV. 775 (1987). I should be understood for most purposes as referring to all those who may have interests in the defaulting enterprise, including those listed in the text.

[FN12] This assertion is a product of my own experience and the comments of numerous people experienced in transnational insolvency problems. There has been no systematic study of the effect of the grab rule on values and returns to creditors. Pending such a study, I believe the assertion to be correct and entitled to considerable evidentiary weight in light of the near-unanimity of opinion (as far as I can ascertain) among the knowledgeable.

[FN13] See, e.g., DALHUISEN, supra note 4, at Part III, s 2.03(3); REPORT OF THE INSOLVENCY LAW REVIEW COMMITTEE, INSOLVENCY LAW AND PRACTICE, 1982, Cmnd. No. 8558, Chapters 49 & 50 ("the ultimate harmonization of insolvency laws in a trading community is essential") [hereinafter Cork Report].

[FN14] See, e.g., Lowell, Conflict of Laws As Applied to Assignments for Creditors, 1 HARV.L.REV. 259 (1888).

[FN15] Deferral to X would follow a forum rule choosing the jurisdiction containing the principal assets of the enterprise. That may or may not be the right choice of forum rule. We put that point aside for now.

[FN16] See supra note 9.

[FN17] See Trautman, Foreign Creditors in American Bankruptcy Proceedings, 29 HARV. INT. L.J. 49, 56 (1988). Professor Trautman brings to this field a real sophistication in choice of law. He sees clearly the lack of choice-of-law analysis in the fashioning of s 304 of the Bankruptcy Code. Id. at 53. But the short space of his article did not allow him to explore these questions in depth.

[FN18] Insolvency Act, 1986, Part III, chapter I. See H. RAJAK, COMPANY LIQUIDATIONS, chapter 3 (1988) [hereinafter RAJAK]. The appointment of a receiver blocks appointment of an administrator, Insolvency Act 1986 s 9(3), and usually frustrates appointment of a disinterested liquidator. See R. GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 108 (1990) [hereinafter GOODE].

[FN19] Anyone suggesting an easy answer in the distinction between substance and procedure shall be sentenced to a lifetime of close study of medieval scholasticism. See, e.g., WEINTRAUB, supra note 6, at s 3.2C2.

[FN20] Anyone interposing here an airy reference to the "situs of the debt" will join the prisoner in the preceding footnote, but without possibility of parole. See, e.g., R. LEFLAR, L. MCDOUGAL & R. FELIX, AMERICAN CONFLICTS LAW s 183 (1986).

[FN21] Intent to prefer is a required element of a preference in British law. Insolvency Act 1986 ss 239(5) & 240(1)(a). See I. FLETCHER, THE LAW OF INSOLVENCY 511-12 (1990) [hereinafter FLETCHER]. For a remarkable overall discussion of avoidance laws in various jurisdictions, see DALHUISEN, supra note 4, at p 2.05[1] nn.30, 48a.

[FN22] The preference period for noninsiders is ninety days in the U.S., 11 U.S.C.A. s 547(4)(A) (West 1979), and six months in the U.K. Insolvency Act 1986 s 240(1)(b), (3).

[FN23] In the U.S., see U.C.C. s 9-303 (1987). There are similar systems in a number of other countries. For example, in the U.K. most security interests other than purchase-money liens must be registered. See Companies Act, 1985, ch. 6, ss 395-96 (Companies Act, 1989, ss 95-97); GOODE, supra note 18, at 183- 85; RAJAK, supra note 18, at pp 324(6), 1115-16.

[FN24] The rule may be different for especially mobile property. E.g., U.C.C. s 9-103(3) (1987) (law of debtor's chief executive office controlling for liens on mobile equipment, certain inventory, and accounts). There is a case to be made, given modern conditions, for a principal-place-of-business rule for all personal property (movables). See WEINTRAUB, supra note 6, at s 8.42.

[FN25] See Galbraith v. Grimshaw, [1910] App. Cas. 508. Cf. In re Fotochrome, 517 F.2d 512 (2d Cir.1975).

[FN26] Ignoring the benefits from greater realization of value from the universalist rule, only "deficit" countries--countries where the ratio of local assets to local claims is regularly below the worldwide ratio--will clearly benefit from a worldwide distribution within one court under a universalist regime. (For example, where local assets / local claims = 10%, while worldwide assets / worldwide claims = 25%, the local jurisdiction is a "deficit" country; its creditors would do better in a worldwide distribution.) The bulk of countries most likely to join in transnational cooperation are those who believe that they are deficit countries at least as often as they are surplus countries. Countries that think they will routinely be in surplus will not be very eager to join an international scheme; the benefits to be realized by everyone from greater realization on assets are probably too imprecise to persuade them that greater asset prices will outbalance loss of a consistent surplus position.

[FN27] See supra notes 11-12 and accompanying text.

[FN28] Because my principal concern in this paper is choice of law, I am assuming for most purposes the essential prerequisites to acceptance of a given forum under a universalist rule: national treatment, procedural fairness, and practical procedures for protecting the rights of distant foreign creditors.

[FN29] See, e.g., Scott & Jackson, On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain, 75 VA.L.REV. 155 (1989).

[FN30] Such a rule would also help to avoid inconsistent adjudications.

[FN31] E.g., 11 U.S.C.A. s 507(a) (West 1979). See Overseas Inns, S.A. v. United States, 911 F.2d 1146 (5th Cir.1990) (refusing recognition to Luxembourg insolvency proceeding judgment that gave U.S. tax claims lower priority than does U.S. law).

[FN32] It is appropriate to address at this point the "better law" approach of many U.S. conflicts scholars. See, e.g., Juenger, Choice of Law in Interstate Torts, 118 U.PA.L.REV. 202 (1969). That approach is not terribly helpful in this context, whatever its value for other purposes. The reason is the diminished financial capacity of the defendant-debtor. There is little benefit to U.S. claimants in applying the "better law" against a German multinational that has only a small percentage of its assets in the U.S. Those claimants can receive meaningful compensation only through bilateral or multilateral cooperation. As against foreign defendants that are solvent and have continuing business operations in the U.S., international cooperation is not essential to compensation of U.S. claimants, but in the insolvency context it is. On the other hand, the "better law" advocates are concerned with important human values that may well require special protection in transnational insolvency. See infra note 111.

[FN33] There was a vigorous debate about inclusion of reciprocity in s 304 of the U.S. Bankruptcy Code. See Nadelman, The Bankruptcy Reform Act and Conflicts of Law: Trial-and-Error, 29 HARV. INT. L.J. 27 (1988). The debate was led by the two great American scholars of transnational insolvency, Professors Stephen Riesenfeld and Kurt Nadelman. Sadly, Professor Nadelman's recent death has stilled an important voice in American scholarship. Professor Riesenfeld continues to take a leading role in the development of private international law in the U.S., so we will continue to have an important scholar at the forefront of American efforts in this field.

[FN34] See supra note 26.

[FN35] See infra section V. For an extreme example of a requirement of positive reciprocity, see Banque Libanaise Pour le Commerce v. Khreich, 915 F.2d 1000 (5th Cir.1990) (refusal to enforce Abu Dhabi judgment absent evidence it had actually enforced U.S. judgments, despite Abu Dhabi statute providing for such enforcement). For a creative application of negative reciprocity under Japanese law (although not under that name), see Taniguchi, supra note 5, at 456.

[FN36] See infra, text accompanying note 96.

[FN37] Of course, the statement in text depends in part on the conflicts rule chosen to determine the "home" country. Country of incorporation is probably the most easily ascertained and reliable, but will not be acceptable in some jurisdictions. Principal place of business is easily established in most cases, but sometimes presents serious ambiguities. See generally Trautman, supra note 17, at 55; FLETCHER, supra note 21, at 621.

[FN38] The distinguished British scholar Ian Fletcher appears to reject the idea that a general choice of home-country law is desirable or possible. See FLETCHER, supra note 21, at 622.

[FN39] See supra section II.B.

[FN40] Even for immovables, there is some movement toward flexibility at the margins. See, e.g., Reichert v. Dresdner Bank, A.G., January 10, 1990, European Court of Justice Case C-115/88 (Under EC judgments convention, action paulienne (fraudulent conveyance action) should be brought in Germany, where both transferor and transferee reside, rather than in France, situs of transferred real property). Concerning mobile property rules, see supra note 24.

[FN41] 102 B.R. 373 (D.N.J. 1988).

[FN42] [1987] 2 Lloyd's Rep. 76.

[FN43] 11 U.S.C.A. ss 304-306 (West 1979). U.S. usage often refers only to s 304 as a sort of shorthand, but in fact the deference procedures are found in ss 304-306. The best survey of s 304 litigation is found in Boshkoff, United States Judicial Assistance in Cross-Border Insolvencies, 36 INT. COMP. L. Q. 729 (1987). Another excellent discussion of s 304 is found in Honsberger, supra note 8. The best recent discussion is in Late Eighties, supra note 4. On the British side, the generally thorough Cork Report made only brief reference to the cross-border problem. See Cork Report, supra note 13, chapters 49 & 50 ("the ultimate harmonization of insolvency laws in a trading community is essential"). On the other hand, the new Insolvency Act does contain a cooperation provision, albeit one that has received little attention. See infra note 109.

[FN44] "Foreign representative" is defined as the trustee or other representative of "an estate" in a "foreign proceeding." 11 U.S.C.A. s 101(23) (West Supp.1991). While the reference to an estate might be puzzling to a non-American, the intent is clear because a "foreign proceeding" is defined as an insolvency proceeding taking place in a debtor's home country. The test for determining home-country embraces most of the usual candidates except place of incorporation. 11 U.S.C.A. s 101(22) (West Supp.1991). So, any officially appointed person responsible for managing the default of an enterprise under the laws of the country where is found its commercial center of gravity will almost certainly qualify.

[FN45] 11 U.S.C.A. s 304(b)(1) (West 1979).

[FN46] 11 U.S.C.A. s 304(b)(2) (West 1979).

[FN47] 11 U.S.C.A. s 305(a) & (b) (West 1979).

[FN48] 11 U.S.C.A. s 304(b)(3) (West 1979).

[FN49] 11 U.S.C.A. s 306 (West 1979).

[FN50] 11 U.S.C.A. s 304(c)(1)-(4) & (6) (West 1979).

[FN51] 11 U.S.C.A. s 304(c)(5) (West 1979). A student paper recently submitted in my Texas seminar, International Business Litigation, makes an excellent argument that most

of the decisions under s 304(c) have simply lumped together all the relevant factors under the heading of "comity" and that it would be better to make findings as to each of the statutory factors separately. That approach gives better deference to the legislative command and better organizes the analysis. Sachnik, Section 304 Guidelines in Transnational Insolvencies (unpublished manuscript 1991) (copy on file with author).

[FN52] American bankruptcy law was traditionally very parochial. See J. STORY, COMMENTARIES ON THE CONFLICTS OF LAWS s 403 (1834). See also Honsberger, supra note 8, at 634-35; Paskay, Impact of the Bankruptcy Reform Act of 1978 on Foreign Debtors and Creditors, 12 STETSON L. REV. 321, 322-24 (1983); Note, The Turnover of Assets Under Section 304 of The Bankruptcy Code: The Virtues of Comity, 12 FORDHAM INT. L.J. 521, notes 9-12 (1989).

[FN53] See Boshkoff, supra note 43; Huber, Creditor Equality in Transnational Bankruptcies: The United States Position, 19 VAND. J. INT. L. 741 (1986); Morales & Deutcsh, Bankruptcy Code Sec. 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity, 39 BUS. LAW. 1573 (1984). For a recent example of deference where s 304 is not mentioned, see Caddel v. Clairton Corp., 105 B.R. 366 (Bankr. N.D.Tex. 1989).

[FN54] E.g., In re Reunidas, S.A., 92 B.R. 584 (Bankr. E.D.N.Y. 1988); In re Toga Mfg., 28 B.R. 165 (Bankr. E.D.Mich. 1983); cf. In re The Drexel, Burnham, Lambert Group, 118 B.R. 209 (Bankr. S.D.N.Y. 1990) (British representative denied seat on creditors' committee). See also Overseas Inns, S.A. v. United States, 911 F.2d 1146 (5th Cir.1990) (refusing recognition to Luxembourg insolvency proceeding judgment that gave U.S. tax claims lower priority than does U.S. law).

[FN55] See Westbrook, U.S. Courts Fight Grab Rule, Wall St. J., Jan. 29, 1988, at 10, col. 4. Cf. Remington-Rand Corp. v. Business Sys., Inc., 830 F.2d 1260 (3d Cir.1987). But see In re Sefel Geophysical, 54 D.L.R. (4th) 117 (Queen's Bench Alberta 1985) (special treatment of distribution from U.S. assets to reflect U.S. deferral to Canadian proceeding under s 304).

[FN56] In re Tarricone, Inc., 80 B.R. 21 (Bankr. S.D.N.Y. 1987). In one recent case, the foreign representative used a full bankruptcy case for avoidance and then obtained turnover relief. In re Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), aff'd, 115 B.R. 442 (S.D.N.Y. 1990), appeal dismissed, 924 F.2d 31 (2d Cir.1991).

[FN57] See supra note 37; infra note 58.

[FN58] 11 U.S.C.A. s 101(22) (West Supp.1991). "Domicile" is a permitted basis and could be interpreted as meaning country of incorporation, but I doubt it will be so understood. For one thing, place of incorporation is too obvious as basis for its omission to be unintended.

[FN59] 102 B.R. 373 (D.N.J. 1988).

[FN60] See also In re Toga Mfg., 28 B.R. 165 (Bankr. E.D.Mich. 1983).

[FN61] See 11 U.S.C.A. s 510(c) (West 1979).

[FN62] Insolvency Act 1986 ss 239(5) & 240(1)(a). It is not persuasive, I think, to argue that Interpool is limited to situations in which the other law has no equivalent doctrine, and therefore its rationale would not apply where the other country has a similar doctrine that differs only in detail. That distinction would have bite only where the other country's law does not address a problem at all, a very rare case. Far more often, the other country's law does address the problem, but under a different name, with a different focus, and perhaps in a different "title" of its statutes. To take the Interpool situation, virtually every developed country has rules protecting against abuses by corporate insiders, even if they are part of corporate (company) law rather than insolvency law and even if they are not called "equitable subordination." That these doctrines are not found in insolvency law hardly means they are not equivalent. Indeed, equitable subordination greatly overlaps corporate doctrines in the U.S., including the doctrines of corporate opportunity, undercapitalization, insider trading, and breach of fiduciary duty. Thus I do not think the preference example is unfairly dissimilar from equitable subordination. The U.K. requirement of "intent to prefer" makes its preference rule importantly different from ours, despite the similarity in names. I suspect that the distance between U.S. and U.K. preference rules is just as great as that between U.S. and Australian rules about insider abuses.

[FN63] 11 U.S.C.A. s 547(b)(4) (West 1979).

[FN64] See Prior, Commentary on Case of Interpool Limited v. Certain Freights of the M/V Venture Star International Bar Association Conference, New York (Sept. 21-22, 1990) [hereinafter Prior].

[FN65] See Hughes, An Australian Perspective on Interpool, 2 INTERNATIONAL SOLVENCY AND CREDITORS' RIGHTS REPORT 32 (1990) [hereinafter Australian Perspective]. For a description of the similar British system, see RAJAK, supra note 18, at chapter 9.

[FN66] See Australian Perspective, supra note 65, at 32.

[FN67] See generally Canadian S. Ry. v. Gebhard, 109 U.S. 527 (1883).

[FN68] If I were a liquidator in such a case and substantial American assets were involved, I would deem it prudent to give notice of a settlement to the U.S. creditors. But I would do so out of a practical concern for U.S. sensibilities, rather than because of a sense of any obligation to do so.

[FN69] I am assuming it was commercially based in Australia, as well as incorporated there.

[FN70] See Canadian S. Ry. v. Gebhard, 109 U.S. 527 (1883).

[FN71] [1987] 2 Lloyd's Rep. 76. Professor Riesenfeld criticizes the decision in Late Eighties, supra note 4, at 415. For an excellent discussion of British practice in international insolvency matters, see Smart, International Insolvency: Ancillary Winding Up and the Foreign Corporation, 39 INT. & COMP. L. Q. 827 (1990).

[FN72] A Mareva injunction does not create any lien or priority, but is a provisional measure that prevents a defendant from removing assets from the jurisdiction or otherwise dealing with them without permission from the court. See S. O'MALLEY & A. LAYTON, EUROPEAN CIVIL PRACTICE s 7.07 (1989).

[FN73] A part of the opinion was devoted to a red herring offered by the U.S. party, an argument that the U.K. court could not control the assets because they had passed to a "new entity," the U.S. bankruptcy estate. Felixstowe, [1987] 2 Lloyd's Rep. at 78-79. The court correctly dismissed this argument, although its resolution of the issue reflected a misunderstanding of U.S. bankruptcy concepts that provides yet another illustration of the difficulty of comprehending other insolvency systems.

[FN74] [1893] 3 Ch. 385.

[FN75] Cunard Steamship Co. v. Salen Reefer Serv. A. B., 773 F.2d 452 (2d Cir.1985); Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir.1987). The court also considered Canadian S. Ry. v. Gebhard, 109 U.S. 527 (1883), a powerfully universalist opinion.

[FN76] See supra text following note 33.

[FN77] Id.

[FN78] See infra section V.

[FN79] The court also misunderstood the concept of the bankruptcy estate as a "new entity." See supra note 73.

[FN80] See supra note 75.

[FN81] 11 U.S.C.A. s 304(b)(2) (West 1979).

[FN82] See REFCO F/X Assoc., Inc. v. MEBCO Bank, 108 B.R. 29 (Bankr. S.D.N.Y. 1989) (deferral to Swiss bankruptcy denied subject to institution of s 304 proceeding).

[FN83] See supra the discussion of Interpool, section III.A.2.

[FN84] I limit my discussion to full-blown proposals, complete in themselves.

[FN85] I have the privilege of being a member of that committee, Committee J.

[FN86] MIICA s 4(a), reprinted in Dimensions, supra note 4, at 287 [hereinafter MIICA]. The proposed Act is actually fuzzy on this point, because it does not contain an explicit choice of law rule for the local court when it is the home-country forum. But it does adopt the stated rule for the local court acting as ancillary. By necessary implication the same rule would apply when the local court is the focus of the procedure.

[FN87] Article 4 of MIICA calls out the "substantive insolvency" law of the principal jurisdiction as controlling. The word "substantive" presumably means that the forum's choice of law rules are not included, and avoids renvoi. This provision ignores the fact that the forum cannot always apply its own law. See supra text accompanying notes 18-25.

[FN88] MIICA art 4.

[FN89] MIICA s 1(b) requires deference to "foreign proceedings" pending in the courts of another country that has adopted the Act. That could be read as choosing as universal forum the place where the first insolvency proceeding was filed, but that seems very unlikely. If Germany has adopted the Act and the first insolvency proceeding against a New York company is filed in Frankfurt, will Germany be the flagship jurisdiction worldwide, even if 2% of the assets and 1% of the creditors are in Germany? If not, then the provision seems to leave the choice of forum to the courts.

[FN90] All choice of law rules contain two parts, although often they are not articulated separately: the first part defines the issues to be governed by the rule and the second chooses the law to govern those issues. The MIICA rule states that most issues in a bankruptcy case will be governed by principal- forum law, but does not state what country will serve as the principal forum.

[FN91] I should make it clear that my comments about the intent of MIICA are based purely on published materials and not the proceedings of Committee J of the IBA.

[FN92] For an insightful discussion of the problem in the context of the Brussels Convention, see Fletcher, supra note 21, at 620-23.

[FN93] MIICA s 1(b) & (c)(i).

[FN94] MIICA s 1(c)(ii). These provisions further obscure the choice-of- forum and choice-of-law issues. Obviously the Act cannot be intended to require the local court to defer where it is the proper home-country forum based on principal place of business or some other generally accepted test, unless MIICA countries are to apply a first-to-file rule. See supra note 89. Thus the court must apply some choice of forum (and related choice of law) test, leaving it unclear how MIICA countries are to be treated differently from non-MIICA countries.

[FN95] Section 1 also provides that every foreign representative shall be "recognized," regardless of reciprocity or choice of forum rules, although recognition does not necessarily lead to deferral. Presumably it simply confers legal standing.

[FN96] A recent U.S. case found that Spanish insolvency law left the holder of a disputed claim effectively out in the cold in liquidation. In re Papeleras Reunidas, S.A., 92 B.R. 584 (Bankr. E.D.N.Y. 1988). The court denied deference on the basis of the supposed defect in Spanish law. If the court's reading of Spanish law were correct, it seems hard to believe the courts of most countries would be willing to defer to a Spanish proceeding, even where it was clearly the home country. It is worthy of note that an able Spanish lawyer who was a student in my LL.M. class at the University of London found the U.S. court's reading of Spanish law ludicrous.

[FN97] Bilateral Treaty, reprinted in Dimensions, supra note 4, at 280. It comes in two forms, one serving as a basis for an EC directive and the other for agreements outside the EC.

[FN98] Another important distinction is that Totty would exclude proceedings that involve "predominantly tax procedure." Bilateral Treaty article 1 (definitions of "predominantly tax procedure," "full insolvency" and "reconstruction") and articles 2 & 3 (applicable only to "full insolvency" and "reconstruction," thus excluding tax-dominated proceedings). This strikes me as an excellent idea, making it much easier to treat tax claims like other claims in transnational bankruptcy while recognizing that they present some especially difficult problems. See generally Smart, International Insolvency and the Enforcement of Foreign Revenue Laws, 35 INT. & COMP. L. Q. 704 (1986). For an example of the problem in the U.S. courts, see Overseas Inns, S.A. v. United States, 911 F.2d 1146 (5th Cir.1990).

[FN99] See Bilateral Treaty, articles 2 & 3.

[FN100] See supra text accompanying notes 57-58.

[FN101] The Strasbourg Convention has a presumption in favor of the country of incorporation ("registration") as the home country, but it is rebuttable. European Convention on Certain International Aspects of Insolvency, art. 14, Europ T.S. No. 136 (1990) [hereinafter Strasbourg Convention].

[FN102] Id.

[FN103] See supra note 3.

[FN104] Strasbourg Convention, supra note 101, art. 18. The term "preferential" here is roughly equivalent to "priority" in U.S. usage and includes the claims of employees and governmental authorities.

[FN105] See Strasbourg Convention, supra note 101, art. 19. The convention has an interesting, if largely academic, twist: the surplus will be distributed in the main bankruptcy pro rata, without reference to the priority rules of the home country.

[FN106] See, e.g., Ghozland, Preferential Claims in Cross-Border Insolvency, British Inst. Int. and Comp. Law, Seminar on Cross-Border Insolvency (unpublished manuscript, Oct. 19, 1988) (copy on file with author) (effect on ordinary creditors of preferential claims in French liquidations).

[FN107] See Strasbourg Convention, supra note 101, art 4(1).

[FN108] See Strasbourg Convention, supra note 101, art. 1.

[FN109] The British Insolvency Act has a provision that seems designed to operate in somewhat this way. Insolvency Act 1986 s 426. See generally Woloniecki, supra note 5. Section 426(4) instructs the U.K. courts to give assistance to courts "having the corresponding [insolvency] jurisdiction" in "any relevant country." A country qualifies as "relevant" under this provision by being so designated by the Secretary of State by statutory instrument. Insolvency Act 1986 s 426(11). Section 426(4) is not much discussed in the literature. It was not even mentioned in Felixstowe. But see Smart, supra note 71. The U.S. has not qualified under section 426(4). See Prior, supra note 64. So far only a limited number of Commonwealth countries have qualified: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibralter, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St. Helena, Turks and Caicos Islands, Tuvalu, and the British Virgin Islands. Cooperation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (S.I. 1986 No. 2123). I understand that negotiations looking to such recognition are going on between the U.K. and other countries, including the U.S.

[FN110] A recent example is Atlantic Computing in London.

[FN111] An alternative to exemption would be provisions for special representation for such claimants. The argument for special treatment would be that such claimants cannot afford to prosecute their claims in a distant forum and are regarded by many societies as the proper object of special legal protections. For an analogous example, the special protections given consumers in the European Community, see Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, s 4, arts. 13-15, OJEC 1978 L 304/77, 8 I.L.M. 229 (1968).