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The Turnover of Assets Under Section 304 of the Bankruptcy Code: The Virtues of Comity

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The Turnover of Assets Under Section 304 of the Bankruptcy Code: The Virtues of Comity

Gary Perlman

Abstract

This Note argues that U.S. courts should favor comity in evaluating requests for the transfer of assets. Part I examines the treatment of foreign debtors in U.S. bankruptcy law, prior to and through the development and implementation of the [Bankruptcy] Code. Part II analyzes the conflicting approaches adopted by courts in determining whether to grant turnover requests. Part III proposes the benefits of adhering to principles of comity in deciding turnover requests. The Note concludes that broad application of the comity to requests for the transfer of property facilitates both the equitable distribution of assets among similarly-situated creditors and the economic and expeditious resolution of the estate.

THE TURNOVER OF ASSETS UNDER SECTION 304 OF
THE BANKRUPTCY CODE: THE VIRTUES
OF COMITY

INTRODUCTION

Section 304 of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code" or the "Code")¹ significantly altered the treatment of representatives of foreign debtors² in U.S. courts.³ This section permits a foreign representative⁴ to institute a proceeding in the United States ancillary to a foreign bankruptcy action.⁵ One remedy available in the ancillary proceeding is the turnover of assets located in the United States to the foreign representative.⁶ Since the Code was enacted, courts have embarked on two paths in determining whether to grant turnover requests. Some courts have adopted a traditional analysis, highlighting the prejudicial effects on U.S. creditors.⁷ Other courts, however, favor the international effects of comity to facilitate an economical and expeditious resolution of the debtor's estate.⁸

This Note argues that U.S. courts should favor comity in evaluating requests for the transfer of assets. Part I examines the treatment of foreign debtors in U.S. bankruptcy law, prior to and through the development and implementation of the Code. Part II analyzes the conflicting approaches adopted by courts in determining whether to grant turnover requests. Part III proposes the benefits of adhering to principles of com-

1. 11 U.S.C. §§ 101-151,326 (1982 & Supp. IV 1986).

2. 11 U.S.C. § 101(12). The Bankruptcy Code defines a debtor as a "person or municipality concerning which a case under this title has been commenced." *Id.*

3. *See* 11 U.S.C. § 304.

4. 11 U.S.C. § 101(23). A foreign representative is a "duly selected trustee, administrator or other representative of an estate in a foreign proceeding." *Id.*

5. 11 U.S.C. § 304.

6. *See* 11 U.S.C. § 304(b)(2); *see infra* notes 38-46 and accompanying text.

7. *See, e.g., In re Toga Mfg. Ltd.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983) (claim of U.S. lien creditor against foreign debtor must be litigated in U.S. court); *In re Lineas Aereas de Nicaragua S.A.*, 10 Bankr. 790 (Bankr. S.D. Fla. 1981) (U.S. assets may be used only to satisfy claims of U.S. creditors); *see infra* notes 51-70 and accompanying text.

8. *See, e.g., Cunard S.S. v. Salen Reefer Servs.*, 773 F.2d 452 (2d Cir. 1985) (granting comity to Swedish court's bankruptcy proceeding); *In re Culmer*, 25 Bankr. 621 (Bankr. S.D.N.Y. 1982) (U.S. assets turned over to Bahamas Supreme Court for distribution); *see infra* notes 73-97 and accompanying text.

ity in deciding turnover requests. This Note concludes that broad application of comity to requests for the transfer of property facilitates both the equitable distribution of assets among similarly-situated creditors and the economic and expeditious resolution of the estate.

I. TREATMENT OF FOREIGN REPRESENTATIVES IN U.S. BANKRUPTCY LAW: PAST AND PRESENT

A. International Insolvencies in the Pre-Code Era

Traditionally, the U.S. system of managing international insolvencies was "territorial."⁹ Under this theory, the courts gave no extraterritorial effect to the laws of another country.¹⁰ The conflict-of-laws rules that most states had adopted¹¹ prevented the foreign representative of a nonresident bankrupt from obtaining the debtor's assets that were both located in the United States and attached by U.S. creditors.¹²

9. See Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 634-35 (1980); Nadelmann, *The Bankruptcy Reform Act and Conflict of Laws: Trial and Error*, 29 HARV. INT'L L.J. 27, 28 (1988). See generally Paskay, *Impact of the Bankruptcy Reform Act of 1978 on Foreign Debtors and Creditors*, 12 STETSON L. REV. 321, 335 (1983). The doctrine of territoriality does not recognize laws and judgments in other countries. See Honsberger, *supra*, at 634. Rather, its primary concern is the protection of local creditors or the national economy. *Id.* This doctrine has been criticized for its failure to recognize the principle of creditor equality and its inherent encouragement of the race to the courthouse. *Id.* at 635.

10. Honsberger, *supra* note 9, at 634.

11. See Nadelmann, *supra* note 9, at 28. "Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state [or nation]." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 2 (1971). The Restatement of Conflicts of Laws § 3 explains the meaning of state: "[A]s used in the Restatement of this subject, the word state denotes a territorial unit with a distinct general body of law." *Id.* § 3.

12. See, e.g., *Taylor v. Geary*, 1 Kirby 313 (Conn. 1787) (bankruptcy in England does not secure debtor's U.S. assets, but bankrupt may remain subject to attachment of U.S. and British creditors); *Ingraham v. Geyer*, 13 Mass. 146 (1816) (assignment that included distribution of assets located outside of Massachusetts was void against a local creditor who brought a subsequent action against debtor); *Abraham v. Ples-toro*, 3 Wend. 538 (N.Y. 1829) (assignee in foreign bankruptcy not entitled to injunction to prevent bankrupt from receiving property from custom-house); *McNeil v. Colquhoun*, 3 N.C. (2 Hayw. 24) 42 (1797) (bankruptcy laws of Scotland cannot affect any goods, estate, or debts due to a North Carolina bankrupt and, therefore, they may be attached here by a creditor under local law); *Milne v. Moreton*, 6 Binn. 353 (Pa. 1814) (assignment of bankrupt in England does not prevent an attachment of the bankrupt's property by an American creditor); *Assignees of Topham v. Chapman*, 8 S.C.L. (1 Mill) 283 (S.C. 1817) (assignment under bankruptcy in England does not

Congress adopted uniform bankruptcy laws in the 1898 Bankruptcy Act (the "Bankruptcy Act" or the "Act").¹³ Although the Act allowed the debtor or creditor to commence or oppose bankruptcy proceedings in U.S. courts,¹⁴ it forbade foreign representatives from initiating such bankruptcy proceedings.¹⁵

Moreover, the Bankruptcy Act gave discretion to courts to dismiss or suspend proceedings where a foreign tribunal of competent jurisdiction adjudged the debtor bankrupt.¹⁶ The

evict title of U.S. property, so as to take a preference over an attachment issued under laws of South Carolina).

Kent describes these state rules as follows:

A prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here; and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad when they have the means to satisfy them under their own control.

2 J. KENT, COMMENTARIES ON AMERICAN LAW § 406 (1854); *see also* Nadelmann, *supra* note 9, at 28; J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 414 (1834).

13. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, (repealed 1978). Under the Bankruptcy Act, creditor preferences could be voided. *See* Nadelmann, *supra* note 9, at 35. The territorial range of adjudication respecting the voiding of preferences, however, was left ambiguous; the court was given substantial discretion. *See id.*

The 1882 Lowell Bill, an earlier attempt at national bankruptcy legislation, was introduced into the Senate in response to widespread dissatisfaction with the law regarding the distribution of assets. S. 1382, 47th Cong., 2d Sess. (1882); *see* Nadelmann, *supra* note 9, at 28. This bill would have permitted U.S. bankruptcy courts to assume jurisdiction over the property of a foreign debtor located in the United States and to distribute that property equally among all creditors, foreign and domestic. S. 1382, 47th Cong., 2d Sess. (1882); *see* Nadelmann, *supra* note 9, at 28-29.

14. *See Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 1443, 1504 (1976) (statement of Prof. Kurt H. Nadelmann).

15. *Id.*

16. *See id.* Sections 2(a)(1) and (22) of the Bankruptcy Act, provided as follows:
Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their

Act, however, did not provide guidelines for courts to use in deciding whether to do so.¹⁷ The foreign representative had no statutory right to comity; his only hope was that the U.S. court would recognize these principles and defer to the foreign court to administer over the estate.¹⁸ The need for more de-

principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this title;

(22) Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States.

Id.

Bankruptcy Rule 119 of the Federal Rules of Bankruptcy Procedure provided:

Bankrupt Involved in Foreign Proceeding

When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and other such persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

Bankr. R. 119, 411 U.S. 1015 (1973); *See* Morales & Deutch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 *BUS. LAW.* 1573, 1575-76 (1984).

17. *See* Morales & Deutch, *supra* note 16, at 1575-76.

18. Some courts did recognize the utility of broader applications of principles of comity. In *Hilton v. Guyot*, the Supreme Court held that U.S. courts must consider principles of comity in determining whether to defer to the requests of foreign laws, proceedings, or judgments. 159 U.S. 113, 202-03 (1895). However, comity would not be extended if it would violate the laws and public policy of the United States to do so. *Id.*

In *Cornfeld v. Investors Overseas Servs., IOS*, a Canadian corporation, was undergoing liquidation under Canadian bankruptcy law. 471 F. Supp. 1255 (S.D.N.Y. 1979) (pre-Code law applied). A U.S. creditor sought to attach certain assets of IOS located in New York. *Id.* at 1258. The court denied the request holding that the Canadian winding-up procedures were jurisdictionally sound and consistent with U.S. bankruptcy policy. *Id.* at 1260; *see also* *Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976) (acknowledging Canadian bankruptcy trustee's claim to records of debtor located in the United States because rights of foreign trustee will be recognized as long as court has jurisdiction over bankrupt and there is no prejudice to local creditors or violation of laws or public policy of the state); *Waxman v. Kealoha*, 296 F. Supp. 1190 (D. Haw. 1969) (Canadian bankruptcy trustee could bring an action in bankruptcy against Hawaiian incorporators and stockholders of Hawaiian corporation to recover amounts owed on stock subscriptions, because U.S. courts typically extend comity in such cases, unless to do so would prejudice local creditors).

Other courts, however, declined to extend comity. *See, e.g.,* *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908) (United States must protect the rights of its own citizens to local property before permitting property to be removed from its

financed principles regarding the role of foreign representatives in multinational insolvencies was evidenced by the 1974 Herstatt affair.¹⁹

In the Herstatt affair, a major West German commercial bank (Herstatt) failed. Herstatt did no direct business in the United States but had substantial funds on deposit at the Chase Manhattan Bank in New York.²⁰ Once the demise of Herstatt became known, foreign and U.S. creditors rapidly began to attach the Herstatt funds held at Chase Manhattan Bank.²¹ Moreover, the West German representative refused to appear in the U.S. court, as the appearance would likely subject him to the jurisdiction of U.S. courts; pretrial discovery, and possibly *res judicata* effects in West Germany.²² As a result, the creditors who responded earliest to the news of the insolvency received a larger proportionate distribution of the assets than did slower creditors.²³ The Herstatt affair highlighted the Act's inadequacies in dealing with foreign bankruptcy law.

*B. Section 304 of the Bankruptcy Reform Act of 1978: Cases
Ancillary to Foreign Proceedings*

In 1970, Congress established the Commission on the Bankruptcy laws of the United States (the "Commission") to analyze and recommend changes in the bankruptcy law.²⁴ After a two-year study, the Commission submitted a report, recommendations, and a revised bankruptcy code.²⁵ One section of this report proposed retaining the basic provisions of the Bankruptcy Act regarding the administration of a debtor's es-

jurisdiction); *In re Berthoud*, 231 F. 529 (S.D.N.Y. 1916) (U.S. court had jurisdiction to commence involuntary bankruptcy proceeding against foreign debtor whose only major U.S. contact was a US\$30,000 bank account).

19. See Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A. J. 1290, 1291-94 (1976).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. See Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (repealed 1978).

25. See H.R. Doc. No. 137, 93d Cong., 1st Sess., pts. I-II (1973) [hereinafter Commission Report] (including report, recommendations, and proposed code). The National Conference of Bankruptcy Judges drafted a bill, which was introduced into Congress soon after the proposal. H.R. 16,643, 93d Cong., 2d Sess., 120 CONG. REC. 30,969-70 (1974).

tate with multinational parties,²⁶ but proposed enlarging their scope to permit a foreign representative to institute a bankruptcy action in the United States.²⁷ For the first time, the bill would give courts a statutory mandate to turn over the foreign debtor's U.S. property.²⁸

The Commission's proposal was modified and amended several times before a final draft, the Bankruptcy Code,²⁹ was approved.³⁰ One such modification affected the section addressing international insolvencies. Earlier proposed versions of the bill did not enumerate comity as a factor that courts should consider in determining what relief to grant foreign debtors.³¹ This section was amended to indicate that courts should utilize comity in their ancillary case analysis.³² Save this amendment, the section of the Commission's proposal involving multinational insolvencies closely mirrors the provisions finally adopted in section 304 of the Code.³³

Section 304 of the Bankruptcy Code authorizes a foreign representative to commence a case in the United States that is ancillary to a foreign bankruptcy action.³⁴ The ancillary action was designed to remedy the cumbersome and inefficient prac-

26. See Commission Report, *supra* note 25, § 4-103.

27. See *id.*; Paskay, *supra* note 9, at 335.

28. See Paskay, *supra* note 9, at 335. Judge Paskay stated:

This section authorized the debtor's foreign representative to file a petition as a creditor, to institute an involuntary proceeding, to file a complaint seeking a dismissal or suspension of a case, and to file a complaint seeking an injunction to stay the commencement or continuation of any action or the enforcement of any judgment against the debtor or his property. *Most importantly, the proposal also authorized the foreign representative to file a complaint seeking a turnover of the debtor's property or its proceeds.*

Id. (emphasis added).

29. 11 U.S.C. §§ 101-151, 326 (1982 & Supp. IV 1986). The Code became effective October 1, 1979. *Id.*

30. See Paskay, *supra* note 9, at 336.

31. See, e.g., H.R. 33, 94th Cong., 1st Sess. (1975).

32. H.R. 8200, 95th Cong., 2d Sess., 124 CONG. REC. 33,994 (1978).

33. Compare Commission Report, *supra* note 25, § 4-103 with 11 U.S.C. § 304.

34. 11 U.S.C. § 304(a). The Code defines "foreign proceeding" as a proceeding, whether judicial or administrative and whether or not under the bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

Id. § 101(22).

tice of orchestrating two simultaneous bankruptcy cases in two countries.³⁵ The ancillary case can be a much simpler proceeding than a complete bankruptcy action; its main objective is to assist and complement the foreign proceeding.³⁶

The remedies available in an ancillary case are described in section 304(b).³⁷ One such remedy is the turnover of assets.³⁸ This section permits the court to order the turnover of the debtor's property, or the proceeds of such property, to the foreign representative who brings the action.³⁹

Turnover orders result in the consolidation of the property located in the United States with property located abroad.⁴⁰ Thus, the foreign representative has all of the assets available to distribute in the main proceeding consistent with the laws of the foreign jurisdiction.⁴¹ These transfers are the

35. See Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729, 739 (1987); Given & Vilaplana, *Comity Revisited: Multinational Bankruptcy Cases Under Section 304 of the Bankruptcy Code*, 1983 ARIZ. ST. L.J. 325, 328. Professor Boshkoff stated:

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

Boshkoff, *supra*, at 739.

36. Boshkoff, *supra* note 35, at 739.

37. 11 U.S.C. § 304(b) provides:

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

(1) enjoin the commencement or continuation of—

(A) any action against—

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

(ii) such property; or

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

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

(3) order other appropriate relief.

Id.

38. *Id.* § 304(b)(2).

39. *Id.* The turnover of assets has been called the ultimate test of a U.S. court's willingness to cooperate with a foreign proceeding. Boshkoff, *supra* note 35, at 745.

40. See Boshkoff, *supra* note 35, at 745.

41. *Id.*

ultimate objective of a foreign representative and, therefore, are frequently requested.⁴² U.S. creditors, especially lienholders, oppose such transfers because they lose control over the assets located in the United States and are inconvenienced by having to pursue their claims abroad.⁴³

In determining whether to grant turnover requests, the statute requires the court to decide what will best assure an economical and expeditious administration of the estate⁴⁴ by considering the factors articulated in subsection 304(c).⁴⁵ These factors include the just treatment of all creditors, protection of U.S. creditors from prejudice and inconvenience, prevention of fraudulent or preferential transfers, distribution of proceeds in accordance with the Code, comity, and the opportunity for a fresh start.⁴⁶

II. THE CONFLICTING APPROACHES ADOPTED BY COURTS IN DETERMINING WHETHER TO GRANT TURNOVER REQUESTS

Courts have traveled in two directions in determining whether to grant turnover requests made pursuant to section 304(b)(2) of the Bankruptcy Code. Some courts have adopted the traditional U.S. approach, ignoring the interests of the for-

42. Huber, *Creditor Equality in Transnational Bankruptcies: The United States Position*, 19 VAND. J. TRANSNAT'L L. 741, 764 (1986).

43. *Id.*

44. 11 U.S.C. § 304; see S. REP. NO. 989, 95th Cong., 2d Sess. 35, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5821; H.R. REP. NO. 595, 95th Cong., 1st Sess. 324-25, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6281.

45. See 11 U.S.C. § 304(c). Section 304(c) states:

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

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

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

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

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Id.

46. *Id.*

eign bankruptcy proceeding.⁴⁷ Other courts have espoused principles of international comity to facilitate the economical and expeditious resolution of the estate.⁴⁸ The ultimate decision lies in the weight courts assign to the various factors articulated in section 304(c).⁴⁹

A. *The Traditional Approach*

One approach adopted by courts in evaluating section 304(b)(2) requests is to focus on the effects of such a transfer on U.S. creditors. Premised on the belief that foreign courts will not provide the same protection to U.S. creditors that the Bankruptcy Code provides, courts endorsing this traditional approach typically deny the representative's motion for the turnover of assets located in the United States.⁵⁰

In *In re Toga Mfg. Ltd.*,⁵¹ a Canadian trustee brought an ancillary proceeding requesting two forms of relief: an injunction against the commencement or continuation of actions against the debtor and an order to turn over the US\$215,000 that had been seized under a writ of garnishment to satisfy the

47. See, e.g., *In re Toga Mfg. Ltd.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983) (claim of U.S. lien creditor against foreign debtor must be litigated in U.S. court); *In re Lineas Aereas de Nicaragua S.A.*, 10 Bankr. 790 (Bankr. S.D. Fla. 1981) (U.S. assets may be used only to satisfy claims of U.S. creditors). Courts adopting this approach are often referred to as "territorial" or "pluralistic." See Honsberger, *supra* note 9, at 634-35; Nadelmann, *supra* note 9, at 28; Paskay, *supra* note 9, at 335. The doctrine of territoriality is characterized by countries rejecting the laws and judgments rendered outside of their borders and advancing the interests of local creditors or the national economy. See Honsberger, *supra* note 9, at 634-35. Territoriality in its extreme form negates the res judicata effect of foreign judgments. *Id.* This doctrine has been criticized for promoting the race to the courthouse, while discounting principles of creditor equality. *Id.*

48. See, e.g., *Cunard S.S. v. Salen Reefer Servs.*, 773 F.2d 452 (2d Cir. 1985) (granting comity to Swedish court's bankruptcy proceeding); *In re Culmer*, 25 Bankr. 621 (Bankr. S.D.N.Y. 1982) (assets turned over to Bahamas Supreme Court for distribution). This approach is often referred to as "universal." See Honsberger, *supra* note 9, at 633. Under the universality theory, local bankruptcy adjudications should be given international effect. *Id.* All creditors, foreign and domestic, will be included in the liquidation or reorganization proceedings by the debtor's local court. *Id.* The utility of comity has been recognized as far back as 1797. See *infra* note 107 and accompanying text. However, the application of comity was sporadic. See *supra* note 18.

49. See 11 U.S.C. § 304(c); see also *supra* note 45.

50. See, e.g., *Toga*, 28 Bankr. at 165; *Lineas Aereas*, 10 Bankr. at 790; see *infra* notes 51-70 and accompanying text.

51. 28 Bankr. 165 (Bankr. E.D. Mich. 1983).

claim of a U.S. creditor.⁵² Hesse, the U.S. creditor, sought the garnishments after having been awarded a large settlement in an arbitration proceeding against the debtor.⁵³

The court recognized that Hesse would not be greatly inconvenienced if he was forced to litigate his claim in Canada.⁵⁴ The court further stated that Hesse would receive just treatment in the Canadian courts.⁵⁵ Nevertheless, the court denied the trustee's transfer request.⁵⁶ Hesse's claim, the court reasoned, would not receive the priority it was entitled to under U.S. law if it was to proceed in a Canadian bankruptcy action.⁵⁷ While U.S. law recognizes Hesse, a lien creditor, as holding a secured claim,⁵⁸ Canadian law probably would have characterized him as an ordinary creditor.⁵⁹ Thus, a distribution under the Canadian proceeding failed to satisfy the section 304(c)(4) requirement that the "distribution of proceeds [be] . . . substantially in accordance with the order prescribed by this title."⁶⁰ Though the court purported to reject the transfer request because it did not conform with the Code, it actually focused on whether the creditor would get the same priority in the foreign proceeding as under U.S. law.⁶¹

The court examined the legislative history of section 304 in rejecting the trustee's argument that comity should con-

52. *Id.* at 167.

53. *Id.* at 166-67.

54. *Id.* at 168.

55. *Id.* at 170-71.

56. *Id.* at 170.

57. *Id.*; see Bankruptcy Act, CAN. REV. STAT. ch. B-3, § 107 (1970). The court explained:

Section 107 of the Canadian Bankruptcy Act basically divides creditors into four classes for purposes of priority distribution. First, there are secured creditors who are entitled to enforce their claims irrespective of their debtors' bankruptcy proceedings. Second, preferred creditors receive a special priority by virtue of Section 107(a) through (j), and they share *pari passu* as among preferred creditors in any particular sub-class of preferred creditors. Third, ordinary creditors are those creditors among which no distinction is made as to judgment creditors and non-judgment creditors. However, judgment creditors are not treated as possessing any security. Fourth, and finally, deferred creditors are those creditors who, as a matter of policy, receive no payment unless and until all other creditors are paid.

Toga, 28 Bankr. at 168 n.6.

58. See 11 U.S.C. § 506 (1982 & Supp. IV 1986).

59. See Bankruptcy Act, CAN. REV. STAT. ch. B-3, § 107 (1970).

60. 11 U.S.C. § 304 (c)(4); See *Toga*, 28 Bankr. at 168 (Bankr. E.D. Mich.).

61. See *Toga*, 28 Bankr. at 168.

trol.⁶² It concluded that the extension of comity is within a court's discretion⁶³ and held that comity did not mandate the transfer of assets.⁶⁴

This protection of U.S. creditors' interests was also the paramount concern of the Florida Bankruptcy Court in *In re Lineas Aereas de Nicaragua*.⁶⁵ In *Lineas Aereas*, the foreign trustee of a financially-troubled Nicaraguan airline filed a petition seeking the turnover of all property of the debtor located in the United States.⁶⁶ The court granted the transfer of the property to the Nicaraguan trustee based on the trustee's representations that the assets would be used primarily to satisfy U.S. creditors' claims.⁶⁷ The court further conditioned the transfer upon prohibiting the trustee from encumbering, assigning, or abandoning the debtor's U.S. assets.⁶⁸ By imposing these restrictions on the distribution of the debtor's assets, the court paid lip service to the foreign representative—granting the request in form but denying it in substance.⁶⁹

These two decisions exemplify the approach adopted by courts that have emphasized the interests of U.S. creditors in determining whether to turn over property located in the United States. In such cases, comity is significantly discounted in the analysis. This suppressed role of comity in deciding section 304(b)(2) requests, however, has been rejected by other courts.⁷⁰

B. *The Economical and Expeditious Approach*

Some courts that have considered turnover requests have

62. *Id.* at 169.

63. *Id.* (citing S. REP. NO. 989, 95th Cong., 2d Sess. 35, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5821; H.R. REP. NO. 595, 95th Cong., 1st Sess. 324-25, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6281). The court stated: "[p]rinciples of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules." *Id.*

64. *Id.*

65. 10 Bankr. 790 (Bankr. S.D. Fla. 1981).

66. *Id.* at 791.

67. *Id.*

68. *Id.*

69. See *In re Axona Int'l Credit & Commerce Ltd.*, 88 Bankr. 597, 611 (Bankr. S.D.N.Y. 1988).

70. See *infra* notes 73-97 and accompanying text.

rejected the idea that the effects such transfers will have on local creditors should be determinative. These courts have adopted the modern trend,⁷¹ which recognizes principles of international comity as playing a more substantial role in balancing the factors articulated in section 304(c).⁷²

In *In re Culmer*,⁷³ Banco Ambrosiano Overseas Limited ("BAOL"), which was organized and licensed under Bahamian banking law, passed a resolution calling for the voluntary liquidation of the bank.⁷⁴ This procedure was to be subject to the supervision of the Bahamas Supreme Court.⁷⁵ The Bahamian law was quite similar to a U.S. voluntary bankruptcy.⁷⁶ U.S. creditors of BAOL commenced litigation against BAOL in the Southern District of New York and obtained attachment orders against its assets located in the United States.⁷⁷ The Bahamian trustees filed a section 304 petition for relief ancillary to the foreign proceeding.⁷⁸ The petition requested the transfer of the debtor's assets located in the United States.⁷⁹

The Bankruptcy Court, relying heavily on principles of

71. See *infra* note 102 and accompanying text.

72. See, e.g., *In re Culmer*, 25 Bankr. 621 (S.D.N.Y. Bankr. 1982). The doctrine of comity was defined by the Supreme Court in *Hilton v. Guyot* as:

[N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

159 U.S. 113, 163-64 (1895).

Comity is an elusive concept. *Laker Airways v. Sabena World Airways*, 731 F.2d 909, 937 (D.C. Cir. 1984). It summarizes "the degree of deference that a domestic forum must pay to the act of a foreign government . . ." *Id.* As our world has become increasingly more interdependent, comity has taken on a more significant role in the management of international affairs. *Id.*

73. 25 Bankr. at 621.

74. *Id.* at 623.

75. *Id.*

76. See *Morales & Deutsch*, *supra* note 16, at 1590 n.92. Compare Statute Laws of the Bahamas, Companies Act, vol. 4, chap. 184, arts. 88, 89, 147, 148 (1965) (Bahamian winding-up proceeding supervised by Bahamian Supreme Court and liquidators must report to court and to creditors semi-annually) with 11 U.S.C. § 704 (1982 & Supp. IV 1986) (liquidators are accountable to court and to parties in interest regarding the administration of the estate).

77. *Culmer*, 25 Bankr. at 624.

78. *Id.* at 622.

79. *Id.* at 623. The request stated that "all claimants to BAOL property . . . return all BAOL deposits and other property which is now in their hands or which

comity, granted the movants' request.⁸⁰ Initially, an examination of the Bahamian law governing the bankruptcy proceeding revealed that U.S. and Bahamian law are in substantial conformity.⁸¹ The court reasoned that comity will be granted to a foreign court as long as it is a court of competent jurisdiction and the forum state's laws and public policy will not be compromised by so doing.⁸² Moreover, the court recognized that U.S. courts should defer to the laws and proceedings in sister common-law jurisdictions.⁸³ After analyzing the effects of Bahamian law on the section 304(c) factors, the court held that granting comity was not violative of U.S. laws and public policy.⁸⁴ The court further held that inasmuch as the Bahamian laws were not repugnant to U.S. ideas of justice, comity must be granted.⁸⁵

Finally, the *Culmer* court stressed the notion that anyone who engages in business with a foreign corporation implicitly subjects himself to the laws of that foreign government.⁸⁶ Thus, the court held that all U.S. creditors' rights were subject to Bahamian laws and every BAOL creditor must pursue his claim in the Bahamian liquidation. One who invests in a for-

may be received by them to the Bahamas for administration in BAOL's liquidation proceeding." *Id.*

80. *Id.* at 629. The court maintained that "all of the factors listed in § 304(c) have historically been considered within a court's determination whether to afford comity to a proceeding in a foreign nation." *Id.* For a discussion of comity, see *supra* note 72.

81. *Culmer*, 25 Bankr. at 629; see *supra* note 76. Specifically, the court noted "that the Bahamian Companies Act, like our own bankruptcy laws, provides a comprehensive procedure for the orderly and equitable distribution of BAOL's assets among all of its creditors." *Culmer*, 25 Bankr. at 629.

82. *Culmer*, 25 Bankr. at 629; see *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). The exceptions to granting comity in New York courts have been even more narrowly construed. In *Intercontinental Hotel Corp. v. Golden*, the court held that unless the foreign based rights are "inherently vicious, wicked or immoral," the rights should be enforced. 15 N.Y.2d 9, 13, 203 N.E.2d 210, 212, 254 N.Y.S.2d 527, 529 (1964).

83. *Culmer*, 25 Bankr. at 631.

84. *Id.*

85. *Id.*

86. *Id.* at 632 (citing *Canada S. Ry. v. Gebhard*, 109 U.S. 527, 537 (1883) (barring New York action to recover on bonds of Canadian railroad company undergoing reorganization in Canada—New York bondholders bound by Canadian reorganization)). The Supreme Court stated that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes." *Id.*

foreign corporation is obligated to appeal to foreign law to protect his investment and may not obtain greater rights than other creditors by bringing an action in U.S. courts.⁸⁷

The U.S. Court of Appeals for the Second Circuit endorsed a similar comity-oriented approach in *Cunard Steamship Co. v. Salen Reefer Services*.⁸⁸ Following the reasoning in *Culmer*, the Second Circuit voided an attachment levied by a domestic creditor of a foreign debtor's assets located in the United States.⁸⁹ In *Cunard*, Salen, a Swedish corporation, commenced a bankruptcy proceeding in the Stockholm City Court.⁹⁰ As mandated by Swedish law, an interim administrator was appointed to organize the bankruptcy, and creditor actions against Salen were stayed.⁹¹ In January 1985, Cunard, a British corporation, commenced an action in the Southern District of New York, by obtaining an attachment of the debtor's assets that garnishee, United Brands Company, held. Salen moved to dissolve the attachment. The district court, using section 304 by analogy, granted the debtor's motion, holding that U.S. public policy would be advanced best by conferring comity to the Swedish court's stay on creditor actions during the Swedish bankruptcy proceeding.⁹²

The Second Circuit affirmed the lower court's decision.⁹³ The court reasoned that in deferring to a foreign bankruptcy proceeding, the assets of the debtor will be distributed equitably, not erratically.⁹⁴ The court rejected the approach taken by

87. *Culmer*, 25 Bankr. at 632.

88. 773 F.2d 452 (2d Cir. 1985).

89. *Id.* at 461.

90. *Id.* at 454.

91. *Id.*; see EUROPEAN INSOLVENCY GUIDE, Sweden 3.1-3.2.

Swedish law requires that upon declaration of bankruptcy, an interim trustee or administrator be appointed and notice sent to all creditors. A meeting of creditors is scheduled and legal actions by creditors are stayed. In addition, the court has the power to issue orders preventing the debtor from dissipating or absconding with assets.

See *id.* cited in *Cunard*, 773 F.2d at 459.

92. *Cunard S.S. v. Salen Reefer Servs.*, 49 Bankr. 614 (Bankr. S.D.N.Y. 1985).

93. *Cunard*, 773 F.2d at 461.

94. *Id.* at 458. The court stated that granting comity to a foreign bankruptcy proceeding facilitates the disbursement of the debtor's assets in "an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." *Id.*

The Second Circuit reaffirmed this comity-oriented approach in *Victrix S.S. v. Salen Dry Goods*, which arose out of the same Swedish bankruptcy proceeding as

U.S. courts that focused on the priorities of U.S. creditors.⁹⁵ Rather, the Second Circuit adopted the modern trend of facilitating the equitable distribution of assets in foreign proceedings.⁹⁶ As every person who deals with a foreign corporation implicitly subjects himself to the laws of that jurisdiction, reasoned the court, the domestic creditors of a bankrupt foreign corporation may be compelled to pursue their claims abroad.⁹⁷

III. THE VIRTUES OF COMITY

Present section 304(c) analysis has led some courts to minimize comity and retain a territorial approach to section 304(b)(2) requests. While the ambiguity in the present statutory application may justify the courts' holdings in *Toga* and *Lineas Aereas*, these decisions obstruct the bankruptcy law objective of equal treatment of similarly-situated creditors.⁹⁸

Cunard. 825 F.2d 709 (2d Cir. 1987). In *Victrix*, Salen agreed to charter *Victrix's* vessel *Ploto* in August 1984. *Id.* at 711. Salen subsequently filed for bankruptcy in Stockholm and informed *Victrix* that it would make no further payments on the charterparty. *Id.* *Victrix* attached Salen's U.S. assets and commenced arbitration proceedings in London pursuant to the charterparty arbitration clause. *Id.* Salen was not represented in the proceedings. *Id.* *Victrix* prevailed in the arbitration and a judgment was entered in London on this award. *Id.* The Second Circuit refused to enforce the arbitration award and vacated the attachment. *Id.* at 713. The court reasoned that the recognition of foreign judgments and proceedings is governed by principles of comity. *Id.* The Second Circuit would not aid *Victrix's* effort to evade the writ of the Swedish bankruptcy court by attaching "captive funds" to satisfy the anticipated arbitration award. *Id.* at 714. As the enforcement of the British judgment would conflict with New York's policy of deferring to foreign bankruptcy proceedings, the court held that a New York court would not enforce the British judgment. *Id.* at 715-16. Thus, Salen's funds would be transferred to the Swedish trustee for distribution. *Id.* at 716.

95. *Id.* See, e.g., *In re Toga Mfg. Ltd.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983); *In re Lineas Aereas de Nicaragua S.A.*, 10 Bankr. 790 (Bankr. S.D. Fla. 1981); see J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 420-421 (1872).

96. See *Cunard*, 773 F.2d at 458; see *infra* note 102 and accompanying text.

97. *Id.* at 458-59.

98. See *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 31 (1959) ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate."); *Sampell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) ("The theme of the Bankruptcy Act is equality of distribution."); *Cunard S.S. v. Salen Reefer Servs.*, 773 F.2d 452 (2d Cir. 1985) (The guiding premise of the Bankruptcy Code, like its predecessor, the Bankruptcy Act, is the equality of distribution of assets among creditors.); *In re Lorber Indus. of Cal.*, 675 F.2d 1062, 1065-66 (9th Cir. 1982) (broad purpose of Bankruptcy Code is to bring about equitable distribution of debtor's estate); *Quigley v. Kimbrough*, 395 F.2d 100, 103 (5th Cir. 1968) (broad purpose of Bankruptcy Act is to facilitate equitable distribution of bankrupt's

Both the *Toga* and *Lineas Aereas* courts distributed the assets of foreign debtors located in the United States to domestic creditors, without considering the effect on creditors abroad.⁹⁹ In *Toga*, the court's reasoning rested solely on the potential loss of priority to the U.S. creditor that would result if the turnover were granted.¹⁰⁰ In *Lineas Aereas*, the court awarded the turnover, conditioned upon the guarantee that the assets located domestically would not be removed from the United States and would be used only to satisfy the debts owed to U.S. creditors.¹⁰¹ By affording domestic creditors maximum protection, these courts ignored the "modern trend . . . which allows assets to be distributed equitably in the foreign proceeding."¹⁰²

Both the express language of section 304(c) and the legislative history of the statute indicate that courts are to be "guided by what will best assure an economical and expeditious administration of [the] estate" in determining what relief, if any, to award.¹⁰³ A transfer facilitates the compilation of the U.S. assets with the assets located abroad.¹⁰⁴ The property lo-

estate); see also Gitlin & Flaschen, *THE INTERNATIONAL VOID IN THE LAW OF MULTINATIONAL BANKRUPTCIES*, 42 *BUS. LAW* 307 (1987).

99. See *Toga*, 28 *Bankr.* at 165; *Lineas Aereas*, 10 *Bankr.* at 791.

100. *Toga*, 28 *Bankr.* at 170.

101. *Lineas Aereas*, 10 *Bankr.* at 791.

102. *Cunard*, 773 F.2d at 458; see *Banque de Financement v. First National Bank of Boston*, 568 F.2d 911, 920-21 (2d Cir. 1977); Riesenfeld, *The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey*, 24 *AM. J. COMP. L.* 288, 305-06 (1976). It is noteworthy that *Toga* is supported by cases dating back to the early nineteenth century that denied the transfer of U.S. property to foreign countries. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (discharge under laws of any state cannot be pleaded in bar of an action brought by citizen of another state, in U.S. courts, or of any state other than that where discharge was obtained); *Harrison v. Sterry*, 9 U.S. 161, 5 Cranch 289 (1809) (entitling U.S. creditor to preference in local distribution, although debt contracted by foreigner, in foreign country).

103. 11 U.S.C. § 304(c); see S. REP. NO. 989, 95th Cong., 2d Sess. 35, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5821; H.R. REP. NO. 595, 95th Cong., 1st Sess. 324-25, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6281.

104. See Huber, *supra* note 42, at 764. By extending comity to foreign courts, U.S. courts will prevent piecemeal distribution of assets located domestically and thereby facilitate the equitable and orderly distribution of the debtor's property. See S. REP. NO. 989, 95th Cong., 2d Sess. 35, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5821; H.R. REP. NO. 595, 95th Cong., 1st Sess. 324-25, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6281; see also *Victrix S.S. v. Salen Dry Goods*, 825 F.2d 709, 713-14 (2d Cir. 1987) (citing *Canada S. Ry. v. Gebhard*, 109 U.S. 527, 539 (1883) ("The equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding.")).

cated in the United States becomes available for distribution in the main proceeding.¹⁰⁵ As one proceeding is more economical and efficient than two or more proceedings, this guideline tends to favor one consolidated action in the foreign tribunal, rather than two proceedings in separate courts.¹⁰⁶

As far back as 1797, the Supreme Court recognized the need to defer to the laws and proceedings of foreign jurisdictions.¹⁰⁷ Federal courts will defer to foreign courts when the foreign court has competent jurisdiction and when extending comity will neither violate domestic public policy nor prejudice the rights of U.S. citizens.¹⁰⁸

In determining what violates public policy, several factors must be considered. The mere fact that the laws of the foreign jurisdiction do not mirror U.S. laws is not significant.¹⁰⁹ The foreign law must be morally repugnant to the U.S. law for it to violate U.S. public policy.¹¹⁰

105. Huber, *supra* note 42, at 764.

106. *See id.*

107. *See* Emory v. Grenough, 3 U.S. 291, 292 n.1, 3 Dall. 368, 369 n.1 (1797). The Court recognized that comity should be extended to foreign law unless doing so would prejudice the rights of other nations or their citizens stating:

By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other governments or their citizens.

. . . [N]othing would be more inconvenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere

Id.

108. *See, e.g.,* Hilton v. Guyot, 159 U.S. 113, 202-03 (1895); *Victrix*, 825 F.2d at 713; *Clarkson Co. v. Shaheen*, 544 F.2d 624, 629 (2d Cir. 1976); *Kenner Products v. Societe Fonciere et Financiere Agache-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1982).

109. *In re Gee*, 53 Bankr. 891, 904 (Bankr. S.D.N.Y. 1985). "It is not necessary that the [law] be a carbon copy of the Bankruptcy Code; rather, it must be of a nature that is not repugnant to the American laws and policies." *Id.*

Thus, U.S. courts are increasingly beginning to conclude that "[i]nternational comity is not reserved for foreign proceedings that obtain results identical to those under American law." *Drexel Burnham Lambert Group Inc. v. Galadari*, 610 F. Supp. 114, 119 (S.D.N.Y.), *modified*, 777 F.2d 877 (2d Cir. 1985).

110. *Loucks v. Standard Oil Co.*, 244 N.Y. 99, 111, 120 N.E. 198, 202 (1918). Justice Cardozo suggested that comity should be the rule unless its extension "would violate some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal." *Id.* Justice Cardozo's discussion is predicated on the concept of comity, though he does not actually use the word. *See id.*; *see also* Bainbridge, *Comity and Sovereign Debt Litigation: A Bankruptcy Analogy*, 10 MD. J. INT'L L. & TRADE 1, 23 (1986).

Prejudice to the rights of U.S. citizens, though often relevant in assessing what violates U.S. public policy, should not be evaluated solely on the basis of different creditor priorities¹¹¹ obtained under foreign law.¹¹² This interpretation is consistent with the Supreme Court's view expressed in *Canada Southern Ry. Co. v. Gebhard*:¹¹³ One who engages in business with a foreign corporation is impliedly subjected to the laws of the foreign government in which the corporation resides.¹¹⁴ This is not to say that priorities have no effect on prejudice. Rather, U.S. courts should protect U.S. creditors only when foreign courts discriminate against them in favor of their own local creditors.¹¹⁵ Thus, if a foreign court would protect its domestic creditors at the expense of U.S. creditors, U.S. courts should not honor the section 304(b)(2) request of a trustee from that nation. Such a transfer would denigrate the Bankruptcy Code goal of equitable treatment of similarly-situated creditors.¹¹⁶

Finally, broader applications of comity facilitate international transactions in our increasingly interdependent global economic system. The Supreme Court has acknowledged that the United States must compromise when engaging in trade and commerce in world markets.¹¹⁷ Failure of U.S. courts to

111. See 11 U.S.C. § 507.

112. See, *Drexel Burnham*, 610 F. Supp. at 119; Bainbridge, *supra* note 110, at 23-25.

113. 109 U.S. 527 (1883) (barring a New York action to recover on bonds of Canadian railroad company that was undergoing reorganization in Canada—New York bondholders bound by Canadian reorganization).

114. *Id.* at 537. The Supreme Court in *Gebhard* stated: "[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes." *Id.*

115. See generally *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. of the Judiciary*, 94th Cong., 2d Sess. 1474-75 (1976) [hereinafter *House Hearings*] (statement of Prof. Kurt H. Nadelmann, Harvard Law School).

116. See *supra* note 98 and accompanying text. The D.C. Circuit recognized the limitations of comity in *Laker Airways v. Sabena, Belgian World Airlines*: "Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." 731 F.2d 909, 937 (D.C. Cir. 1984).

117. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). The United States "cannot have trade and commerce in world markets . . . exclusively on [its] own terms, governed by [its] laws, and resolved in [its] courts." *Id.*

recognize foreign governmental acts impedes the efficient functioning of the international economic system.¹¹⁸ Extending comity to foreign judgments induces foreign lawmakers to enforce the decisions of U.S. courts, as they can depend upon U.S. courts to effectuate their laws.¹¹⁹ Both forums benefit from such a policy: The foreign court's laws and policies are vindicated and the domestic country's international cooperation and ties are strengthened.¹²⁰ Thus, broader applications of comity result in a smoother, more stable international economic system.¹²¹

In sum, principles of comity should be applied to turnover requests unless the laws of the foreign forum are morally repugnant to U.S. law or inconsistent with the Code. Within their section 304 analysis, courts should favor comity in evaluating turnover requests, and emphasis on objections regarding prejudice to domestic creditors should be minimized.

CONCLUSION

Through enacting section 304 of the Bankruptcy Code, Congress recognized and sought to remedy the problems inherent in an unregulated international insolvency system. The impetus behind the section was honorable; its application is

118. *See id.*

119. *See id.* The court in *Laker Airways* stated:

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

Laker Airways, 731 F.2d at 937.

120. *See Unger, U.S. Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153, 1183 (1985).

121. *See House Hearings, supra* note 115, at 1504-05. "[R]ecognition accorded to a foreign trustee should enhance the likelihood that a trustee of an estate appointed or elected in this country will be accorded respect when he sues to recover property located abroad." *Id.* The court in *Laker Airways* corroborated this point: "[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity . . . through the satisfaction of mutual expectations." *Laker Airways*, 731 F.2d at 937.

critical. U.S. courts must continue on the ambitious path paved by those courts that have recognized the need to confer comity in turnover requests. Only then will foreign governments institute similar policies and the Bankruptcy Code's fundamental goal be realized.

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