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INTRODUCTION

THERE is no aspect of transnational insolvency more important than application of the avoiding powers. Virtually all insolvency regimes have provisions for avoidance of certain kinds of pre-proceeding transactions that may be fraudulent or prejudicial to creditors. Amidst the increasing complexity of modern finance, it has become routine for lawyers to be asked to ensure that a contemplated transaction will not be vulnerable to attack under one of these provisions in the event a party to the transaction becomes subject to an insolvency proceeding. It is in this area, above all, that predictability is important for commercial actors, but it is equally important to avoid creating mechanical results that permit easy evasion of policies designed to ensure fairness and efficiency in commercial transactions and in insolvency proceedings.

These problems are presented in perhaps the most important transnational avoidance case ever to be decided, *In re Maxwell Communication Corporation*,[1] presently pending in the Second Circuit. The case has not yet received much scholarly commentary and the reports so far published have failed to capture the careful and subtle holdings of the bankruptcy and district courts. Thus, even though the matter pends in the Court of Appeals, it seems worthwhile to clarify the issues and the proper analysis.

The lower court opinions in *Maxwell* have demonstrated how avoidance rules can be applied sensibly in a worldwide proceeding even within the framework of the highly questionable "presumption against extraterritoriality" announced by the Supreme Court a few years ago.[2] The judges in *Maxwell* realized that in every non-obvious case there will be important elements of the challenged transaction taking place in more than one country and, therefore, no legal device can avoid the necessity for a choice-of-law analysis. Such an analysis is in any event required by the overwhelming weight of authority in the conflicts field. In *Maxwell*, that analysis reaches the same result that a simple-

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1. 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995). I was appointed by the bankruptcy court sua sponte as its amicus curiae in that case, but I represented no client and I have no stake in its outcome beyond my own convictions about the proper result.

2. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. Rev. 598 (1990).

minded approach would suggest, but in such an important and visible case, the path to the result is of enormous importance. It is also important that the courts not feel overcommitted to the choice-of-law approach that is probably necessary on the unique facts of *Maxwell*, but is less desirable as a general rule.

THE OVERALL PROBLEM

A transnational insolvency problem arises whenever a multinational commercial enterprise[3] falls into general default on its obligations. In that circumstance, legal intervention is often required, whether in the form of liquidation or reorganization. That requirement creates two legal questions, choice of forum and choice of law.[4] It must be decided what court or courts will take charge of the problem and what law will be applied to each of the many legal issues likely to arise in such a case.[5]

Traditionally, there are two approaches to these problems. The one most often applied is the "principle" of "territoriality." This is a self-serving approach to an international free-for-all, with each country claiming plenary power over assets located within its boarders and paying no attention to what other countries may say. This approach was thought to serve local creditors, although the emergence of "national treatment" (that is, nondiscrimination) in the insolvency laws of many countries may expand the benefit to large and sophisticated creditors. Because these large creditors are able to claim in many jurisdictions and be treated equally with local creditors, the territorial approach in many countries may now give preference to those creditors as well as purely local claimants.[6] Territoriality has earned the nickname "grab rule."[7]

The other approach is variously called "unity" and "universality." The distinctions between these terms are less than clear. The former focuses primarily on choice of forum—selection of a single court to administer and adjudicate a transnational insolvency—while the latter emphasizes choice of law and, in its modern version, deference and cooperation by "ancillary" courts in favor of a "primary" jurisdiction.[8]

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3. By "multinational commercial enterprise," I mean one having assets or creditors in more than one country. *See* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 Am. Bankr. L.J. 457, 458 n.2 (1991).

4. *See id.* at 461-62.

5. Although there are many multinational defaults involving small companies (for example, along the U.S.-Mexico and U.S.-Canada borders), the smaller cases are nearly invisible to scholarship, absent an empirical study, and they rarely permit litigation of issues so difficult and unsettled as those discussed here.

6. *See* Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 Brook. J. Int'l L. 499, 513-14 (1991) [hereinafter *Avoidance*].

7. *Id.* at 513.

8. *See* J.H. Dalhuisen, 1 Dalhuisen on International Insolvency and Bankruptcy, § 203[3], 3-190.2 & nn.49-51 (1986); Ian F. Fletcher, The Law of Insolvency 546

In recent years two middling positions have achieved some prominence. One of them, which I have called "modified universalism,"[9] is best represented by the case law that has emerged under section 304 of the United States Bankruptcy Code.[10] This approach focuses primarily on choice of forum, but in the modern, cooperative mode that commands deference by an ancillary court to a primary one. The adjective "modified" is justified by the restraints imposed on this cooperation with reference to the statutory requirements for deference. These requirements include evaluation of the fairness of the foreign law and the foreign proceeding, especially as to possible prejudice to United States creditors.[11]

The second recent approach can be called the "secondary proceeding" concept. It is exemplified by the convention nearing signature among the members of the European Union.[12] That approach provides for local control by each jurisdiction, because it provides little deference to a central proceeding when a local or "secondary" proceeding has been opened. Therefore, it represents a less-bold advance over territorialism than does modified universalism.[13] Nonetheless, it contemplates considerable cooperation with a foreign proceeding in cases where claimants do not have enough at stake to open a local proceeding. It also permits cross-filing by liquidators or administrators in each jurisdiction, which could lead to a much more equitable distribution across national lines.[14]

THE CHOICE-OF-LAW PROBLEM

Regardless of the approach to management of a transnational insolvency, the courts involved must decide what law to apply to pre-bankruptcy transactions that might be avoidable as fraudulent or prejudicial to creditors. The choice-of-law rules are not well developed, so it is presently hard to predict what avoidance rules might be applied in transnational cases. Even the new EU convention is unclear on this point, seeming to call for application of the primary juris-

(1990); Hans Hanisch, *Survey Over Some Laws on Cross-Border Effects of Foreign Insolvency Procedures on the European Continent*, *in* Cross-Border Insolvency: Comparative Dimensions, 12 United Kingdom Comparative Law Series 159 (Fletcher ed. 1990); Donald T. Trautman, Jay Lawrence Westbrook, & Emmanuel Gaillard, *Four Models for International Bankruptcy*, 41 Am. J. Comp. L. 573, 575-76 (1993) [hereinafter *Four Models*].

9. *See Avoidance*, *supra* note 6, at 517-18.

10. 11 U.S.C. § 304(c) (1994).

11. *See id.*

12. The convention has been initialed, but it will not be signed and ratified until an explanatory commentary has been approved. Peter Fidler, *A Small Step Forward? The Draft EU Bankruptcy Convention*, [1996] J. Int'l Banking L. 3.

13. *See Four Models*, *supra* note 8, at 602. That article discusses an earlier draft of the EU Convention, but the current draft is similar in all respects for which it is cited herein.

14. *Id.* at 608.

diction's rules,[15] but then stating special rules for security interests, real property, and setoff that would largely trump the general rule.[16]

I have summarized the law in the United States prior to *Maxwell* as follows:

> These are the possible choice of avoidance law rules:
>
> The transaction will be avoided if (1) it is only avoidable under home-country law (that is, domiciliary law governs completely); (2) it is only avoidable under local law (that is, situs or forum law governs completely); (3) case-specific choice of law rules choose home-country or local law based on the contacts and state interests presented in each case, and it is avoidable under the law thus chosen; (4) it is avoidable under *either* home-country *or* local law; or, (5) it is avoidable under *both* home-country and local law (that is, it is unavoidable unless both laws would avoid).
>
> The "rule" that seems to be emerging from the recent United States cases is the fourth: the transaction is avoidable if either law would avoid it.[17]

I have criticized the fourth rule—the rule that would avoid a transaction if either local law or the law of the primary jurisdiction would permit avoidance—and urged adoption of a rule applying the avoidance law of the primary jurisdiction in most cases.[18]

MAXWELL

The *Maxwell* case as a whole is one of the most important transnational insolvencies of modern times. When Robert Maxwell was found drowned after he disappeared from his yacht, a global empire of publishing and other businesses collapsed in a matter of weeks amidst scandal about shocking financial maneuvers. The empire was an unusual one with its true "seat" in London, where it was administered and nearly all of its financial affairs (especially loans and the grant of security) were managed, but with its principal assets in the United States in the form of various large operating companies.[19]

This ambiguous structure gave rise to a double-headed proceeding: an administration in the United Kingdom and a Chapter 11 bankruptcy in the United States. The bankruptcy judge in the United States refused to dismiss the Chapter 11 case, but provided unprecedented cooperation through appointment of an examiner, Richard Gitlin of the Connecticut bar, instructing him to work with the British

15. Convention on Insolvency Proceedings, 1995, European Union, art. 4(2)(d), (m) (Initialed Draft) [hereinafter Convention] (on file with the *Fordham Law Review*).

16. *See* Convention, *supra* note 15, arts. 5-8.

17. *See Avoidance*, *supra* note 6, at 525 (footnotes omitted).

18. *See id.* at 530-34.

19. *In Re* Maxwell Communication Corp., 170 B.R. 800, 801-02 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995).

administrators. As Judge Brozman herself described it, "The joint administrators in England and the examiner in New York, subject to the jurisdiction of both courts, have carried out the administration of MCC in unprecedented cooperation with each other . . . in accordance with a document called the 'Protocol.' "[20] She goes on to summarize the remarkable sequence of events leading to perhaps the first worldwide plan of orderly liquidation ever achieved:

> In February, 1993, building on what the Protocol had created, the joint administrators, with the concurrence of the examiner, filed their plan of reorganization (plan) and scheme of arrangement (scheme). Although separate plan and scheme documents exist, the plan and scheme are mutually dependent and, in their effect, constitute a single mechanism, consistent with the laws of both countries, for reorganizing MCC through the sale of assets as going concerns and for distributing assets to creditors. . . . Rather than carving up the assets for distribution by the two courts to different groups of creditors, the plan and scheme set up a single "pot" for distribution to all creditors. In keeping with the single distribution mechanism, creditors were permitted to submit a claim in either jurisdiction which would suffice for participation under both the plan and scheme.
>
> . . . .
>
> Voting on MCC's plan was completed on July 1, 1993, with holders of 99.3% in number and 99.98% in amount of class 3A (general unsecured) claims voting to accept the plan. I confirmed MCC's plan on July 14, 1993. The U.K. court sanctioned MCC's scheme pursuant to section 425 of the Companies Act 1985 the following week, with holders of 99.3% in number and 99.7% in amount of scheme claims voting to accept the scheme.[21]

The plan thus adopted left open the problem of actions by the administrators and the examiner with respect to possible preferences. There were very large possibilities in the form of payments received by three of the company's banks within the ninety days prior to the insolvency filings. Two of the banks were English and one was French.[22] Most of these transfers were made among accounts carried on the books of bank offices in the United Kingdom. Some were made from, or bore some other relationship to, the proceeds of sale of United States assets of the debtor. Some were denominated in pounds sterling and some in dollars. Some dollar payments were processed through New York. It seemed clear that the transfers

20. *Id.* at 802.
21. *Id.* at 802-03.
22. *Id.* at 801.

would be avoidable if subject to United States preference law,[23] but would not be avoidable if subject to British preference law.[24]

These facts, creating an action to avoid a preference under United States law, resulted in what might be called the *Laker* irony. In the 1980's, the collapse of the British discount airline founded by Sir Freddie Laker led to a classic cross-border confrontation between the United States and the United Kingdom. The irony came from the fact that the British liquidator of Laker felt compelled to bring an antitrust action in the United States against various airlines although their conduct, in all likelihood, would not have violated British law. Furthermore, British policy was squarely against application of United States antitrust law to British companies acting outside the United States. The result was a duel of injunctions that both countries found very embarrassing.[25]

A similar irony arose in *Maxwell.* As in *Laker*, the British insolvency administrators felt compelled to seek the application of United States law to avoid the payments to the European banks. As in *Laker*, those banks went to court in the United Kingdom to try to block any United States action.

Barclays Bank plc sought an injunction in the English courts to bar the English administrators from bringing a preference action against it in the U.S. Chapter 11 case.[26] The British court (Mr. Justice Leonard Hoffmann, as he then was), refused the injunction, holding that it was up to the United States courts to assess the proper law to apply to the challenged transfers. The decision was upheld by the Court of Appeals, almost entirely on the basis of the trial court opinion.[27] Justice Hoffmann expressly noted that the United States courts could best determine whether to exercise jurisdiction and what law to apply.[28]

23. 11 U.S.C. § 547 (1994).

24. The reason for the difference is that British law requires an "intent to prefer," while intent is mostly irrelevant under United States law. *See Maxwell*, 170 B.R. at 806.

25. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); British Airways Bd. v. Laker Airways Ltd., 1985 App. Cas. 58 (H.L.).

26. Barclays Bank plc v. Homan & Ors. (*In re* Maxwell Communication Corp.), 1992 BCC 757, 757; *see* Ian F. Fletcher, *The Ascendence of Comity from the Ashes of Felixstowe Dock*, 6 Insolvency Intelligence 10, 11 (1993) [hereinafter *Ashes*].

27. *Barclays Bank plc*, 1992 BCC at 757.

28. *See* 170 B.R. at 801-02 (noting Justice Hoffmann's comment). This decision was especially important to future cooperation because an earlier U.K. judgment, Felixstowe Dock and Ry. v. U.S. Lines, Ltd., [1987] 2 Lloyd's Rep. 76, had created doubts about the willingness of British courts to cooperate in cases with a U.S. center of gravity. The *Barclays* judgment seems to confirm a commitment to cooperation in transnational cases. *See Ashes*, *supra* note 26, at 12-13. It should be noted, however, that the *Barclays* judgment was also consistent with British doctrine that carefully and generously refrains from cross-border anti-litigation injunctions in most cases. *See, e.g.*, Castanho v. Brown & Root (UK) Ltd. [1981] 1 All E.R. 143, 152 (H.L.) (affirming the Court of Appeals' decision discharging an interlocutory injunction).

Thereafter, the administrators and the examiner brought actions challenging certain of the payments to the three banks.

Both the bankruptcy court and, on appeal, the district court held that United States law did not apply to the transfers and dismissed the complaints.[29]

In analyzing *Maxwell*, one must start with the sheer obviousness of applying British law to the alleged preference. How could anyone have trouble choosing the applicable law for a payment of moneys made by bank transfers within the United Kingdom to British banks, and to the London branch of a French bank, by a British company with its principal place of business in Britain? British law must have been applicable unless other factors in the case powerfully pointed to some other law.

The administrators principally relied upon two facts. One was the ambiguity created by the fact that most of the debtor's assets were in the United States. This fact was no doubt an important part of Judge Brozman's insisting on retaining United States jurisdiction and requiring the concurrence of a United States examiner in major decisions in the case. Yet the court had recognized from the start that the center of gravity of the company was in the United Kingdom, the location of its principal executive offices. For that very reason, the court had ceded primary authority for corporate governance to the British administrators, while protecting against potential injury to U.S. interests through maintenance of the Chapter 11 case and appointment of the examiner.[30]

The second fact was that certain of the moneys paid had come from the liquidation of United States assets. Indeed, in some instances it was claimed that the company had been pressured to liquidate United States assets to make the challenged payments. The plaintiffs asserted that this connection between liquidation of United States assets and the payments to the European banks was sufficient to make United States preference law applicable.

One could imagine that these contacts could have real importance in choosing applicable law in a particular case. If, for example, the record in *Maxwell* had shown that the banks had forced the company to make payments by liquidating important United States operations, thereby putting United States creditors, employees, and communities at risk, then interests to which the preference laws are relevant would have been implicated.[31] In fact, nothing of that sort seems to have

29. *Maxwell*, 170 B.R. at 818.

30. *See id.* at 802.

31. The primary policy behind United States preference law, along with equality of distribution, is lowering the pressure, and incentives, for creditors to dismantle a financially troubled debtor. 170 B.R. at 807-08; *see* Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186, 1194 (7th Cir. 1989); 4 Collier on Bankruptcy, ¶ 547.01 n.18 (15th ed. 1996); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725, 727-

been involved. The United States contacts seem to provide little connection between the challenged transfers and any legitimate interests or concerns of the United States or its citizens. The argument to the contrary was tenuous at best, although the very able advocates involved made it as well as it could be made.[32]

If it seems evident that British law should have been applied in *Maxwell*, the analysis in both courts was greatly complicated by the "presumption against extraterritoriality" articulated by the Supreme Court in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*[33] That rule, which the Court resurrected from the long-discarded antitrust doctrine of *American Banana Co. v. United Fruit Co.*,[34] states that the courts will presume that Congress does not intend a statute to apply extraterritorially unless such an application is expressly stated.[35] Ironically, this simple-minded concept made it harder for the courts in *Maxwell* to resolve the case on the simple conflicts analysis just described.

It seems evident that the Court, in articulating the presumption against extraterritoriality, could not have meant to exclude the application of United States laws from every situation in which any element whatsoever of a transaction took place outside the United States.[36] If not, then any analysis must start with a determination whether the center of gravity of the transaction is within or without the United States.

Both the bankruptcy court and the district court recognized this key point and devoted considerable attention to this threshold question. As the bankruptcy court stated:

> Not every transaction that has a foreign element represents an extraterritorial application of our laws. The court must look at the facts of a case to determine whether they have a center of gravity outside the United States. Thus, for example, a transfer made in the U.S. by a foreign national to a foreign national conceivably could be considered a domestic transaction. So, too, a transfer made overseas

31, 756-68 (1984). *But see* Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713, 748 (1985) (arguing that the deterrent effect of preference law is very weak); John C. McCoid, II, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 Va. L. Rev. 249, 261-65 (1981) (same).

32. The plaintiffs made several other arguments as well. In particular, they argued that the existence of a "full" bankruptcy proceeding in the United States (that is, a proceeding other than an "ancillary" proceeding under § 304 of the Code) necessarily made the avoiding powers applicable. *Maxwell*, 186 B.R. at 819. Neither court had much difficulty with that argument. If such an argument had any force, it would yield a rule that a bankruptcy court must dismiss a full bankruptcy with foreign elements or must apply United States law to all transactions involving the debtor, a rule impossible to justify.

33. 499 U.S. 244, 248 (1991).

34. 213 U.S. 347 (1909).

35. *Id.* at 357; *see* Turley, *supra* note 2, at 604.

36. *Maxwell*, 170 B.R. at 809.

> to a U.S. creditor of a U.S. debtor conceivably could be considered a domestic transaction. *See In re* Pacat Finance, 295 F. 394, 401, 411 (S.D.N.Y. 1923). Once it is determined that the facts as a whole have a center of gravity outside the U.S., then the court's attention should shift to the propriety of the proposed extraterritorial application of U.S. law.[37]

The district court in *Maxwell* was perhaps even more conscious of the importance of avoiding a simple-minded application of the presumption based upon the place where the transfer physically took place. The court specially addressed and rejected the simple-minded approach:

> Because MCC actually parted with the transferred funds in England, it is possible to view the transfers as occurring wholly outside the borders of the U.S. However, such a limited conception of "transfer" for purposes of an extraterritoriality analysis would have potentially dangerous implications for the future application of § 547: a creditor—be it foreign or domestic—who wished to characterize a transfer as extraterritorial could simply arrange to have the transfer made overseas, a result made all too easy in the age of the multinational company and information superhighway. . . . The fact that funds were electronically transferred to accounts in England is not, standing alone, sufficient to characterize the events as extraterritorial.[38]

The district court then decided that the contacts with the United States—including the sale of assets and the banks' subsequent filing of claims in the proceeding—were not enough to overcome the many elements of the transaction connected with the United Kingdom, a conclusion that would have resulted from a straight-forward choice-of-law analysis as above. Having thus jumped through the hoops erected by the presumption, the court applied it and held that United States law did not apply.[39]

Although the rhetoric and analysis in the two courts differed in various respects, both opinions demonstrated a sensitivity to the dangers involved in a literal application of a presumption against extraterritoriality based on the "location" of a transaction narrowly defined. That danger is particularly great as to a preference claim in a transnational

37. *Id.*

38. *Maxwell*, 186 B.R. 807, 816.

39. *Id.* at 818-21. The plaintiffs had also argued that the "effects" rule required application of United States preference law because of the effects of liquidation of assets to make the payments, and because of a consequent lower distribution in the United States proceeding. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (applying the Sherman Act). The district court declined to decide if the effects test could be applied in the face of the presumption against extraterritoriality, but held that the effects in *Maxwell* were in any event too attenuated to support application of the effects rule. 186 B.R. at 821. This holding seems to be a reiteration of its finding that the United States contacts were simply insufficient to apply United States law.

insolvency because the payment itself, the physical transfer, is easy to separate rhetorically and easy to manipulate factually. Conversely, it can also be a trap for the unwary.

If one views the place of physical delivery of a check, for example, as controlling as to applicable preference law, then one might apply United States law to avoid as a preference a payment from a British account of an Indian company to the Hong Kong account of a Thai company because the check was delivered in New York, despite no other contacts with the United States. The result is obviously absurd. On the other hand, once a court admits that the physical place of payment is not controlling, then a conflicts analysis resting on the materiality of various contacts is inevitable. In the example just given, is the governing jurisdiction the principal place of business of the debtor, the location of either of the two accounts, the principal place of business of the creditor, the agreed place of payment (under the original contract), or the jurisdiction of the "proper" law of the contract? The shelves of every law library groan with the weight of literature demonstrating the hopelessness of this sort of simple-minded territoriality.[40] Both the courts in *Maxwell* realized that it would be especially hopeless in the instance of preference law.[41]

The bankruptcy and district courts in *Maxwell* performed a great service by establishing an analytical approach that requires consideration of United States contacts, and ultimately United States interests, in preference actions in transnational cases. Nonetheless, it must be conceded that the result is essentially a case-by-case choice-of-law analysis.[42] That approach pays the price of unpredictability to avoid the harmful consequences of a mechanical territorial rule. To some extent, of course, any predictable rule tends to be mechanical, with the frequent consequences of potential manipulation and of results too often unrelated to the interests at stake. But some sorts of rules are more predictable while being less mechanical and therefore more related to the merits and less manipulable.

I have suggested previously a general rule for preference actions in transnational cases that would presumptively apply the law of the home-country of the debtor.[43] The presumption could be overcome in

40. *See generally* Robert A. Leflar, American Conflicts Law §§ 86-88 (3d ed. 1977) (discussing choice-of-law theories); Russell J. Weintraub, Commentary on the Conflict of Laws §§ 3.1-3.2 (3d ed. 1986) (same).

41. The territorial approach also creates a serious risk of creating a sort of international Bad Lands, where no country's law is applied and international rogues are free to operate at will. *See generally* Jay Lawrence Westbrook, *Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 Tex. Int'l L.J. 71 (1990) (reviewing A.D. Neale and M.L. Stephens, *International Business and National Jurisdiction* (1988), and discussing the need for international agreement regarding regulation of transnational economic activity).

42. Indeed, the bankruptcy court in *Maxwell*, in a remarkably thorough and analytical opinion, did a choice-of-law analysis as well. 170 B.R. at 816-18.

43. *See Avoidance*, *supra* note 6, at 529.

appropriate cases, as where the transaction was between a local branch and a local merchant and was otherwise entirely local, so that application of local preference law would match ordinary expectations.

CONCLUSION

Worst luck for someone of my views that the first great case of transnational preference law in the United States in modern times should be *Maxwell*, one of the uncommon instances where the debtor's home country might be subject to some plausible debate.[44] In a case like *Maxwell*, a particularized choice-of-law analysis may be unavoidable. In most transnational cases, however, the home country of the debtor-transferor of an alleged preference will be beyond serious argument. I continue to believe application of a home-country rule in those cases makes the most sense.

In a prior article, I argued as follows:

> If every creditor knows in advance that the debtor's home-country avoidance rules will be applied to all prebankruptcy transactions, the costs and risks of credit extension under various circumstances will be far more predictable than they are today. For example, the extent and timing of permissible setoffs will be known, so that the benefits of requiring maintenance of balances in lending banks can be calculated. The costs and benefits of obtaining security can be better predicted as well, in part because the degree of protection provided to the unsecured creditors body can be assessed. Even more obviously, creditors will be better situated to evaluate the competing risks presented by a proposed restructuring of a troubled debtor, knowing the extent to which self-help by noncooperating creditors will be curable through a bankruptcy filing.[45]

No other rule—a mechanical territorial rule or a contacts analysis—can produce the same level of predictability. Although *Maxwell* is not the case in which a home-country rule can be easily applied, it is to be hoped that its resolution in the Second Circuit will leave open the possibility of adopting a home-country presumption when the right case comes along.

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44. I argued in my amicus brief that the home-country rule should apply in *Maxwell*. *See supra* note 1. My theory was that despite the United States assets the company was essentially English and therefore application of English law was appropriate, producing the same result as an ordinary choice-of-law analysis. The bankruptcy court flatly rejected my position, in large part because the court believed that position would require a special rule for preference conflicts analysis different from that applied for other aspects of the case. 170 B.R. at 817. I believe this point is related to the larger tension between maintaining the Chapter 11 proceeding in *Maxwell* while recognizing that its center of gravity was in England.

45. *See Avoidance*, *supra* note 6, at 529-30.