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Text

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Introduction

Cross-border insolvencies are not a new phenomenon. However, it was only relatively recently that great strides have been made toward more coordinated and efficient cross-border bankruptcies. Despite these advances, it must be acknowledged that some problems continue to resist solution in any consistent fashion. One of those persistent problems, and the topic of this paper, is whether property subject to security interests should be funneled through the "main" court overseeing the bankruptcy when doing so will abridge the secured creditor's remedies or entitlements. How sacrosanct should security interests be when cooperation is sought in the context of an international bankruptcy case?

When cross-border insolvency occurs, tribunals in different countries oversee aspects of the international bankruptcy case. Which court will collect, administer, and distribute the various assets of the debtor in light of the differing priorities that exist among the countries overseeing the case? And to what extent will one tribunal impinge on the rights of a secured creditor in order to cooperate with another tribunal's collection, administration, and distribution efforts? The issue of how to treat property subject to the claims of secured creditors is neither small nor merely academic. The issue has been sharpened by two developments. First, the international presence of companies has reached an unprecedented level. The entire globe now furnishes both the tools for enterprises' operations and the customers for enterprises' products. Second, the legal landscape has changed substantially with the promulgation (and adoption by a number of countries) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency Proceedings.

This article is divided into three sections. The first briefly discusses international bankruptcy theories. In the second section, the article gives an overview of Chapter 15 of the Bankruptcy Code, which represents United States' adoption of the Model Law. Lastly, the article focuses on how, based on the modern statutory regime and relevant case law, assets that are subject to security interests are to be remitted for distribution to "home" countries. We argue that the scheme available in the current statutory regime is sufficient to resolve the tension between appropriate protection of secured creditor interests and the cooperation required to achieve the ends of modified universalism.

I. Theories of and Approaches to International Bankruptcies

A. International Bankruptcy Generally

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (the "Bankruptcy Code").¹ The Act contained a new Chapter 15, essentially adopting the Model Law on Cross Border Insolvency promulgated by UNCITRAL in 1997.² Although Chapter 15 is discussed at length in Section II of this paper, and is the backbone of the analysis therein, it is important to provide a **[*515]** brief overview of the general cross-border bankruptcy theories that informed the development of the Model Law.³

Prior to the Model Law, there was largely a void with respect to a global substantive framework to deal with international bankruptcies.⁴ As a result, companies with an international presence focused first on where - in what country - they would file for bankruptcy.⁵ The country of filing would be the bankruptcy's home court.⁶ The focus on which country would act as the home court was done in anticipation of that country applying its own laws, including choice of law rules.⁷ The choice of forum decision was clearly influenced by an analysis of which country had laws that favored the debtor's needs.⁸ Unsurprisingly such debtors often had assets in more than one country that were subject to security interests of creditors located in different jurisdictions. By choosing a given country as a forum, the debtor might avoid a priority that would otherwise be enjoyed by a particular creditor constituency in another country where some assets or operations were located.

Of course, choosing the forum of its bankruptcy case is only half the battle for any enterprising international debtor. The home court might have great difficulty in convincing a court in another country (the ancillary or helper court) to funnel assets in the ancillary country through the home court for administration and distribution in accordance with the home court's rules of priority and distribution. This difficulty may be especially acute when a local creditor's priority or security interest might be impaired or lost in the home court proceeding. For instance, Country A, as the home court, might ask that Country B, as the ancillary court, remit assets located in Country B to Country A for distribution to all of the debtor's creditors, including the creditors that are located in Country B. Country B, however, notes that the local secured creditors will be harmed by the distribution scheme of Country A's insolvency laws because they do not enjoy the same priority as they do under Country B's insolvency laws. Whether Country B decides to cooperate with Country A's request will depend on Country B's views of the duties it owes to the local creditor, relative to its views of its obligation to cooperate with the larger insolvency goals of achieving a coordinated global resolution of the enterprise's financial problems.

Although different countries' insolvency laws may be poles apart on specific issues - such as the order in which creditors are to receive distributions from the bankruptcy estate - it is also true that there are common principles that

¹ Edward S. Adams & Jason K. Fincke, Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism, [15 Colum. J. Eur. L. 43, 46 \(2009\)](#).

² [11 U.S.C. § 1501\(a\)](#) (2005).

³ After all, as Vern Countryman noted, "to understand how we got where we are, it is necessary to understand where we were." [Marshall v. Stern, 600 F.3d 1037, 1050 \(9th Cir. 2010\)](#) (quoting Vern Countryman, Scrambling to Define Bankruptcy Jurisdiction, 22 Harv. J. On Legis. 1, 2 (1985)).

⁴ See Adams & Fincke, *supra* note 1, at 45 (stating that until recently the international community had not been able to effectively coordinate cross-border insolvencies).

⁵ *Id.* at 47.

⁶ See *id.* (stating that "no court will conduct bankruptcy proceedings pursuant to the laws of another jurisdiction").

⁷ See *id.* ("The choice of forum and the choice of law are intertwined in the area of international insolvency because no court will conduct bankruptcy proceedings pursuant to the laws of another jurisdiction.").

⁸ See *id.* at 45 (classifying domestic insolvency laws as either "debtor-or creditor-oriented").

tend to be found in most insolvency laws worldwide.⁹ One such common principle is the "Principle of Collectivity," which is the "recognition that insolvency constitutes an **[*516]** example of the so-called "common pool problem" which arises whenever conditions are such that more than one person has rights over the same finite fund of resources."¹⁰ Even within a given country, there is always a tension between the broader distributional purposes of a bankruptcy proceeding and the more individualized concerns expressed as priorities of one sort or another. We include here the de facto priority that results from secured creditor status when that status is recognized and preserved in the insolvency proceeding.

That tension is heightened when the insolvency involves more than one country. Two competing notions regarding how to resolve that tension in the cross-border context have emerged over the years, roughly grouped under two basic doctrines - universalism and territorialism.¹¹ The doctrine to which Country B, the helper court, subscribes will largely determine whether it will grant Country A's request to funnel assets through Country A for purposes of administration and distribution, or deny the turnover request and retain those assets to administer and distribute pursuant to Country B's laws.

B. Pure Universalism and Pure Territorialism

Country B's reaction to a request by Country A is likely to depend on whether its laws have a universalist slant, or a territorialist slant. Unsurprisingly, both doctrines have both benefits and drawbacks.¹² The following is a concise description of the doctrines.

Universality is the conflict of laws approach to international insolvency disputes[,] which favors resolution of all claims against the debtor's estate in one proceeding initiated in the debtor's domicile country. All the debtor's property, wherever located, is removed to that jurisdiction for consolidation; all creditors must pursue their claims in the same forum. Under principles of comity, the judgment that results is recognized and enforced by all foreign courts. Two factors are said to support this approach: increased economy (by avoiding the chaos of multiple duplicative proceedings around the world), and greater equality of treatment for creditors (through consolidation of assets and claims). The opposing doctrine of territoriality or pluralism accords no extraterritorial effect to the laws of a foreign country; a bankruptcy proceeding under domestic law may be initiated against a foreign debtor and his domestically held assets without regard for concurrent insolvency proceedings or judgments of other countries.¹³

Under pure universalism, "the dominant case in the home country is called the "main' case or proceeding. A case in any other country is called a "secondary' or "non-main' case or proceeding. Territorialism does not require such specialized **[*517]** terminology because every case filed in a separate country is its own main case."¹⁴ Thus, if Country B subscribes to pure universalism, it is likely to grant Country A's (the home country) request to send to Country A assets to be distributed under Country A's laws. However, if Country B adheres to territorialism as the right approach, it will keep the assets in question and distribute them according to its own distribution rules.

But which doctrine is the "right" doctrine, prescriptively? Answering that question (if it can be answered at all) must start with understanding the underlying principles that inform each theory. Professor Fletcher noted that the two doctrines encompass two pairs of contradictory hypotheses that are based upon (i) the philosophy of bankruptcy on

⁹ Ian F. Fletcher, *Insolvency In Private International Law* 8, para. 1.07 (James J. Fawcett ed., 2d. ed. 2005).

¹⁰ *Id.* para. 1.08, at 9.

¹¹ See Adams & Finke, *supra* note 1, at 47 (describing universalism and territorialism as principles of international insolvency law).

¹² See *id.* at 52-55, 57-58 (describing the strengths and weaknesses of universalism and territorialism).

¹³ Stacy A. Morales & Barbara A. Deutsch, [Bankruptcy Code Section 304](#) and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity, *39 Bus. Law. 1573, 1586 n.70 (1984)* (citing John D. Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 *Case W. Res. L. Rev.* 631, 633-34 (1980)).

¹⁴ Adams & Fincke, *supra* note 1, at 48.

the one hand, and (ii) the effects of bankruptcy on the other. ¹⁵ Universalism has as its core the notion of "unity of bankruptcy," which ideally would "preclude any subdivision of insolvency proceedings into two or more distinct administrations governed by the laws of separate states." ¹⁶ For every debtor there should be a unified process of administration with all claims and interests channeled through the one main proceeding. ¹⁷ Territoriality, by contrast, has at its core the principle of plurality, which accepts the "possibility of plurality of proceedings, their exact number and jurisdictional location to be determined by the circumstances of the instant case." ¹⁸ Implicit in this principle is the recognition that insolvency laws do not, of themselves, have an extraterritorial reach, dealing as they must with the application of a given country's rules to a collection of property within the jurisdictional reach of that country. ¹⁹

On the one hand, universalism has the benefit of being most in line with the common fund ideal of bankruptcy itself in that it appears to be "in fullest harmony with the principal of collectivity and the equal treatment of all creditors on a global basis." ²⁰ On the other hand, however, universalism may lead to injustice among creditors in that parties in jurisdictions other than the debtor's home country may have their expectations defeated because of the imposition of the home country's laws on their dealings with the debtor. ²¹ Another negative might be the cost associated with funneling all claims and assets through one home bankruptcy because, practically, it might be cheaper to deal with far-flung assets in the country in which they are located. ²² Additionally, states are "averse to allowing foreign laws to operate with extraterritorial effect in relation to property located within their jurisdiction." ²³ Absent a treaty or some other kind of relationship, states are less likely to let property located in their jurisdiction be administered under anything **[*518]** other than local laws. ²⁴ Lastly, especially with regard to corporate groups, some critics of universalism assert that "the home country standard is vulnerable to strategic manipulation," for example, forum shopping. ²⁵

Being the opposite side of the coin, the benefits of territoriality are obviously the detractions for the universalist approach, to wit, a territorialist approach may be more cost-effective in certain circumstances, local creditors do not have their expectations defeated, and property is administered and distributed in each bankruptcy case according to the local law in which the property resides. ²⁶

¹⁵ Fletcher, *supra* note 9, paras. 1.11-1.13, at 11-13.

¹⁶ *Id.* para. 1.12, at 11-12.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* para. 1.13, at 13.

²⁰ *Id.* para. 1.12, at 11-12.

²¹ Fletcher, *supra* note 9, para. 1.12, at 12.

²² *Id.* Though in fairness it is recognized that a foreign representative might "realize" the assets in their country of location, moving only the proceeds of such realization to the home country for distribution. This, it might be noted, is certainly contemplated by the Model Law. See Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998) [hereinafter Model Law] (noting that "the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person.").

²³ Fletcher, *supra* note 9, para. 1.12, at 12.

²⁴ *Id.*

²⁵ Lynn M. LoPucki, Cooperation In International Bankruptcy: A Post-Universalist Approach, [84 Cornell L. Rev. 696, 709, 720-21 \(1999\)](#).

²⁶ See Fletcher, *supra* note 9, para. 1.12, at 12 (discussing the drawbacks of universalism).

With respect to the effects of a bankruptcy, universalism expects that the effects - on both the property and the interests of the debtor - will be worldwide, regardless of whether the property and/or interests are located in the home country.²⁷ The drawbacks to this ideal are the same as noted above regarding the philosophical interests in universalism: additional costs, frustrated creditor expectations, and applicable law being inconsistent with traditional choice of law rules. Moreover, there is the practical reality that a given country's law can only have an effect in another country if the second country lets it.²⁸ "Thus, while it is not uncommon to find the national law expressed in terms which declare that the insolvency proceedings of that system shall enjoy universal effect, ... no state has yet adopted, freely and unilaterally, a policy of according matching effect to insolvency proceedings conducted under the laws of foreign states."²⁹

Conversely, under the territorialist point of view, the effects of a bankruptcy proceeding are limited to property and interests that are located in that specific territory.³⁰ The main problem with limiting the effects of a bankruptcy under the territoriality model is that it simply does not address more complex cases in which the debtor has its hands in varied interests in a number of countries.³¹ That in turn means inconsistent and uncoordinated rulings that are likely to frustrate a unified restructuring of a global enterprise.

C. Modified Universalism and Cooperative Territorialism

Today, because neither pure universalism nor pure territorialism is practical, "modified universalism" and "cooperative territorialism" have emerged as plausible alternatives.³² Although modified universalism already has its expression in the [*519] Model Law,³³ both theories are worth examining. Treating universalism and territorialism as two ends of a spectrum, modified universalism begins with the idea of pure universalism and then moves toward the center of the spectrum by incorporating certain territorialist tendencies.³⁴ "Modified universalism recognizes the problems of a global system where debtors can easily choose a substantive law that will govern their insolvency and that is contrary to the expectations and interests of creditors."³⁵ For this reason, under modified universalism, ancillary courts retain the right to administer the assets located within their jurisdiction pursuant to local law when circumstances so require.³⁶

Certainly, modified universalism has its critics. Professor LoPucki believes that the very territorialist nature of modified universalism - for example, allowing ancillary courts to retain their right to protect local creditors - is its downfall.³⁷ One of the main benefits of pure universalism is considered to be the predictability it gives the debtor's

²⁷ Id. para. 1.13 at 12-13.

²⁸ Id.

²⁹ Id.

³⁰ See id. (discussing territorial jurisdiction).

³¹ See id. (discussing drawbacks with the territoriality model).

³² See LoPucki, *supra* note 25, at 700-02 (describing the evolution away from pure universalism in response to historical problems and introducing LoPucki's theory of cooperative territoriality). Professor LoPucki notes that "bankruptcy literature generally disparages territoriality and sometimes equates it with a lack of cooperation between countries. Perhaps because of this history, territoriality has failed to emerge as an alternative to universalism as a foundation for ordering the international bankruptcy regime." Id. at 701-02. This has some truth. As such, this article endeavors to use the terms "universalism" and "territorialism" without passing judgments on either doctrine, except to note that neither is perfect.

³³ See Adams & Fincke, *supra* note 1, at 59-64 (describing the Model Law and identifying modified universalism as the "key concept used by the Model Law").

³⁴ See id. at 50 (noting that "modified universalism embraces universalism's core belief of cooperation, but maintains the primacy of local courts' power to exercise discretion with respect to the 'fairness of the home country procedures' and with respect to protecting the interests of local creditors").

³⁵ Id. at 51.

³⁶ Id.

lenders because they will know the debtor's home country in advance (whether this is actually the case is also the subject of vigorous dispute).³⁸ But, under modified universalism, predictability is sacrificed because the "regime or regimes that will ultimately distribute the debtor's assets may depend on the country in which the assets are located at the time of bankruptcy."³⁹ Additionally, the lenders will have to predict "what intercountry differences in bankruptcy law the forum court will consider substantial."⁴⁰ Given the differences in bankruptcy laws among countries, LoPucki believes that, under modified universalism, the ability of each court to enforce its own laws eviscerates one of the principal benefits of pure universalism, even though modified universalism purports to retain it.⁴¹

Moreover, LoPucki believes that modified universalism does not provide any solution to the problem of forum shopping, which he takes to be one of the main evils underlying pure universalism.⁴² Although LoPucki does admit that modified universalism lowers the stakes that are affected by forum shopping under pure universalism, he believes that fact to be irrelevant because debtors will still forum shop, regardless of whether the stakes are a bit lower.⁴³ As an example, LoPucki points to the fact that, in the United States - where bankruptcy laws and procedures are generally uniform, and, consequently, the benefits of forum shopping are not as palpable - debtors engage in "rampant forum shopping among bankruptcy courts" ⁴⁴ LoPucki also believes that because corporate bankruptcy is a big business, countries can and do compete for bankruptcy business, which presumably leads to a "race to the bottom" with respect to bankruptcy laws that are favorable to **[*520]** debtors.⁴⁵ For all these reasons, LoPucki believes that modified universalism is not a viable alternative to pure universalism.⁴⁶

Cooperative territorialism, proposed by Professor LoPucki, starts from the other end of the spectrum - with the idea of pure territorialism - and incorporates aspects of universalism, albeit in a purely discretionary manner.⁴⁷ Under cooperative territorialism, each country is expected to administer its own bankruptcy case, with no one case to be considered a main case or an ancillary case, and with each country administering the assets located within its jurisdiction pursuant to local law.⁴⁸ "No nation need recognize foreign authority over domestic assets or sacrifice the interests of local debtors or creditors in particular cases. The elimination of that universalist tension provides the foundation for cooperation among courts and representatives that will be mutually beneficial in each case."⁴⁹ LoPucki suggests five areas that he believes ought to be the subject of cooperation:

(1) the establishment of procedures for replicating claims filed [in a bankruptcy proceeding] in any one country in all of them; (2) the sharing of distribution lists by representatives to ensure that later distributions do not go to creditors who have already recovered the full amounts owed to them; (3) the joint sale of assets, when a joint sale would

³⁷ LoPucki, *supra* note 25, at 728.

³⁸ *Id.* at 728-29.

³⁹ *Id.* at 729.

⁴⁰ *Id.*

⁴¹ *Id.* at 728.

⁴² *Id.* at 730.

⁴³ LoPucki, *supra* note 25, at 730.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *id.* at 720-32 (identifying the problems caused by modified universalism, and explaining why it is inferior to pure universalism). The authors here reserve any judgment regarding whether this conclusion is warranted, as it is beyond the scope of this article.

⁴⁷ Adams & Fincke, *supra* note 1, at 56-58.

⁴⁸ LoPucki, *supra* note 25, at 742-43.

⁴⁹ *Id.* at 750.

produce a higher price than separate sales in multiple countries or when the value of assets within a country is not sufficiently large to warrant separate administration; (4) the voluntary investment by representatives in one country in the debtor's reorganization effort in another; and (5) the seizure and return of assets that have been the subject of avoidable transfers.⁵⁰

Cooperative territorialism is said to have a number of advantages. It solves the "home" country problem, it provides greater predictability to lenders, and it is a much less complex system than universalism.⁵¹ LoPucki does recognize that cooperative territorialism comes with its own set of problems, but he believes that they are still less onerous than the problems encountered by modified universalism.⁵² Among the evils he identifies with cooperative territorialism are: the requirement of multiple claim filing and prosecution, the fact that voluntary cooperation is not a requirement, the strategic removal of assets from one country to another before bankruptcy is filed, and the general lack of protection for what he terms "involuntary" creditors.⁵³

The most serious problem that has emerged with LoPucki's cooperative territorialism appears to be that the regime does not require cooperation. When courts eschew cooperation, cross-border bankruptcies become messy fairly quickly. For instance, in *Lehman Brothers*, the English Court of Appeal came down with a [*521] decision that directly conflicted with a later U.S. bankruptcy court decision on the same exact issue.⁵⁴

The weakness of cooperative territorialism has also been highlighted in the liquidation of Allen Stanford's banks,⁵⁵ which, due to the lack of cooperation among the various courts overseeing such liquidation, has led to some very interesting - and conflicting - rulings from Canadian and English courts. Broadly speaking, in the Stanford case there was a ruling from the Court of Appeals in England, recognizing the liquidation that is taking place in Antigua as a foreign main proceeding,⁵⁶ while two rulings of the Quebec Superior Court held to the contrary, finding the U.S. receivership to be the proper foreign main proceeding.⁵⁷ The recognition fights are important because the recognized proceeding will be able to recover assets in the ancillary country for purposes of distribution in the foreign main proceeding.⁵⁸ In addition to the battles taking place in Canada and England, the Antiguan liquidators

⁵⁰ *Id.*

⁵¹ *Id.* at 751-52.

⁵² *Id.* at 753-60.

⁵³ *Id.* at 753-59.

⁵⁴ *Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. Ltd. (In re Lehman Bros. Holdings Inc.)*, 422 B. 407, 412 (Bankr. S.D.N.Y. 2010); *Perpetual Tr. Co. Ltd. v. BNY Corporate Tr. Servs. Ltd.* [2009] EWCA (Civ) 1160, [2010] Ch. 347 (Eng.); Stephen Lubben, *Lehman, Synthetic CDOs, Sapphires, etc., Credit Slips* (Jan. 28, 2010), <http://www.creditslips.org/creditslips/2010/01/lehman-synthetic-cdos-sapphires-etc.html> (describing the two opinions).

⁵⁵ For a somewhat outdated but informative description of the various ongoing cases that are liquidating Allen Stanford's banks, please see *The Stanford Sag - Chapter 16: Settlin' Words? Or Something Else?*, *The S. Bay L. Firm L. Blog* (Feb. 15, 2010), <http://www.southbaylawfirm.com/blog/?tag=stanford-financial-group>.

⁵⁶ *In re Stanford Int'l Bank* [2010] EWCA (Civ) 137, [2010] W.L.R. 941 (Eng.).

⁵⁷ *In re Stanford Int'l Bank Ltd.*, 2009 QCCS 4109 (Can.); *In re Stanford Int'l Bank Ltd.*, 2009 QCCS 4106 (Can.). The decisions were later upheld by the Quebec Court of Appeals. *In re Stanford Int'l Bank Ltd.*, 2009 QCCA 2475 (Can.). For a thoughtful analysis of these decisions, see Fraser Hughes, *Are We Moving Further Away From Common Principles: The Stanford Bank Decisions in England and Quebec*, 2010 *Caribbean Insolvency Symp.* (Am. Bankr. Inst.) 243, available at <http://www.abiworld.org/committees/newsletters/international/vol7num2/index.html>.

⁵⁸ See Matthew Campbell, *Stanford's Antigua Liquidators in Talks With Janvey*, *Bloomberg* (Feb. 5, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aw6RVvY6ASnU> (discussing Janvey and the U.S. Department of Justice's appeal of a United Kingdom ruling prohibited them from controlling Stanford's U.K. assets and Vantis's consideration of appealing a Canadian court ruling that Janvey controls Stanford's Canadian assets).

and the U.S. receiver were gearing up for fights over assets situated in other locations, such as Switzerland.⁵⁹ In early 2010, there was also a pending application for recognition in the United States by the Antiguan liquidators as well as pending motions by creditors in the U.S. receivership for permission to file involuntary bankruptcy proceedings against Mr. Stanford's entities.⁶⁰ Apparently, in late January or early February 2010, the U.S. District Court judge presiding over the SEC receivership and the petition for recognition in the United States agreed to cancel various matters pending settlement discussions that were taking place between the U.S. receiver and the Antiguan liquidators.⁶¹ Notably, as of February 2010, the U.S. receiver had collected approximately \$ 145 million and spent 40% of that recovery - almost \$ 58 million - in fees and costs for operating expenses, receivership costs, and fees.⁶²

[*522] Suffice it to say that cooperation has been slow in coming in both the Lehman case and the Stanford case. The conflicting positions that have been taken in these cases undermine LoPucki's assumption that cooperation will take place between parties that are interested in an international insolvency, or even that cooperation will occur when there is enough money at stake to make it in everyone's best interests to cooperate.

Ultimately, despite the various benefits and costs associated with each modern model, what has currently emerged as the dominant theory is that of modified universalism. That is certainly the case in those countries that have adopted the Model Law. Still, aspects of cooperative territorialism emerge in the practice and the case law. It is far from irrelevant.

II. Statutory Framework Available in the United States

Cross-border insolvencies do not exist in a vacuum. They occur against the backdrop of a given country's statutory law and common law (if any).⁶³ Consistent rules enhance the ability of creditors to assess risk and consequences in the event insolvency ensues.⁶⁴ It was to that end that such consistent effort was put into the development of a

⁵⁹ *Id.*

⁶⁰ Hughes, *supra* note 57, at 260; The Stanford Saga - Chapter 10: "Bleak House" Redux?, The S. Bay L. Firm L. Blog (Oct. 19, 2009), <http://www.southbaylawfirm.com/blog/?tag=jaime-alexis-arroyo-bornstein>.

⁶¹ The Stanford Saga - Chapter 16, *supra* note 55.

⁶² Laurel Brubaker Calkins & Andrew M. Harris, Stanford Lost It All in a Year: Fortune, Yachts, Right to Name, Bloomberg (Feb. 17, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aV6OHeNbWQLo>.

⁶³ See Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings plc, [2006] UKPC 26, [16], [2007] 1 A.C. 508, (appeal taken from Isle of Man) (U.K.) (discussing the common law principle of universalism, which has been applied in England since 1764); Samuel L. Bufford, et. al., Int'l Insolvency 1 (Fed. Judicial Ctr. 2001), available at http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=5039C7BED064416285256CA30068DF69, (noting that the "legal rules governing insolvency law and practice are rooted deeply in the legal traditions of individual countries. In part this arises because insolvency law preempts and supersedes many rules of both substantive and procedural law ...").

⁶⁴ Judge Bufford puts it this way:

In calculating expected economic benefits, parties are assumed to take into account the legal systems and rules that will likely govern how their transactions are carried out and the benefits are allocated. In addition, the parties must evaluate the risks undertaken, including how these risks will be handled under the applicable legal system. If it is uncertain what legal system will govern the risks, it is difficult to quantify them. Where the distribution rules of legal systems are different, the ultimate beneficiaries of transactions may differ from those the parties have anticipated *ex ante*. Thus the application of varying distribution rules may result in the parties' entering into sub-optimal transactions, and leave them poorer than they would have been otherwise.

model law for handling the difficult issues of cooperation and coordination among countries when international insolvency cases occur.

The work and consensus-building involved in formulating and passing the Model Law was formidable, and not likely to be easily repeated.⁶⁵ Even if there were another, better model for handling cross-border insolvency cases, it is unlikely that such a model could supplant the existing Model Law - at least not in the foreseeable [*523] future. If we are to arrive at a sensible construct for when assets should or should not be turned over to a foreign proceeding when those assets are subject to a security interest, it must as a practical matter be done within the existing statutory schemes available to courts, creditors, and counsel. And this is so even though many countries have yet to adopt the Model Law. Already, the Model Law has gained sufficient traction that even countries that have not formally adopted it are nonetheless influenced by it in the manner in which they handle cross-border insolvency proceedings.

In fact, for two reasons, it is appropriate to further confine the analysis to the language of Chapter 15 of the Model Law as adopted in the United States. If the analysis offered here is to be of any real use to U.S. courts, one of the principal jurisdictions with a developed system of secured transactions, then it ought to be firmly linked to the law that U.S. courts must apply. Additionally, decisions in the United States are published and easily available via the Internet. Their sheer currency gives them greater persuasive power.

Moreover, as noted above, the law that U.S. courts are required to consult is unlikely to change in any significant way for the near term. First, it is extremely doubtful that the U.S. Congress will be able to obtain the consensus in the near term to modify, much less re-write, Chapter 15 - and that assumes that Congress would even care to do so. Frankly, international insolvency issues do not generate much political excitement. Second, abandoning Chapter 15, or even specific terms of Chapter 15, in favor of some other, non-uniform provision would contravene one of the main goals of the Model Law: uniformity.

Consequently, we limit our analysis to what is available to courts in the United States: Chapter 15, and, when relevant, common law and case law interpreting the statute. Even within these constraints, however, there is ample room for creative analysis.

A. Former § 304

When Congress enacted § 304 of the Bankruptcy Reform Act,⁶⁶ it made a dramatic turn away from a history of territorialism and committed itself full tilt to the [*524] principles of modified universalism. Section 304 was "little

⁶⁵ After over two years of work and negotiation, UNCITRAL formally adopted the Model Law on Cross-Border Insolvency in 1997. See Rep. of the Working Grp. on Insolvency Law on the Work of Its Twenty-First Session, U.N. Gen. Assembly, U.N. Doc. A/CN.9/435; UNCITRAL, 30th Sess., paras. 1-9 (1997) (providing an overview of the parties involved and the work performed that ultimately resulted in the Model Law). In 2005, the United States enacted its version of the Model Law as Chapter 15 of the Bankruptcy Code. Jay Lawrence Westbrook, Chapter 15 at Last, [79 Am. Bankr. L.J. 713, 719 \(2005\)](#). The long delay in adoption by the United States was caused by its inclusion in a larger reform bill whose consumer provisions were highly controversial. *Id.*

⁶⁶ Section 304, titled "Cases ancillary to foreign proceedings," provides in full:

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

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

short of revolutionary ... [and] there is a broad consensus of scholarly acclaim for their inspired originality of vision."⁶⁷ In 2005, when the United States enacted the Model Law as Chapter 15 of the Bankruptcy Code, it continued its commitment to the ideals of modified universalism.⁶⁸ Not surprisingly, the case law under former § 304 is still relevant to the interpretation of Chapter 15, especially as it concerns the remedies available to a foreign representative once recognition has been granted.⁶⁹ Indeed, certain provisions of former § 304 survived the enactment of Chapter 15. For instance, § 304(c) was incorporated into § 1507 (although not in an identical fashion), which represented a studied elaboration of the language of Article 7 of the Model Law.⁷⁰

Additionally, courts deciding issues that arise under §§1521(a)(5), (b), and 1522 have looked for guidance to decisions written under former § 304.⁷¹ In *Atlas Shipping*, the court looked to former § 304 for guidance in determining the scope of relief that ought to be available to a foreign representative seeking turnover of accounts

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

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

(3) order other appropriate relief.

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

(1) just treatment of all holders of 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 [\[11 U.S.C. §§101 et seq.\]](#);

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns. Bankruptcy Reform Act of 1994, § 304, **108 Stat. 4132** (repealed 2005).

⁶⁷ Fletcher, *supra* note 9, para. 4.27, at 247.

⁶⁸ The following countries have also implemented some version of the Model Law: "Australia (2008), British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and the United States of America (2005)." Status: 1997-Model Law on Cross-border Insolvency, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited August 26, 2010).

⁶⁹ See Alan Gropper, Current Developments in International Insolvency Law: A United States Perspective, 927 PLI/Comm 867, 883-84, 898 (2010); see also [In re Artimm, S.r.L., 335 B.R. 149, 158-166 \(Bankr. C.D. Cal. 2005\)](#) (applying § 304 prior to its repeal but comparing and contrasting the new provisions of Chapter 15 to the former provisions in § 304); see also [In re Iida, 377 B.R. 243, 256 \(B.A.P. 9th Cir. 2007\)](#) (comparing old § 304 to the new provisions of Chapter 15).

⁷⁰ Article 7 of the Model Law provides: "Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State." Model Law, *supra* note 22, art. 7.

⁷¹ See, e.g., [In re Milovanovic, 357 B.R. 250, 257 \(Bankr. S.D.N.Y. 2006\)](#) (ordering the turnover of property subject to a judgment lien, with the creditor being permitted to assert its lien rights in the Serbian court where the main insolvency proceedings were then pending); [In re Atlas Shipping A/S, 404 B.R. 726, 735 \(Bankr. S.D.N.Y. 2009\)](#) (examining case law under former § 304 in deciding whether property subject to a garnishment lien should be turned over to a Danish insolvency representative, with the lien validity to then be determined by the Danish court pursuant to the Danish insolvency regime).

subject to garnishment liens considering the relief available under either § 1507 or § 1521(b), and in facing the prohibition on the use of Chapter 5 avoidance actions in Chapter 15 proceedings.⁷² Atlas Shipping supported its use of § 304 jurisprudence by finding that:

The philosophies underlying former § 304 were deference to the foreign proceeding and the prevention of the piecemeal distribution of the [*525] debtor's estate. Section 304 provided a bankruptcy court with broad discretion in fashioning an appropriate remedy in a particular case. Section 304(c) outlined several factors, including comity, which a court must consider before granting a foreign representative any type of relief Many of the principles underlying § 304 remain in effect under Chapter 15. Significantly, Chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. This is evidenced by the pervasiveness with which comity appears in Chapter 15's provisions.⁷³

Thus, when the foreign representative suggested that, under the principles of comity developed under § 304,⁷⁴ the U.S. court could apply Danish insolvency law rather than U.S. insolvency law to avoid the garnishment liens, the court agreed, going so far as to say that:

Both *Cunard* [*Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452 (2d. Cir. 1985)] and *Milovanovic* [*In re Milovanovic*, 357 B.R. 250 (Bankr. S.D.N.Y. 2006)] [both cases decided under § 304] stand for the proposition that attachments that would be void under foreign law should not be accorded special status just because the foreign representative initiated an ancillary proceeding here. Both cases also stand for the proposition that in such circumstances, the attachments would be dissolved and the funds returned to the foreign forum without prejudice to any of the creditors raising arguments in the foreign proceedings. Therefore, unless the adoption of Chapter 15 altered the principles of comity recognized in *Cunard* and *Milovanovic*, the Court would grant comity to the Danish proceedings and dissolve the seven attachments filed after the Danish bankruptcy was announced.⁷⁵

Ultimately, Atlas Shipping voided the garnishment liens, turned over the accounts to the foreign representative, and held that the Danish courts would determine the rights of the creditors at issue in the case.

Historically, comity played a leading role in the United States' analytical approach to international bankruptcies;⁷⁶ however, with the enactment of § 304, [*526] comity became just one of six factors that were to be used to inform a cross-border insolvency issue. Specifically, in deciding whether to grant relief under § 304(b), courts were directed to measure the request against all six factors listed in subsection (c).⁷⁷ Ultimately, although courts took

⁷² *In re Atlas Shipping A/S*, 404 B.R. 733, 741-42 (Bankr. S.D.N.Y. 2009).

⁷³ *Id.* at 738 (internal citations omitted).

⁷⁴ *Id.* at 733.

⁷⁵ *Id.* at 736. More recently, in *In re The Int'l Banking Corp. B.S.C.*, 439 B.R. 614 (Bankr. S.D.N.Y. 2010), the court agreed with Atlas Shipping and denied (without prejudice) the request by a foreign administrator to (i) vacate two state court attachments, and (ii) turn over the cash subject to those attachments to the foreign administrator for distribution in the Bahraini proceeding, which had been recognized as a foreign main proceeding under Chapter 15. The court noted that it "would not hesitate to vacate the Attachment Orders and order the turnover of the Attached Funds if the attachment occurred after the commencement of the Bahraini proceeding ... or the Attachment Orders were plainly voidable under the law of the jurisdiction where the foreign bankruptcy is pending." *Id.* at 628.

⁷⁶ See *In re Artimm, S.r.L.*, 335 B.R. 149, 160-161 (Bankr. C.D. Cal. 2005) (saying that the sufficient protection of creditors language that exists in §§1521(b) is informed by the old § 304(c) factors.); see also *In re Atlas Shipping A/S*, 404 B.R. at 741-742 (saying that, although it is unclear how §§1507 and 1521 interact, "the legislative history confirms that Congress expected courts to interpret the provisions consistently with prior law under § 304."); see also *McGrath v Riddell* (*In re HIH Cas. & Gen.Ins. Ltd.*), [2008] UKHL 21, [30], [2008] 1 W.L.R. 856 (H.L.) (Lord Hoffmann) (appeal taken from Eng.) (U.K.) (noting that principles of universalism have informed English courts' decisions with respect to turnover of assets).

this directive to heart,⁷⁸ it could have been argued that because subsection (c)(5) explicitly listed "comity" as a factor, the remaining subsections of (c) existed merely to amplify the considerations that had always made up the comity analysis; such a reading of § 304(c) would have put foreign representatives right back into the dark ages of U.S. insolvency law (i.e., prior to 1978).⁷⁹ Thankfully, as noted above, courts did not so treat these additional § 304(c) subsections.⁸⁰ Instead, courts used § 304(c) as it was intended - to direct courts away from traditional comity analysis, thereby preventing them from simply invoking comity vel non to make its decision.⁸¹ Indeed, in *Bank of N.Y. v. Treco*, the Second Circuit said:

§ 304(c) supplants the federal common law comity analysis conducted by courts pursuant to *Hilton*. It directs courts instead to use the statutory factors to balance the reasons for and against affording comity. But the statutory factors reflect the considerations that "have historically been considered within a court's determination whether to afford comity to a proceeding in a foreign nation." And application of those factors requires that comity not be extended in some circumstances.⁸²

Ultimately, by giving courts a set of tools other than just comity with which they could work on cross-border bankruptcy issues, § 304 substantially advanced the idea of modified universalism in the United States.

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B. Chapter 15

Under Chapter 15, a foreign representative seeks recognition of a foreign bankruptcy proceeding with a view to being afforded certain "automatic" rights if the petition for recognition is granted as a main proceeding.⁸³ Chapter 15 differs from § 304 by divorcing the issue of recognition from the issue of relief sought upon recognition.⁸⁴

⁷⁷ [Bank of N.Y. & JCPL Leasing Corp. v. Treco \(In re Treco\)](#), 240 F.3d 148, 154 (2d Cir. 2001).

⁷⁸ [Id. at 148-58.](#)

⁷⁹ See Morales & Deutsch, *supra* note 13, at 19 (arguing that although the result in [In re Culmer](#), 25 B.R. 621 (Bankr. S.D.N.Y. 1982), which was one of the first decisions interpreting § 304, was correct, the court's analysis was wrong in that it "equated § 304(c) with the comity doctrine itself, [so as] to render comity the only controlling criterion ...").

⁸⁰ See, e.g., [In re Treco](#), 240 F.3d at 154 (citing to the legislative history of § 304 for the proposition that the guidelines in § 304 were "designed to give the court the maximum flexibility in handling ancillary cases"). The *Treco* court went on to note that, notwithstanding the clear directive to adhere to notions of comity in evaluating a request for assistance, the listing of factors also indicated Congress' clear intent that a given request be measured against each of those factors. "Section 304 does not implement pure universalism, however. The statute expressly directs courts to consider several factors before deferring to the foreign court." *Id.* In *Treco*, as will be discussed in greater detail later, the court concluded that one of those factors so strongly militated against according relief that relief was denied, regardless of its implications for comity. [Id. at 159](#) (holding against the principle of comity based on the difference in prioritization under U.S. and Bahamian law).

⁸¹ Morales & Deutsch, *supra* note 13, at 19.

⁸² [In re Treco](#), 240 F.3d at 158 (noting that, although courts in the Second Circuit had "decided a number of cases involving foreign bankruptcy proceedings based on principles of comity as developed by federal common law ... [and] these cases inform our understanding of comity, our decision must ultimately rest on the statutory provision, § 304(c)"). The irony is that, in *Treco*, it was believed that a slavish adherence to common law comity analysis might lead to excessive cooperation. The court's insistence that all factors be consulted resulted in the court's concluding that cooperation should not be accorded in the case sub *judice*.

⁸³ [11 U.S.C. § 1520](#) (2005). The distinction between a main and a non-main proceeding, contemplated under the Model Law, goes to the core of modified universalism, which presumes that global insolvency cases ought to be managed from a single forum under that forum's insolvency law. Getting that forum right matters much more in a scheme of modified universalism than it might in a scheme of, say, cooperative territorialism, as championed by Professor LoPucki. In deference to the importance of

Once a foreign representative gains access to United States courts via the recognition process (which is a fairly routine endeavor), judicial discretion once again plays a much larger role in the nature and scope of assistance afforded.⁸⁵ Even if the foreign proceeding is recognized as a foreign main proceeding, there is a sizable reservoir of additional relief available to the foreign representative.⁸⁶ And it is here, in these additional reservoirs, that the tension relating to property subject to a local security interest is likely to be most acute.⁸⁷

[*528] As did former § 304(b)(2), §§1521(a)(5) and 1521(b) of Chapter 15 explicitly anticipate that foreign administrators might want to gain possession of assets located in the United States for administration and ultimate distribution elsewhere.⁸⁸ Unfortunately (or perhaps fortunately, for those who favor broad discretion in the hands of a U.S. bankruptcy judge), beyond the limitations found in §§1521(b) and 1522, no further specific guidance⁸⁹ is

the main proceeding, § 1520 of the U.S. law (Article 20 of the Model Law) puts in place an automatic stay in favor of the foreign main proceeding—even if that proceeding's own laws does not afford a similarly broad remedy. It applies the expansive powers to use, sell, or lease property of the debtor within the territorial jurisdiction of the United States, a power which includes the realization of assets free of interests (including security interests). It authorizes the operation of the debtor's business within the United States by the foreign representative, without having to initiate a full bankruptcy case under Chapter 11. These are extraordinary powers, and they are automatically conferred upon recognition as a main proceeding. See [11 U.S.C. § 1520](#) (2005) (describing the effects of recognition of a foreign main proceeding).

⁸⁴ See [In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.](#), 374 B.R. 122, 132 (Bankr. S.D.N.Y. 2007) ("Section 304 did not have a recognition requirement as a first step ... Section 304 simply gave the United States courts the authority to open an ancillary proceeding and grant various broad forces of relief ... Chapter 15, on the other hand, imposes a rigid procedural structure for recognition of foreign proceedings.").

⁸⁵ U. N. Comm. Int'l Trade Law, Legislative Guide on Insolvency Law, para. 154, U.N. Sales No. E.05.V.10 (2005) [hereinafter Legislative Guide] ("Post-recognition relief under article 21 [§ 1521] is discretionary, as is pre-recognition relief under article 19 [§ 1519]."); [id. para. 157](#) ("The 'turnover' of assets to the foreign representative ... as envisaged in paragraph 2 [§ 1521(b)], is discretionary.").

⁸⁶ [11 U.S.C. §§1519](#), 1521, 1507, 1522 (2005); Model Law, *supra* note 22, art. 21; Legislative Guide, *supra* note 85, paras. 135-137, 154-157.

⁸⁷ Consider that the automatic relief permitted in a main proceeding is couched in terms of the preexisting protections accorded secured creditors under other chapters of the Bankruptcy Code. Section 1520 makes § 362 applicable, but that section in turn self-refers to § 361, which defines "adequate protection" for purposes of the Code. [11 U.S.C. §§1520\(a\)\(1\)](#), 361 (2005). "Adequate protection" is an essential element in § 362, and is a term of art with a well-developed body of case law. See [United Savings Ass'n of Tex. v. Timbers of Inwood Forest Ass'n](#), 484 U.S. 365, 370 (1988) (discussing the meaning of adequate protection in light of §§361 and 362). Similarly, the use, sale, or lease of property subject to a security interest is governed by notions of adequate protection, and all of these concepts are imported into § 1520 by virtue of its express incorporation of § 363. [11 U.S.C. §§1520\(a\)\(2\)](#), 363(e) (2005). And § 1520 by its own terms only authorizes the realization of assets. It does not authorize the transfer of those assets (or their proceeds) out of the jurisdiction of the United States, or their distribution in accordance with the distribution scheme of the foreign insolvency regime. Those remedies are only available under the discretionary provisions in § 1521. Thus, the foreign representative who wishes to actually remove the assets to another jurisdiction, and to distribute them in a manner that may be inimical to the interests of the secured creditor will have to seek relief under the discretionary provisions found in §§1521 and 1507. That, then, is where the tension arises.

⁸⁸ Bankruptcy Reform Act of 1994, § 304, **108 Stat. 4132** (repealed 2005); [11 U.S.C. §§1521\(a\)\(5\)](#), 1521(b) (2005).

⁸⁹ Of course, there are the broad policy directives of §§1501, 1506, and 1508, as well as the direction in §§1525 and 1527 that courts cooperate with one another. And there is the directive in § 1508 that the statute be interpreted consistent with its international origins. However, these broad principles are frustratingly unhelpful when a court is faced with a specific request. See, e.g., *Rubin v. Eurofinance SA*, [2009] EWHC (Ch) 2129, [71], [2010] All E.R. (Comm.) 81 (noting that "what was contemplated was that there should be practical co-operation and communication within the framework of the law in both States, but not that one State should disregard important provisions of its own legal system").

provided to help a court determine when it is appropriate to grant a request to remit local assets to the main case.
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The task of informing the court's discretion is especially difficult when security interests are involved.⁹¹ In particular, § 1521(b), requires that, before allowing local assets to be taken to a home court for distribution, the bankruptcy court be "satisfied that the interests of creditors in the United States are sufficiently protected."⁹² Likewise, § 1522 also limits a court's ability to grant relief under § 1521 to situations in which "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."⁹³ All that we are told about this phrase, so important to the task of moderating relief, is that it is not to be considered the same as "adequately protected," a term that has history and baggage that Congress intended not to import into these provisions of Chapter 15.⁹⁴

[*529] An additional section that a foreign representative might think to use in making a request for a turnover of assets is § 1507.⁹⁵ Although "the interplay between the relief available under §§1507 and 1521 is far from clear,"

⁹⁰ [11 U.S.C. §§1508](#), 1519, 1521(b), 1522(a), 1522(b) (2005). Section 1521(b) says that "the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative ... provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected." [11 U.S.C. § 1521\(b\)](#) (2005) (emphasis added). Section 1522(a) says that the court "may grant relief under § 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." [11 U.S.C. § 1522\(a\)](#) (2005). Section 1522(b) adds that the court can condition the grant of relief under §§1519 or 1521 "to conditions it considers appropriate, including the giving of security or the filing of a bond." [11 U.S.C. § 1522\(b\)](#) (2005). The discretion is accordingly broad, and the intention to protect affected parties is similarly clear, but the statutory scheme is light on the details. The court's discretion is accordingly broad, but it is informed only by the court's own good judgment, and the directive in § 1508 that the statute be interpreted with a consideration for its international origins, a clear reference to the Model Law's adoption of modified universalism as its underlying theme and thrust.

⁹¹ But see [In re Tri-Cont'l Exch., 349 B.R. 627, 637-38 \(Bankr. E.D. Cal. 2006\)](#) (believing the tools available under Chapter 15 to deal with a foreign representative's request under § 1521(a)(5) to be ample based upon the language of § 1522 and § 1506). This paper does not quarrel with the Tri-Continental court's description of Chapter 15's provisions, its citation to the Model Law's Guide to Enactment, or its analysis. But our point goes further in that Chapter 15 does not provide much guidance for purposes of determining whether, in granting relief under § 1521, the court is also sufficiently protecting the interests of creditors and other interested entities, including the debtor. The devil is always in the details. We will return to Tri-Continental later to discuss its handling of a judgment lien creditor claiming to be secured, and a foreign representative's efforts to gain control over property potentially subject to that judgment lien.

⁹² [11 U.S.C. § 1521\(b\)](#) (2005) (emphasis added).

⁹³ [11 U.S.C. § 1522\(a\)](#) (2005) (emphasis added).

⁹⁴ See H. R. Rep. No. 109-31, § 1521, at 115 (2005) ("The word 'adequately' in the Model Law, articles 21(2) and 22(1), has been changed to 'sufficiently' in sections 1521(b) and 1522(a) to avoid confusion with a very specialized legal term in United States bankruptcy, 'adequate protection'.").

⁹⁵ [11 U.S.C. § 1507](#) (2005), titled "Additional assistance" provides in full:

(a) Subject to the specific limitations stated elsewhere in this chapter [[11 USCS §§1501](#) et seq.] the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure--

(1) just treatment of all holders of claims against or interests in the debtor's property;

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

⁹⁶ it is probably true that relief available under § 1521 is not limited by the factors of § 1507. ⁹⁷ The converse is probably true as well: courts should not construe the range of relief under § 1507 to be bound by the same limitations that apply in § 1521. Section 1507 is titled "additional assistance," after all. ⁹⁸ But additional assistance under § 1507 is "subject to the specific limitations stated elsewhere in this chapter" ⁹⁹ More significantly, additional assistance is permitted only after consideration of the specific factors listed in § 1507(b) - the old § 304(c) factors. ¹⁰⁰ Given its lineage, it is unlikely that relief [***530**] under § 1507 will much exceed the sort of relief that would have been permitted under former § 304(c) - at least insofar as handing over assets that are subject to a security interest. ¹⁰¹

- (3) prevention of preferential or fraudulent dispositions of property of the debtor;
- (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
- (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

In contrast to § 1507, Article 7 of the Model Law provides: "Nothing in the present Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State." Model Law, *supra* note 22, art. 7. Congress thus made a studied decision to preserve the former § 304(c) standards in § 1507, as an additional reservoir of judicial discretion. See [In re Atlas Shipping A/S, 404 B.R. 726, 740 \(Bankr. S.D.N.Y. 2009\)](#) (discussing the additional protections that maybe available under § 1507 as additional protections to § 1521).

⁹⁶ [In re Atlas Shipping A/S, 404 B.R. at 741.](#)

⁹⁷ See [id. at 741 n.11](#) ("The legislative history makes clear that "[§ 1507] is intended to permit the further development of international cooperation begun under § 304, but is not the basis for denying or limiting relief otherwise available under this chapter." (quoting H. R. Rep. No. 109-31, at 115 (2005)).

⁹⁸ In *Atlas Shipping*, Judge Glenn noted the difference of the actual language used in § 1507 compared to § 1521. Section 1507 allows a "court to grant 'additional assistance' to the trustee ... [compared to] the language in § 1521 allowing the court to fashion 'any appropriate relief' to fit the circumstances of the case." [In re Atlas Shipping A/S, 404 B.R. at 741.](#) The court rejected the contention that the factors in § 1507 should be read to limit the scope of relief intended by the phrase "any appropriate relief" in § 1521. *Id.*

⁹⁹ [11 U.S.C. § 1507\(a\)](#) (2005). It is possible to argue that this "subject to" language is intended to invoke the considerations contained in § 1522. However, the lack of a cross reference to § 1507 in § 1522 itself more likely means that additional assistance is not necessarily subject to the "sufficiently protected" standard in § 1522. Instead, only the factors in § 1507(b) would function as delimiters on "additional assistance." If that approach is taken, then the "subject to" language in § 1507(a) must refer to limitations other than those stated in § 1522. Possible candidates (by way of example) might be the limits imposed on foreign representatives of non-main proceedings, or the limits specified in § 1513(b) regarding allowability or priority of certain kinds of claims, or the prohibition on foreign representatives bringing Chapter 5 avoidance actions under the aegis of Chapter 15.

¹⁰⁰ [In re Atlas Shipping A/S, 404 B.R. at 740-41.](#) The redesign of § 1507 is likely to permit courts to color slightly more outside the lines than they might free to do under former § 304(c). The comity consideration was moved from the listing of factors up to the chapeau of the statute, indicating Congress' intent that courts, in applying § 1507(b) give greater attention to comity considerations when considering a request for additional assistance under this section. See, e.g., [In re Metcalfe & Mansfield Alt. Inv., 421 B.R. 685, 696 \(Bankr. S.D.N.Y. 2010\)](#) ("Here, the Monitor asks the Court to provide 'additional assistance' under § 1507, specifically an order enforcing the Canadian Orders in the United States. Section 1507 directs the court to consider comity in granting additional assistance to the foreign representative.").

¹⁰¹ That said, not all security interests are created equal. In *Atlas Shipping*, the security interest in question was a garnishment lien in favor of a previously unsecured creditor, obtained within a suspect period prior to the commencement of proceedings in [Denmark. In re Atlas Shipping A/S, 404 B.R. at 730.](#) The court turned over the asset in question (a bank account) without imposing any special conditions for the preservation of the lien. See [id. at 747](#) (noting that the foreign representative could take the funds if "such funds are hereby subjected to the jurisdiction and administration of the Danish bankruptcy court" but not

As alluded to above, a request for turnover of assets that constitute the collateral of a local secured creditor for distribution in a main case is no doubt one form of relief that is specifically contemplated by, and allowed by, Chapter 15.¹⁰² However, in a scheme of modified universalism, as opposed to pure universalism, the ancillary court retains the power to deny such relief in certain circumstances.¹⁰³ Just what those "certain circumstances" might be is the question that is left unanswered by the language of the statute. Clearly, denying relief will be appropriate when to grant it would be manifestly contrary to the public policy of the United States,¹⁰⁴ or when the interests of creditors are clearly unprotected.¹⁰⁵ On the other hand, [*531] granting relief is an easy decision when the secured creditor consents to the turnover, or when the foreign regime to which the assets will be subject is equally as solicitous of protecting the secured creditor's interests as would be a U.S. court in a U.S. insolvency proceeding. This article accomplishes nothing if it only addresses the easy scenarios. Our task is to attempt to find guidance for the meaning of "sufficiently protected" when the interests of a secured creditor are at stake, to explore

imposing other conditions). The court relied on § 1521(b) as its primary authority, declining to use the factors in § 1507 to limit the relief that would otherwise be available. *Id.* at 741. It also declined to find that any special protection needed to be accorded under § 1522(b) (which permits the imposition of a security or bond in order to "sufficiently protect" a creditor's interest), because the real question had less to do with protecting the security interest, and more to do with whether the creditor was even entitled to a security interest at all. See *id.* at 739-42 (discussing available protections under § 1522(b), but focusing its discussion on whether U.S. creditors were "sufficiently protected." The Court then granted relief to the foreign representative.). That question, the court concluded, was best decided by the court presiding over the foreign proceeding, and not by the ancillary court - especially as the ancillary court would first have to make a choice of law decision regarding whether to apply Danish insolvency law or local non-insolvency law. See *id.* at 742 (ordering turnover to the foreign representative subject to its administration by the Danish bankruptcy court because it was "economical and efficient"); see also *In re Int'l Banking Corp.*, 439 B.R. at 629-30 (noting that the preferable course in that case was to defer to the Bahraini court decision on whether the attachment orders in that case were avoidable under Bahraini law.). What was clear to the Atlas court at the very least was that the U.S. insolvency law would only be relevant by analogy - there would be no reason to apply U.S. insolvency law to the question of the validity of the garnishment lien when there was no U.S. insolvency proceeding then pending. See *In re Atlas Shipping A/S*, 404 B.R. at 744 (distinguishing *Condor* as "inapplicable to this case since the foreign representative had not commenced an avoidance action under U.S. or foreign law").

¹⁰² [11 U.S.C. § 1521](#)(b) (2005).

¹⁰³ See Westbrook, *supra* note 65, at 726 (describing the United States' "discretion to fashion and limit relief depending on the circumstances of the case, including the fair treatment of United States creditors in the foreign proceeding" under a system of modified universalism).

¹⁰⁴ [11 U.S.C. § 1506](#) (2005).

¹⁰⁵ [11 U.S.C. §§1521](#)(b), 1522 (2005). As noted above, in *In re Int'l Banking Corp.*, Judge Bernstein denied the request of a foreign administrator that the court vacate two state order attachments and remit the cash subject to the attachments to the foreign administrator to distribute in the Bahraini proceeding. Judge Bernstein denied the request without prejudice because the foreign administrator did not show how it would protect those attachments in the Bahraini proceeding. In other words, the foreign administrator "put[] the cart before the horse. The Attachment Orders created [perfected liens under New York law]. If the Court vacates the Attachment Orders and "unseizes" the Attached Funds, entrusting the Attached Funds to the Administrator for administration in Bahrain, the Banks are justifiably concerned that "there will be no attachments that could be "upheld" in the Administration. Thus, the Administrator essentially asks this Court to destroy [the secured creditors'] security interest even though it might be found valid (as it should be) in the Administration.' In short, a turnover order may grant the Administrator the ultimate relief it seeks but is not entitled to in the first place." *In re Int'l Banking Corp.*, 439 B.R. at 629. Judge Bernstein also noted that the foreign administrator did not say how it intended to protect the secured creditors' interests until such time as the assets could be administered in the Bahraini proceeding. *Id.* Ultimately, Judge Bernstein denied the administrator's request without prejudice, directing the parties to seek a ruling by the Bahraini court as to whether the attachments were avoidable. *Id.* Once the Bahraini court had ruled, Judge Bernstein would allow the prevailing party to come back before him to "ask that comity be afforded to the Bahraini court's decision." *Id.* It is clear that in *Int'l Banking Corp.* Judge Bernstein put a little meat on the bones that make up the term "sufficiently protected." It seems that Judge Bernstein's intent was to ensure that the secured creditors had the ability to enforce their interests in the Bahraini proceeding, without regard to the manner in which the Bahraini court decided the issue. In other words, Judge Bernstein felt that, if he voided the attachments in the U.S., it would preclude those creditors from enforcing their liens in the foreign proceeding at all.

when (if ever) a secured creditor's rights ought to be held paramount as a matter of public policy, and to consider how § 1507 relief ought to be shaped when that relief threatens a secured creditor's rights. Already, there is some guidance in the case law, from both the United States and England.

III. Secured Creditors' Rights in Bankruptcy

Long before the enactment of either the Model Law in 1997, or its adoption in the United States as Chapter 15 in 2005, and outside of the arena of international bankruptcy law, courts have grappled with the manner in which insolvency laws should be permitted to alter secured creditors' rights. A case worth special consideration, because of its influence on the intersection of insolvency law and secured transactions, is the Supreme Court's decision from 1935 in *Louisville Joint Stock Land Bank v. Radford*.¹⁰⁶ In *Radford*, the Court struck down the Frazier-Lemke Act because it violated the Takings Clause of the [Fifth Amendment of the U.S. Constitution](#).¹⁰⁷ Broadly speaking, the Frazier-Lemke Act provided that "a farmer who has failed to obtain the consents requisite to a composition under section 75 of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire alternative options in respect to mortgaged property[.]"¹⁰⁸ The Court found that the Frazier-Lemke Act was unconstitutional because it compelled the mortgagee to relinquish the property to the mortgagor free of the lien notwithstanding the fact that the mortgage was not paid in full at some point in time through application of the security interest: in other words, it deprived the creditor of its interest in property - the mortgage - without just compensation.¹⁰⁹ The Court distinguished the Frazier-Lemke Act from the mere restructuring of secured debt in a bankruptcy case, which **[*532]** involves intrusions into the creditor's unfettered right to access to its interest in property, but not the entire elimination of its property right.¹¹⁰ Here is what the Court said:

No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lien holders. In [Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., 294 U.S. 648, 79 L. Ed. 1110](#), where, in a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act (11 USCA s 205), the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this court said: "The injunction here in no [way] impairs the lien, or disturbs the preferred rank of the pledgees. It does not more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. [Straton v. New, 283 U.S. 318, 321, 75 L. Ed. 1060](#), and cases cited." "The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy.' ...

Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of paragraph 7 [of the Frazier-Lemke amendment]. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy - an agreement which "originates in a

¹⁰⁶ [Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 \(1935\)](#).

¹⁰⁷ [Id. at 601-02.](#)

¹⁰⁸ [Id. at 575.](#)

¹⁰⁹ [Id. at 581-82.](#) Note that the right that is preserved is not the "right" to be paid in full (there is no such right), but rather the right to seek payment in full through the application of the mortgage, i.e., through recourse to the collateral; [id. at 582](#) (stating that "statutes for the relief of mortgagors, when applied to preexisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in [Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 78 L. Ed. 413, 54 S. Ct. 231](#), they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co. v. Kavanaugh*, ante, p. 56, when it appeared that this substantive right was substantially abridged." (emphasis added)).

¹¹⁰ [Id. at 583-86.](#)

voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors.' So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised by courts of law; and of admiralty. It is the same power[,] which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of the creditors. In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the mortgagee provided for in Paragraph 3 of the Frazier-Lemke amendment (11 USCA s 203(s)(3). They are not analogous to the so-called adjustment compelled by paragraph 7 (11 USCA s 203(s)(7)).¹¹¹

[*533] As strong a statement of rights as Radford may appear (and despite the fact that it has never been overruled), it has been substantially limited over the years. Radford itself set out what it claimed were five essential attributes of a secured creditor's property rights, suggesting that all five such rights are protected from incursion by the Takings Clause.¹¹² As one court candidly stated, were Radford in its unadulterated state still the law, many provisions of the current Bankruptcy Code (including the very heart of Chapter 12) would be rendered unconstitutional.¹¹³ The Supreme Court, over the years, has diluted the apparent holding of Radford itself. In *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, the Court interpreted Radford as having struck down the Frazier-Lemke Act only because "the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law."¹¹⁴ Then, in 1940, the Court completed its departure from Radford's strict limits in *Wright v. Union Central Life Ins. Co.*¹¹⁵ The Union Central Court said that "safeguards were provided to protect the rights of secured creditors ... to the extent of the value of the property. There is no constitutional claim of the creditor to more than that."¹¹⁶ The Supreme Court opted for the Union Central approach over the Radford rationale in *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.* holding that a secured

¹¹¹ [Louisville Joint Stock Land Bank, 295 U.S. at 583-86](#) (citations omitted) (emphasis added).

¹¹² [Id. at 594-95, 601-02.](#) (listing the following rights):

1. The right to retain the lien until the indebtedness thereby secured is paid.
2. The right to realize upon the security by a judicial public sale.
3. The right to determine when such sale shall be held, subject only to the discretion of the court.
4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

[Louisville Joint Stock Land Bank, 295 U.S. at 594-95.](#) In fairness, it must be noted that these rights were themselves gleaned from what the Court understood the state law there in question (in that case, Kentucky) assured to secured creditors.

¹¹³ [Albaugh v. Terrell, 93 B.R. 115, 118 \(E.D. Mich. 1988\)](#), rev'd on other grounds, [892 F.2d 469 \(6th Cir. 1989\)](#).

¹¹⁴ [300 U.S. 440, 457 \(1937\)](#) (emphasis added).

¹¹⁵ [311 U.S. 273, 278 \(1940\)](#).

¹¹⁶ [Id. at 278](#) (citation omitted) (emphasis added).

creditor did not have a right to relief from stay solely because it was not receiving compensation for the lost opportunity cost resulting from not having immediate recourse to its collateral. ¹¹⁷

[*534] The principles articulated in *Radford*, *Union Central*, and later Supreme Court decisions are reflected in the structure of the current U.S. Bankruptcy Code, which clearly allows for the rights of holders of secured claims to be altered - even significantly altered - so long as their collateral value is preserved. ¹¹⁸ It is only a complete taking of a secured creditor's property interests that is proscribed by the Fifth Amendment. Put another way, "the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral. Compare [Hanover National Bank v. Moyses](#), [186 U.S. 181, 188 \(1902\)](#) with [Louisville Joint Stock Land Bank v. Radford](#), [supra](#), and [Kaiser Aetna v. United States](#), [444 U.S. 164 \(1979\)](#)." ¹¹⁹ The Bankruptcy Code offers an example of a statute that permits considerable intrusion into a secured creditor's contractual rights, but cannot be said to entirely extinguish those rights. ¹²⁰ For instance, § 506(a) provides:

an allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title [\[11 U.S.C.S. § 553\]](#), is a secured claim to the extent of the value of such

¹¹⁷ [484 U.S. 365, 375 \(1988\)](#). The Court in *Timbers* does not cite to either *Union Central* or *Radford*, and never directly discusses the Fifth Amendment implications of Chapter 11 of the 1978 Bankruptcy Code. Were *Radford* the controlling precedent, it is difficult to see how the Court could have avoided the constitutional implications of the Code's treatment of a secured creditor's claim, however. Admittedly, the automatic stay is the equivalent of a temporary injunction, and so is arguably not a "taking" as such. Still, under *Radford*, even that would be an issue because of the impact of an extended Chapter 11 on one or more of the "bundle of rights" that makes up a secured creditor's interest in property. Instead, the Court in *Timbers* simply said "it is common ground that the "interest in property" referred to by § 362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay." [Id. at 370](#). In other words, the secured creditor's rights during the course of the proceeding were sufficiently protected so long as the value of the collateral was protected from diminution. That is consistent with the approach taken in *Union Central*.

¹¹⁸ But see [United States v. Sec. Indus. Bank](#), [459 U.S. 70, 75-76 \(1982\)](#) (holding that § 522(f) could validly extinguish non-possessory non-purchase money liens on consumer goods on a prospective basis, though it could not be construed to apply retroactively to liens created prior to the statute's enactment, because that would constitute a taking under the Takings Clause of the Fifth Amendment). The Court explained:

Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytic framework employed in [Penn Central Transportation Co. v. New York City](#), [438 U.S. 104 \(1978\)](#), and [Prune-Yard Shopping Center v. Robins](#), [447 U.S. 74 \(1980\)](#), where governmental action affected some but not all of the "bundle of rights" which comprise the "property" in question. The Government argues that the interest of a secured party such as was involved here is "insubstantial," apparently in part because it is a nonpurchase-money, nonpossessory interest in personal property. The "bundle of rights" which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the Government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property. And our decisions in [Radford](#), [supra](#), and [Armstrong v. United States](#), [364 U.S. 40 \(1960\)](#), militate against such a proposition.

[Sec. Indus. Bank](#), [459 U.S. at 75-76](#) (emphasis added). The statute survived constitutional muster on a prospective basis because it described a particular category of liens which, as a matter of public policy, could be extinguished and the holders of such liens would know, before taking the lien, that existing law made such liens vulnerable to extinguishment as a matter of federal law. No taking takes place in that circumstance because the property right itself is subject to the risk of extinguishment as a matter of law. In other words, the federal enactment constitutes part of the nature of the property right that can be acquired by a lender.

¹¹⁹ [Id. at 75](#).

¹²⁰ However, a federal enactment could deprive a secured creditor of its property rights if those rights were obtained after a federal statute was enacted, [supra](#) text accompanying note 118.

creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in **[*535]** conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest. ¹²¹

Obviously, when a secured creditor's claim is bifurcated, the creditor is no longer getting the absolute benefit of the bargain it struck with the debtor pre-petition. Its contractual rights have been abridged. That is permitted. Its lien rights, to the extent required by the Takings Clause of the Fifth Amendment, as construed by the Supreme Court, are preserved because § 506 properly equates the secured creditor's property interests with the value of its collateral. ¹²² Similarly, in a Chapter 11 plan, under § 1129(b)(2)(A), the value of a secured creditor's claim may not be what he or she had bargained for pre-petition. ¹²³

The Philadelphia Newspapers decision is particularly instructive regarding the extent to which a secured creditor's "bundle of rights" may be affected without in the process destroying that creditor's rights. The court there said that a plan could provide for the sale of the assets of the debtor and could also bar the creditor from credit bidding. ¹²⁴ It reached that conclusion by noting that § 1129(b)(2)(A) provides for a third alternative basis for confirming a plan over the objection of a secured creditor, namely a finding by the court that the plan provides for "the realization by such holders of the indubitable equivalent of such claims." ¹²⁵ According to the Fifth Circuit, in a decision quoted with favor by the Philadelphia Newspapers court,

Congress did not adopt indubitable equivalent as a capacious but empty semantic vessel. Quite the contrary, these examples focus on what is really at stake in secured credit: repayment of principal and the time value of money. Clauses (i) and (ii) explicitly protect repayment to the extent of the secured creditors' collateral value and the time value compensating for the risk and delay of repayment. Indubitable equivalent is therefore no less demanding a standard than its companions. ¹²⁶

¹²¹ [11 U.S.C. § 506\(a\)\(1\)](#) (2005).

¹²² [Timbers of Inwood Forest Assocs., Ltd., 484 U.S. at 365-66.](#)

¹²³ See, e.g., [In re Phila. Newspapers, LLC, 599 F.3d 298, 316-17 \(3d Cir. 2010\)](#) (stating that "the Code provides for a variety of treatments of secured claims, all of which are calculated to balance the interests of the secured lender and the protection of the reorganized entity, and none of which ensure an advantageous return on a secured investment.").

¹²⁴ [Id. at 301.](#) Credit bidding means simply that, in a sale of assets subject to a security interest, the secured creditor may "bid" for the assets using the debt owed to it, rather than having to make a cash bid for the assets. Credit bidding not only permits the creditor to make use of its offset rights, but also allows the creditor to prevent the asset from being sold for an amount that is less than the amount of the debt owed the secured creditor. See [11 U.S.C. § 363\(k\)](#) (stating that a lender may "offset" the claim against the purchase price). Credit bidding assures that the asset will not be sold for less than what the debtor owes the creditor. However, credit bidding could also be used as a holdup tactic, with the secured creditor insisting on payment that exceeds the true value of the asset.

¹²⁵ [11 U.S.C. § 1129\(b\)\(2\)\(A\)\(iii\)](#) (2005); [In re Phila. Newspapers, 599 F.3d at 318-19.](#)

¹²⁶ [In re Phila. Newspapers, 599 F.3d at 311.](#) (quoting [In re Pacific Lumber Co., 584 F.3d 229, 246 \(5th Cir. 2009\)](#); see also [In re Sun Country Dev., Inc., 764 F.2d 406, 409 \(5th Cir. 1985\)](#) (holding that notes at issues "were the indubitable equivalent" of a creditor's lien on property). It was the time value of money that created the problem in Radford. Under the Frazier-Lemke Act, a debtor could, under some circumstances, keep the property for 10 years, while repaying the creditor for the value of the property over that period at one percent. The Court noted that, under that repayment scheme, the creditor would not receive the value of its collateral, because, at that rate, the present value of the deferred payments would be less than the appraised value of the property. See [Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 575, 595-99 \(1935\)](#) (finding that "all deferred payments [would] bear interest at the rate of 1 per cent per annum," and holding in favor of the bank).

[*536] Thus, secured claims, while deserving of a level of protection under U.S. law (and of course under the U.S. Constitution), are nonetheless subject to considerable modification in the course of a U.S. insolvency proceeding: the interest rate may change, the maturity date may be altered, the terms of payment may be amended, the creditor's credit bid rights may be suspended, its right to resort to its remedies against its collateral may be delayed, and its deficiency claims may be reduced or eliminated. In short, many sticks may be removed from the bundle of rights that constitute a secured creditor's property interest arising from its security interest.

IV. Learnings from the Jurisprudence

While it is certainly the case that, under Chapter 15, the ancillary court is not to measure its relief on the basis of whether the main proceeding's insolvency laws mirror those of the United States, there is nonetheless a lesson from the foregoing exercise. A security interest is not sacrosanct. It can be subjected to substantial alteration in the course of an insolvency proceeding. Boiled down to its essence, the question for a court considering a request to release assets subject to a security interest is not whether a turnover of assets subject to a security interest changes the creditor's recovery - the creditor's remedy is often altered by virtue of bankruptcy, be it an American bankruptcy or a foreign bankruptcy. Rather, the question is whether the turnover of assets subject to a secured creditor's claim would so undermine the creditor's secured claim that it could be said that the creditor would, as a result, no longer have a security interest at all.

Still, the inquiry is not an easy one. Consider, for example, the fact that, by virtue of our federalist system of governance, a secured creditor's property right is created by state law, while our insolvency system is a creature of federal law. ¹²⁷ Article VI, clause 2, of the constitution permits a federal enactment to preempt state law. Thus, a secured creditor's rights, although created by state law, may be altered by the Bankruptcy Code. ¹²⁸ Once such a statute is enacted, the fact that it places a secured creditor's entitlements in jeopardy does not raise a takings problem unless the law deprives a creditor of a right created prior to the enactment of that law. ¹²⁹ No such similar pre-emption analysis can be said to apply if a foreign insolvency regime impinges on those same rights. Consider the following hypothetical: a U.S. court, acting under the authority of § 1521(b), turns over assets to a foreign representative such that a secured creditor's interest in the collateral is destroyed. Could it be argued that the court's action should be proscribed by the Takings Clause of the Fifth Amendment? Should the answer be different if the secured creditor's rights in its collateral would be merely impinged? Merely affected?

There is also the question of whether the court's reasons for resisting turnover would spring from the existing conceptual notions in Chapter 15 or from elsewhere. **[*537]** Should a court decline turnover as a matter of public policy? If so, then the court must recall that § 1506 restricts use of the public policy exception to actions that would be "manifestly contrary" to U.S. public policy. ¹³⁰ The "manifestly contrary" phraseology was intentionally used in the Model Law to invoke the international usage designed to "restrict[] the public policy exception to "the most fundamental policies of the United States." ¹³¹ In the Ephedra case, the district court overruled an objection filed by certain creditors to the enforcement of a Canadian order setting procedures for claim objections that did not include a right to a jury trial. ¹³² It said that "neither § 1506 nor any other law prevents a U.S. court from giving

¹²⁷ See, e.g., [Graber v. Fuqua](#), 279 S.W.3d 608, 623 (Tex. 2009) ("The disposition of the debtor's property is governed by federal law, although a debtor's property interests are generally created and defined by state law unless a federal purpose requires otherwise.")(Internal quotation omitted).

¹²⁸ See [U.S. Const. art. VI, cl. 2](#) (providing that federal law should be the "the supreme Law of the Land; and the Judges in every state shall be bound thereby").

¹²⁹ See [United States v. Sec. Indus. Bank](#), 459 U.S. 70, 81 (1982) ("No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.").

¹³⁰ [11 U.S.C. § 1506](#) (2005).

¹³¹ H. R. Rep. No. 109-31, § 1506, at 109 (2005).

recognition and enforcement to a foreign insolvency procedure for liquidating claims simply because the procedure alone does not include a right to jury." ¹³³ The court added,

In adopting Chapter 15, Congress instructed the courts that the exception provided therein for refusing to take actions "manifestly contrary to the public policy of the United States" should be "narrowly interpreted," as "the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." ... Determining what foreign procedures are "'manifestly contrary to the public policy of the United States" is, moreover, familiar territory to federal courts, who have long had to confront similar issues when determining whether or not to enforce foreign judgments rendered on the basis of foreign proceedings that were plainly fair but that did not include some commonplace American practice. ¹³⁴

If the statutory basis for resisting turnover is drawn from §§1521(b) and 1522(a), then the court must ground its decision on the statute's directive that the interests of the secured creditor are "sufficiently protected." Yet, here too a court will face the difficulty of infusing this expression with content in view of the legislative history, which noted that this phraseology was employed expressly to avoid importing the body of jurisprudence that has built up around the expression "adequately protected." ¹³⁵ That clear a directive must surely steer courts away from simply reimporting that jurisprudence.

Nor should any of the foregoing musings be mistaken for a frustration that courts ought to have adequate tools to resist turnover; quite the opposite. In a scheme of global insolvency committed to the principles of modified universalism, courts should rightly eschew the temptation suddenly to become territorialist when it is a secured creditor waving the bloody shirt of the Takings Clause in the face of efforts to centralize the insolvency process in a single forum. The Model Law, even as adopted in the United States, dictates that, in interpreting its provisions, a court "shall consider its international origin, and the need to promote an application of [the law] that is consistent with the application of similar statutes adopted by foreign jurisdictions." ¹³⁶ That principle of necessity should warn off territorialist [*538] retrenchments. ¹³⁷ In *Artimm*, Judge Sam Bufford said that "in the insolvency context, U.S. courts should require only that the foreign forum have subject-matter jurisdiction, recognize fundamental creditor protections, and provide fair treatment to all claim holders." ¹³⁸

Already, the case law has begun to poke at this conundrum, in ways that are only just now revealing the tensions. In this section, we examine a few significant cases, starting with some American decisions.

A. U.S. Decisions

¹³² [In re RSM Richter Inc. v Aguilar \(In re Ephedra Prods. Liab. Litig.\) 349 B.R. 333, 335-36.](#)

¹³³ *Id.*

¹³⁴ [Id. at 336](#) (internal citations omitted).

¹³⁵ H.R. Rep. No. 109-31, § 1521, at 115 (2005).

¹³⁶ [11 U.S.C. § 1508](#) (2005).

¹³⁷ See [In re Artimm, S.r.L., 335 B.R. 149, 160-61 \(Bankr. C.D. Cal. 2005\)](#) (describing factors courts must consider before "deciding whether to turn over property of a foreign bankruptcy estate to that estate's representative," the first of which is "what will best assure an economical and expeditious administration of the foreign bankruptcy estate"); see also [In re Atlas Shipping A/S, 404 B.R. 726, 741-42 \(Bankr. S.D.N.Y. 2009\)](#) (laying out five factors for courts to consider, including "protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding").

¹³⁸ [In re Artimm S.r.L., 335 B.R. at 161](#) (citing [In re Schimmelpenninck, 183 F.3d 347, 352, 365 \(5th Cir. 1999\)](#)).

Atlas Shipping A/S and Atlas Bulk Shipping AS (together, "Atlas") were Danish corporations that were debtors in a bankruptcy proceeding taking place in Denmark; the Danish proceedings were filed on December 17, 2008.¹³⁹ Under Danish insolvency law, "all existing attachments lapse upon commencement of the bankruptcy [case], and no further attachments may be levied against the [debtor's] assets."¹⁴⁰ Between November and December 2008, a number of Atlas' unsecured creditors obtained maritime liens - so-called Rule B attachments - against approximately \$ 4.3 million of Atlas' funds located in New York.¹⁴¹ Two of the liens attached pre-petition, the remainder were post-petition attachments. All the attachments, however, were obtained before the Chapter 15 petitions were filed.¹⁴² In January 2009, the Danish foreign representatives filed a Chapter 15 petition seeking recognition of the foreign bankruptcy case as a foreign main proceeding, and requesting, upon recognition and pursuant to § 1521, that the court vacate the attachments and turn over the funds to them for distribution in the Danish bankruptcy case.¹⁴³ The court granted recognition on February 20, 2009.¹⁴⁴

Two creditors objected to the turnover of Atlas' funds: Dormin Shipping and Allied Maritime.¹⁴⁵ The creditors argued that the foreign representatives should be required to file a full-blown Chapter 7 or 11 case, and attempt avoidance under U.S. bankruptcy law.¹⁴⁶ Otherwise, their request for turnover should be rejected.¹⁴⁷ The court overruled the creditors' objections and turned over the funds to the foreign representative.¹⁴⁸

[*539] The court first concluded that the foreign representative's request to apply Danish insolvency law to dissolve the attachments for turnover would be granted under basic principles of comity, even were there no Chapter 15.¹⁴⁹ The court explained:

American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings. The equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail. Congress implemented this policy by enacting section 304 as part of the Bankruptcy Reform Act of 1978. This provision allows foreign bankrupts to prevent piecemeal distribution of assets in this country by filing ancillary proceedings in domestic bankruptcy courts. Under general principles of comity as well as the specific provisions of section 304, federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat claims of local creditors.¹⁵⁰

¹³⁹ [In re Atlas Shipping A/S, 404 B.R. at 730.](#)

¹⁴⁰ *Id.*

¹⁴¹ [Id. at 730-31.](#)

¹⁴² [Id. at 731.](#)

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ [In re Atlas Shipping A/S, 404 B.R. at 731.](#)

¹⁴⁶ *Id.*

¹⁴⁷ See *id.* (stating that the "creditors argued that the attachments could only be vacated" if certain criteria were met. Therefore, if the criteria were not met the request for turnover should be rejected.).

¹⁴⁸ [Id. at 742-43.](#)

¹⁴⁹ [Id. at 734-35.](#)

¹⁵⁰ [Id. at 737](#) (quoting [In re Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-14 \(2d Cir. 1987\)](#)).

The court went on to explain, with respect to attachments obtained after the commencement of the Danish insolvency proceeding, that the attachments would not enjoy any special status simply because the foreign representative initiated an ancillary proceeding in the United States.¹⁵¹ Those attachments would be resolved under prior law, without prejudice to the creditors' right to raise their arguments for special status in the Danish proceeding.¹⁵²

The court then considered whether the result is altered by the enactment of Chapter 15.¹⁵³ In particular, the court focused on the specific limitations applicable to turnover that are built into § 1521.¹⁵⁴ The court concluded that the "sufficiently protected" language did not significantly alter the outcome from what it would have been under former § 304.¹⁵⁵ Consistent with the principles of comity, Judge Glenn said that the creditors are "protected by making those funds subject to administration by the bankruptcy court in Denmark."¹⁵⁶ In other words, "the relief granted ... is without prejudice to creditors' rights, if any, to assert in the Danish bankruptcy court their rights to the previously garnished funds. This is sufficient protection to the creditors here."¹⁵⁷ He continued:

The Objecting Creditors' rights, if any, are not being avoided; rather, whether they have superior claims to the previously garnished funds will be for the Danish court to decide. The Objecting Creditors' argument is also belied by their motives: it appears that their strategy is to try to avoid the reach of both this Court and the Danish court to further [*540] enhance their leverage in negotiations with Atlas or to provide an avenue to recover their claims in full.¹⁵⁸

The Atlas Shipping decision is enlightening because the court permitted a fund subject to a security interest to leave the United States without the imposition of special conditions, protections, directives, or bond (distinguishing the case from Tri-Continental Exchange, where the funds remained in the United States).¹⁵⁹ True enough, the security interest in question was suspect, and vulnerable to attack under the insolvency regimes of either the United States or Denmark. And true enough, the creditors' real motive might have been to prevent (at least as a practical matter) any court from cancelling their liens. Still, it cannot be denied that, with the transfer of the funds to the foreign representative, the effective value of the security interest obtained was destroyed. The court said that the creditors could make their case to the court in Denmark that they ought to be treated as secured creditors, while knowing full well that their argument would fail. This result, it should be noted, was said to be the same regardless whether former § 304 or current provisions of Chapter 15 were controlling.

There are valuable lessons to be gleaned from Atlas Shipping. One of them is that a security interest that would be vulnerable under the foreign insolvency law is less deserving of special protection in a regime of modified universalism. This is because the creditor should not be able to take refuge behind the law of the ancillary jurisdiction to avoid an outcome that is a legitimate and familiar outcome under the insolvency regime of the foreign

¹⁵¹ [In re Atlas Shipping A/S, 404 B.R. at 736.](#)

¹⁵² *Id.*

¹⁵³ [Id. at 738.](#)

¹⁵⁴ [Id. at 739.](#)

¹⁵⁵ [Id. at 741.](#)

¹⁵⁶ [Id. at 742.](#)

¹⁵⁷ [In re Atlas Shipping A/S, 404 B.R. at 742.](#)

¹⁵⁸ [Id. at 745.](#)

¹⁵⁹ [Id. at 747; In re Tri-Cont'l Exch., 349 B.R. 627, 639 \(Bankr. E.D. Cal. 2006\)](#) (stating "the funds ... would be maintained in a deposit account within the jurisdiction of this court").

proceeding. It is worth emphasizing here that the court in Atlas Shipping did not rule that the Danish law was appropriately applied because it looked like U.S. law. Instead, it looked like the sort of rule commonly found in many insolvency systems around the world - provisions designed to prevent last minute tactics to improve one's position relative to other similarly situated creditors.¹⁶⁰ The law of the foreign insolvency proceeding need not be identical; it need only be consistent with the sort of rule one might expect to find in an insolvency regime that bears the indices of fundamental fairness, as noted in Artimm.¹⁶¹

Thus, perhaps one marker of the level of cooperation that ought to be accorded to a given insolvency regime's request for turnover of a given asset subject to a secured creditor's interest might be the found in a comparison of that regime's treatment of secured claims in a manner that one might expect of an insolvency regime that would pass muster in the world community as fundamentally fair. And one source that courts might think of consulting if they are to take this tack might be the UNCITRAL Legislative Guide on Insolvency Law. The text represents a five-year effort to derive a best practices guide for the enactment of a modern insolvency [*541] law, as an aid to countries engaged in just such a task. Because the text was the result of input from a number of expert groups and non-governmental organizations, as well as healthy debate among delegates from the thirty-six member nations of UNCITRAL, representing countries around the globe, both common law and civil, both developed and developing, its provisions are drafted with sufficient breadth to encompass a fairly wide variety of insolvency systems, while still offering concrete recommendations that, in the aggregate, could serve as a template for a modern insolvency law to be enacted by a country that never before had such a law.¹⁶² The text, of course, presumes a number of basics: a transparent rule of law, supervised by a judicial or administrative system designed to assure due process and fair treatment, and at least a moderately developed commercial law regime (one that may, but need not necessarily, include a scheme for security interests).¹⁶³

The Legislative Guide states, in Recommendation 3, that "the insolvency law should recognize rights and claims arising under law other than the insolvency law, whether domestic or foreign, except to the extent of any express limitation set forth in the insolvency law."¹⁶⁴ In Recommendation 4, it says that "the insolvency law should specify that where a security interest is effective and enforceable under law other than the insolvency law, it will be recognized in insolvency proceedings as effective and enforceable."¹⁶⁵ Finally, the Legislative Guide discusses what a regime of avoidance actions might look like, discussing what the criteria ought to be, what purpose such provisions ought to serve, what a suspect period might look like, and the like.¹⁶⁶ Were the court in Atlas Shipping

¹⁶⁰ See Legislative Guide, *supra* note 85, at 268 (discussing the "equitable subordination" doctrine, which prevents creditors from using legal mechanisms to gain advantages in priority relative to other creditors).

¹⁶¹ As an aside, it is worth noting that the Fifth Circuit ruled in 2010 (after Atlas Shipping), that nothing in Chapter 15 prohibited a foreign representative from utilizing the avoidance provisions of the foreign proceeding by way of a suit instituted within a Chapter 15 proceeding in the [United States. In re Condor Ins. Ltd., 601 F.3d 319, 320 \(5th Cir. 2010\)](#). Condor tells us little more about how one should answer the issue under discussion in this article, but it is at least circuit ratification that Atlas Shipping was not wrong to rule that Danish law could be invoked in a Chapter 15 proceeding regarding the avoidability of a security interest obtained within a suspect period.

¹⁶² See Legislative Guide, *supra* note 85, at 20 (discussing the common features that require consideration in designing an effective and efficient insolvency law).

¹⁶³ See *id.* at 2, para. 5 (discussing how the proper implementation of an insolvency regime requires establishment of underlying factors that go beyond which is focused upon in the guide); see generally *Cambridge Gas Transp. Corp. v. The Official Comm. of Unsecured Creditors of Navigator Holdings PLC*, [2006] UKPC 26, [15], [2007] 1 A.C. 508 (appeal taken from Isle of Man) (U.K.) ("The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them.").

¹⁶⁴ Legislative Guide, *supra* note 85, at 14.

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at 135-52 (discussing the subject of avoidance proceedings which include avoidance criteria, types of transactions subject to avoidance, transactions exempt from avoidance actions, the effect of avoidance, establishing the suspect period, the

to have consulted the Legislative Guide, it would no doubt have found the Danish law to be consistent with the principles described there. Other provisions of the Legislative Guide relating to the expected treatment of secured claims (both those within the jurisdiction of the court and those arising under the law of another country) would be similarly helpful to a court attempting to evaluate a given insolvency regime's expected treatment of a claim subject to a security interest in the jurisdiction of the ancillary court. ¹⁶⁷

[*542] When the insolvency law of a given regime appears to depart substantially from what a given court might expect with respect to the treatment of a secured claim, it ought to meet resistance. Prior to the adoption of the Model Law in the United States, and prior to the publication of the Legislative Guide, just such an issue was presented to the Second Circuit in *Bank of N.Y. v. Treco*. ¹⁶⁸ In *Treco*, the Second Circuit considered whether to grant a foreign liquidator's request to remit assets (that may have been subject to a security interest) located in the United States to the Bahamas, which was where the main bankruptcy case was proceeding. ¹⁶⁹ The facts were the following: on April 25, 1995, the Supreme Court of the Bahamas put Meridien International Bank Limited (MIBL) into involuntary liquidation and appointed Alison Treco and David Hamilton as liquidators (Liquidators). ¹⁷⁰ The Liquidators of MBIL then, pursuant to § 304, filed an application for recognition in New York, and requested the turnover of certain funds then held by the Bank of New York (BNY). ¹⁷¹

Prior to the bankruptcy, MIBL pledged the money in its account (and any future money or accounts) to BNY as security for MIBL's future obligations to BNY. ¹⁷² At the time the § 304 petition was filed, there was \$ 600,000 on account at BNY, which funds were, according to BNY, subject to the pledge. ¹⁷³ As of May 1998, only \$ 1.75 million remained in MIBL's estate in the Bahamas. ¹⁷⁴ Under Bahamian law, secured creditors are paid after administrative expenses are paid. ¹⁷⁵ Although the Liquidators had collected close to \$ 10 million during the course

conduct of avoidance proceedings, liability of counterparties to avoided transactions, and the conversion of reorganization to liquidation).

¹⁶⁷ See *id.* at 71, para. 88 (stating the choice of law relating to the allowance or recognition of a secured claim). The Guide reads:

Some insolvency laws also adopt the approach of providing an exception to the application of the *lex fori concursus* with respect to security interests. This solution means that the law governing a right in rem would determine not only its creation and general validity, but also its effectiveness in the case of insolvency proceedings. In other words, the position of the real security interest in insolvency proceedings commenced abroad will not be established by *lex fori concursus*, but by the insolvency rules of the law application to the security interest. Application of the *lex fori concursus* otherwise may affect the legal framework for secured lending, introducing a factor of instability that may increase the domestic cost of finance. If foreign proceedings intrude upon local security interest, the value of those security interests may be seriously impaired. Similarly, a transfer of the debtor's centre of main interests to a different State can bring about a radical change in the positions of the secured party. Rights of set-off may also be subject, as noted above, to law other than the law of the forum, for reasons related to the parties' expectations, especially if they engage in regular dealings with each other.

Id.

¹⁶⁸ [In re Treco, 240 F.3d at 154.](#)

¹⁶⁹ [Id. at 151.](#)

¹⁷⁰ *Id.*

¹⁷¹ [Id. at 152.](#)

¹⁷² *Id.*

¹⁷³ [Id. at 153.](#)

¹⁷⁴ [In re Treco, 240 F.3d at 153.](#)

¹⁷⁵ [Id. at 155.](#)

of their administration, most of the money (some \$ 8 million) did not go to creditors.¹⁷⁶ It went instead to pay the Liquidators and their professionals.¹⁷⁷ Thus, BNY feared that, if its collateral were given over to the Liquidators, it would be consumed for yet more administrative expenses, permanently depriving BNY of its collateral.¹⁷⁸ Thus, if BNY had to turn over the \$ 600,000, it was unlikely to get any money back via the Bahamas proceeding; if they did get anything, it would be negligible.¹⁷⁹

The Treco court was clearly troubled by the level of administrative costs in the Bahamian proceedings.¹⁸⁰ However, it also understood the mandate to cooperate [*543] with foreign proceedings, and not to condition that cooperation on either a quid pro quo or an insistence that the foreign insolvency law offer identical treatment.¹⁸¹ The court focused on § 304(c)(4), one of the factors to be considered when evaluating a request for assistance.¹⁸² The Second Circuit said that:

the priority rules of a foreign jurisdiction need not be identical to those of the United States [A] comparison of the priority rules cannot be conducted in the abstract. A court must consider the effect of the difference in the law on the creditor in light of the particular facts presented.¹⁸³

Thus, the court demurred from holding that cooperation should be withheld simply because the distributional scheme was different.¹⁸⁴ However, it felt that, based on the egregious facts of the case, it was inappropriate to force BNY, who might have been a secured creditor, to turn over the money if it were in fact secured.¹⁸⁵

The Second Circuit noted that the rules are different when the turnover request involves property subject to a security interest. The court stated:

¹⁷⁶ [Id. at 159.](#)

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* (reasoning that because 70% of the \$ 300 million in claims had not been resolved, the Liquidators would continue to incur significant fees).

¹⁷⁹ See *id.* ("Viewing this evidence in the light most favorable to BNY, it appears probable that BNY would recover only a fraction, if any, of the \$ 600,000 it holds as a secured creditor if it were ordered to turn over those funds.").

¹⁸⁰ See [In re Treco, 240 F.3d at 159](#) (disagreeing with the district court ruling that the prioritization of administrative expenses over secured claims was insufficient to "render turnover inconsistent with § 304(c)(4)"). The court noted, "the difference in prioritization under United States and Bahamian law is particularly acute in this case because of the strong possibility that MIBL's estate will have little or no funds after payment of administrative expenses." *Id.*

¹⁸¹ See [id. at 156](#) ("The purpose of the section is to provide a statutory mechanism through which United States courts may defer to and facilitate foreign insolvency proceedings ... Comity does not, as the Liquidators suggest, automatically override the other specified factors.").

¹⁸² [Id. at 158-61.](#) "Distribution of proceeds of such estate substantially in accordance with the order prescribed by this title." [11 U.S.C. § 304\(c\)\(4\)](#) (repealed 2005).

¹⁸³ [In re Treco, 240 F.3d at 158-59.](#)

¹⁸⁴ [Id. at 158](#); see also [Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg., S.A. \(In re Bd. of Dirs. of Telecom Arg., S.A.\), 528 F.3d 162, 173 \(2d Cir. 2008\)](#) (saying, in the context of an argument under § 1129(a)(7), that "comity, however, does not require that foreign proceedings afford a creditor identical protections as under U.S. bankruptcy law ... so long as the other § 304(c) factors are satisfied, the statute does not require that the amount of a distribution in a foreign insolvency proceeding be equal to the hypothetical amount the creditor would have received in a proceeding under U.S. law").

¹⁸⁵ [In re Treco, 240 F.3d at 155](#) (noting that a "secured claim will be subordinated under Bahamian law to, among other things, the administrative expenses of liquidation"). The matter was remanded to the district court for a determination of BNY's status. [Id. at 163.](#)

One consideration that informs our analysis of § 304(c)(4) and weighs against turnover is the special protected status that secured creditors enjoy under United States law. See 4 [Collier on Bankruptcy P 506.02](#) at 506-6 ("As a general matter, the Code recognizes and prescribes a number of special rights and protections for the holders of secured claims."). Indeed, security interests have been recognized as property rights protected by our Constitution's prohibition against takings without just compensation. See [U.S. Const. amend. V](#); [United States v. Security Indus. Bank](#), 459 U.S. 70, 75, 74 L. Ed. 2d 235, 103 S. Ct. 407 (1982); [Louisville Joint Stock Land Bank v. Radford](#), 295 U.S. 555, 602, 79 L. Ed. 1593, 55 S. Ct. 854 (1935); *id.* at 589 ("The position of a secured creditor, who has rights in the specific property, differs fundamentally from that of an unsecured creditor, who has none."); [In re George Ruggiere Chrysler-Plymouth, Inc.](#), 727 F.2d 1017, 1019 (11th Cir. 1984). We do not mean to suggest that turnover under § 304 of property subject to a security [*544] interest is an unconstitutional taking, a subject we discuss in part II.A, below. But our observation that security interests enjoy constitutional protection supports our conclusion that United States law affords strong protection to secured creditors and treats those protections very seriously, a conclusion that, in turn, amplifies the significance of the difference in the way secured claims are treated under Bahamian law.¹⁸⁶

The court declined to directly reach the Takings Clause constitutional issue raised by BNY, saying that "if BNY's claim is secured, turnover would be barred under § 304 and we would not need to reach the constitutional issue."¹⁸⁷ Yet the court's comments about why the rules should be different for secured creditors are in fact premised on the constitutional dimensions of security interests. On the facts of the case before it, the security interest was threatened with destruction, not just infringement. The court remanded the case for consideration whether BNY in fact had a security interest, ruling in effect that, if it did, then the request for turnover, in the face of sure destruction of that interest if it were granted, would have to be denied.¹⁸⁸

Although the Second Circuit in Treco approached the issues before it from a universalist point of view, the outcome has a territorialist feel to it. While it is easy to justify the Second Circuit's conclusion when viewed from a U.S. public policy point of view, it is much more difficult to support that view if one analogizes to the priority scheme of, say, Mexico, which might decline to release property in Mexico for distribution in a U.S. proceeding which would honor a security interest in the property, on grounds that, under Mexican law, the workers have a prior claim on those assets that have constitutional dimensions in Mexico.¹⁸⁹ Treco exemplifies how [*545] modified universalism can

¹⁸⁶ [Id. at 159-60](#). The court added:

The Liquidators cite no cases - and we are aware of none - ordering turnover of assets under § 304 from a creditor with a secured claim. To the contrary, several bankruptcy courts have refused to grant relief under § 304 where the priority of secured creditors was not recognized under the law of the foreign jurisdiction. See [In re Hourani](#), 180 B.R. at 69 (denying turnover where Jordanian law failed, among other things, to distinguish between secured and unsecured claims); [In re Papeleras Reunidas, S.A.](#), 92 B.R. 584, 593 (Bankr. E.D.N.Y. 1988) (denying relief under § 304 because, inter alia, a judgment lien creditor, a secured creditor under United States law, would be treated as an unsecured creditor under Spanish law and would therefore receive nothing in the Spanish proceeding because there were no funds in the estate for unsecured creditors); [In re Toga Mfg. Ltd.](#), 28 B.R. 165, 168-70 (Bankr. E.D. Mich. 1983) (denying turnover and injunctive relief where a judgment lien creditor would be treated as an unsecured creditor under Canadian law); cf. [Koreag](#), 961 F.2d at 359 (observing that the deprivation of a "valid security interest or other benefit of domestic law ... might render a turnover unfair or otherwise improper") (dictum); [Cunard S.S. Co.](#), 773 F.2d at 459 (affirming, in a non- § 304 proceeding, vacatur of creditor's attachment of Swedish debtor's United States property on the ground of comity, in part because the creditor's claim was not secured and that there was therefore "no compelling policy reason for a general creditor ... to receive preference over other creditors).

Id. at 160.

¹⁸⁷ *Id.* at 161.

¹⁸⁸ See *id.* at 160-61 ("The Bahamian rule that secured creditors do not have priority over administrative expenses threatens to destroy BNY's claim. We therefore conclude that the bankruptcy court abused its discretion by ordering turnover without first determining that in the discrete context of BNY's claim against MIBL's estate, the order of distribution under Bahamian law was "substantially in accordance with the order prescribed by' the United States Bankruptcy Code.").

¹⁸⁹ *Constitucion Politica de los Estados Unidos Mexicanos [C.P.]*, art. 123(A)(XXIII) (Mex.).

easily fall hostage to territorialist instincts - with the ancillary court called upon to resist cooperation (or to at least condition it) when a local interest of perceived paramount importance is likely to be otherwise eviscerated. The tenor of the Treco decision gives strong indication that, had the same set of facts been presented to the circuit court under Chapter 15, the court might well have been tempted to ground its refusal to cooperate on § 1506 (the public policy exception), even though the Model Law expressly counsels applying this exception narrowly, consistent with international usage of the term. It is difficult, nonetheless, to miss the Second Circuit's innuendo that the foreign proceeding's treatment of the secured creditor came dangerously close to violating a fundamental policy of the United States, though it fails to fully articulate what that fundamental policy might be. ¹⁹⁰

B. English Decisions

Though the case did not involve the turnover of assets subject to a security interest, an English decision by Lord Leonard Hoffmann offers important insights into the interplay between ownership rights in an ancillary jurisdiction and the demands of an insolvency proceeding elsewhere, under principles of modified universalism. ¹⁹¹ In the late 1990s, four businessmen investing in a shipping business borrowed \$ 300 million in the New York bond market and bought five boats. ¹⁹² They [*546] were unsuccessful and at the end of 2003 filed for Chapter 11 in the United States. ¹⁹³ In March 2004, the bankruptcy court confirmed a creditors' plan under which the assets were taken over by the creditors. ¹⁹⁴ The corporate structure of the business caused problems, however. The ships were owned and managed by a group of companies in the Isle of Man. ¹⁹⁵ Each boat was owned by a separate subsidiary of a management company and all the shares in the management company were held by a holding company, Navigator

¹⁹⁰ I say "dangerously close" because the court in fact stops short of premising its ruling on that basis. [In re Treco, 240 F.3d at 157](#). Instead, the court claims to be simply applying the language of the statute then in effect, § 304(c), which, it will be recalled, listed multiple factors a court ought to consider when deciding whether to grant relief under § 304(b). *Id.* One factor, of course, is comity, and the foreign representative laid heavy emphasis on that factor, with its appeal to universalist principles. *Id.* The Second Circuit noted, however, that comity must be applied in light of the other factors, one of which expressly calls for the ancillary court to evaluate the treatment accorded affected creditors in the foreign proceeding, as compared with how such creditors would be treated under the U.S. insolvency regime. *Id.* Thus, the court did not need to appeal to public policy as such, having a ready "excuse" in the form of § 304(c)(4). *Id.* The court said:

In this case, of course, § 304(c) supplants the federal common law comity analysis conducted by courts pursuant to Hilton. It directs courts instead to use the statutory factors to balance the reasons for and against affording comity. But the statutory factors reflect the considerations that "have historically been considered within a court's determination whether to afford comity to a proceeding in a foreign nation." [In re Culmer, 25 B.R. at 629](#). And application of those factors requires that comity not be extended in some circumstances. *Id.* at 158.

In its later application of § 304(c)(4), the court adverts to the "special protected status that secured creditors enjoy under United States law" but adds that "we do not mean to suggest that turnover under § 304 of property subject to a security interest is an unconstitutional taking, a subject we discuss in part II.A, below. But our observation that security interests enjoy constitutional protection supports our conclusion that United States law affords strong protection to secured creditors and treats those protections very seriously, a conclusion that, in turn, amplifies the significance of the difference in the way secured claims are treated under Bahamian law." *Id.* at 160. In a footnote, the court acknowledges that "the status enjoyed by secured creditors under United States bankruptcy law has attracted substantial academic criticism and defense." *Id.* at 160 n.9. Thus, while the tenor of the decision is consonant with an appeal to public policy, the decision should not be read as one whose holding is premised on public policy.

¹⁹¹ *Cambridge Gas Transp. Corp. v. The Official Comm. of Unsecured Creditors of Navigator Holdings PLC*, [2006] UKPC 26, [16]-[22] [2007] 1 A.C. 508, 517-18 (appeal taken from Isle of Man) (U.K.)

¹⁹² *Id.* at [1].

¹⁹³ *Id.*

¹⁹⁴ *Id.* "The mechanism[,] which the plan used to vest the assets in the creditors was to vest the shares in Navigator in their representatives. That would enable the creditors to control the shipping companies and implement the plan." *Id.* at [5].

¹⁹⁵ *Id.* at [2].

Holdings PLC. ¹⁹⁶ In turn, Navigator was held by companies located in other offshore jurisdictions, two of which were Cambridge Gas Transportation Corporation (Cambridge) and its parent company, Vela Energy Holdings Ltd. (Vela). ¹⁹⁷ Cambridge was a Cayman company that owned, either directly or indirectly, at least 70% of Navigator. ¹⁹⁸

Under the Chapter 11 plan, the interests of current shareholders of Navigator were necessarily extinguished in order to give the creditors control over Navigator and its assets (the ships). ¹⁹⁹ The bankruptcy court sent a letter of request to the Manx court, asking for assistance in giving effect to the plan. ²⁰⁰ The creditors' committee did the same. ²⁰¹ Cambridge asked the Manx court not to recognize or enforce the plan, arguing that Cambridge was a separate legal entity that had not submitted itself to the jurisdiction of the New York court, and could not therefore be stripped of its property rights over its objection. ²⁰² The High Court of the Isle of Man agreed with Cambridge. ²⁰³

On appeal, the Privy Council reversed and found that the plan was effective in the Isle of Man. ²⁰⁴ Lord Hoffmann said that the limits of assistance under the common law - as opposed to the types of assistance that a court is able to provide pursuant to statutory law - are that

the domestic court [i.e., the ancillary court] must at least be able to provide assistance by doing whatever it could have done in the case of a domestic bankruptcy. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum. ²⁰⁵

In his analysis, Lord Hoffmann noted that bankruptcy proceedings are neither in rem nor in personam judgments, rather, they "provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted [***547**] or established. The mechanism may vary in its details ... The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them." ²⁰⁶

The raison d'etre of a bankruptcy proceeding is not to establish rights vis-a-vis property of the estate as such, but to collect and distribute property of the debtor for the benefit of the creditors. ²⁰⁷ This axiom - the Principle of Collectivity - is one of the few that does not typically vary by country. ²⁰⁸

¹⁹⁶ Id.

¹⁹⁷ Cambridge Gas Transp. Corp., [2006] UKPC 26, [3], 1 A.C. at 513.

¹⁹⁸ Id.

¹⁹⁹ Id. at [4].

²⁰⁰ Id. at [6].

²⁰¹ Id. at [7].

²⁰² Id.

²⁰³ Cambridge Gas Transp. Corp., [2006] UKPC 26, [10], 1 A.C. at 515.

²⁰⁴ Id. at [21].

²⁰⁵ Id. at [22].

²⁰⁶ Id. at [14]-[15].

²⁰⁷ Id. at [14].

²⁰⁸ Fletcher, supra note 9, at 9, para. 1.08; see Legislative Guide, supra note 85, at 75, para. 1 (noting that "fundamental to insolvency proceedings is the need to identify, collect, preserve and dispose of the debtor's assets").

Of course, there may be a need to establish rights during the course of a bankruptcy in order to achieve bankruptcy's collective aim with appropriate protections for those property interests. Indeed, procedures exist for the establishment of such rights.²⁰⁹ For example, a debtor may object to a proof of claim or a creditor may dispute whether some item is property of the debtor.²¹⁰ However, those procedures "are incidental procedural matters and not central to the purpose of the proceedings."²¹¹ The court explained:

The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.²¹²

Lord Hoffmann then noted that traditionally (i.e., under English common law with a provenance of more than a century), recognition of a foreign proceeding carried with it "the active assistance of the court."²¹³ The limitations with respect to that assistance are by now familiar - prejudice to local creditors, or infringement of local law.²¹⁴ However, whatever the limits,²¹⁵ the court was certain that it could afford [*548] assistance at least equivalent to what it could do were a full proceeding initiated under English law.²¹⁶ And in a local proceeding, the cancellation of shareholder rights in favor of the superior rights of creditors was well known in English law.²¹⁷ This was not the same as, say, a third party confiscating a shareholder's shares and awarding them to someone else, a situation much more closely analogous to the "confiscation" of a secured creditor's collateral.²¹⁸ Lord Hoffmann said: "as against the outside world, that bundle of rights is an item in property, a chose in action. But as between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act."²¹⁹ It is likely that the shareholders here chose not to

²⁰⁹ Cambridge Gas Transp. Corp., [2006] UKPC 26, [15], 1 A.C. at 516.

²¹⁰ Id.

²¹¹ Id.

²¹² Id. at [16]. One has to respect Lord Hoffmann's candor, as he observed that perhaps England's long-standing commitment to principles of universalism in international insolvency was owing to England's long-standing position throughout the 18th and 19th centuries as an imperial economic power.

Not all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view.

Id. at [17].

²¹³ See id. at [20], [22] (noting that English courts actively assist recognizing the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company, as entitled to do in England).

²¹⁴ See Cambridge Gas Transp. Corp., [2006] UKPC 26, [21], 1 A.C. at 518 (noting that limitations to "active assistance" from English courts include infringement of local law and prejudice to local creditors).

²¹⁵ The court thought it "doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system," Id. at [22]. No authority is cited for this proposition. Perhaps this is the law in England. It is not the law in the United States. See [In re Condor Ins. Ltd., 601 F.3d 319, 327 \(5th Cir. 2010\)](#) (treating the possible application of Nevis insolvency law as a question of choice of law, and not a question of public policy).

²¹⁶ Cambridge Gas Transp. Corp., [2006] UKPC 26, [22], 1 A.C. at 518.

²¹⁷ Id. at [26].

²¹⁸ See [In re Condor Ins. Ltd., 601 F.3d 319, 328 \(5th Cir. 2010\)](#) (discussing the objectives of UNCITRAL and the Model Law in relation to international bankruptcy law, and indicating limits on the rules that were the basis for UNCITRAL and the Model Law).

²¹⁹ Cambridge Gas Transp. Corp., [2006] UKPC 26, [26], 1 A.C. at 519-20.

participate in a proceeding that could legitimately alter their rights, then hoped to claim lack of jurisdiction to prevent enforcement. The Privy Council would have none of it, and ordered that the Manx court was to grant assistance as requested by the U.S. court.²²⁰

The Cambridge Gas case, on its facts, offers less than complete guidance on the issue of handling requests for turnover of assets subject to a security interest. However, it strikes a common theme with Treco: when the foreign proceeding is doing little different than would the "home" proceeding in a full insolvency proceeding, there is little call not to cooperate, especially when cooperation is so important to centralized administration of worldwide insolvency proceedings consistent with principles of universalism. If the security interest would, in the process of turnover, be effectively destroyed, then turnover should not be permitted. If the security interest might be altered in significant ways that fall short of destruction, and such alterations might be expected under U.S. insolvency law, then Cambridge Gas suggests that a court would once again have little reason not to cooperate.

In mid-2008, the House of Lords ruled in HIH Casualty that, on request of Australian liquidators, assets in the control of English liquidators should be remitted to the Australian proceeding for distribution pursuant to Australian insolvency law.²²¹ The request was made pursuant to § 426 of the Insolvency Act 1986, but Lord Hoffmann ruled that the request would have been honored even under the common law.²²²

A brief summary of the facts is useful. On March 15, 2001, four insolvent Australian insurance companies, collectively, HIH Casualty & General Insurance (HIH), entered winding up proceedings in Australia.²²³ Although the bulk of the [*549] assets were in Australia, some of HIH's assets were located in England.²²⁴ To protect the English assets, provisional liquidators were also appointed in England.²²⁵ Thereafter, the Australian court, pursuant to § 426(4) of the Act, sent a letter request to the English court asking that the English provisional liquidators be directed to remit assets to the Australian liquidators for distribution.²²⁶ Australia's insolvency scheme for insurance companies requires assets to be paid out in a different priority than would be paid out in a similar English proceeding.²²⁷ Aside from this difference in priority, however, the two schemes have a similar structure in that the assets are distributed *pari passu* among "ordinary" creditors.²²⁸ The issue considered by the House of Lords was whether the English court could, and, if so, whether it should grant the Australian court's request that assets located in England be remitted to Australia for distribution under Australian law, despite the fact that a certain class of creditors is granted a priority in Australia.²²⁹ The lower courts had held that the assets should not be remitted.²³⁰ They were overruled.²³¹

²²⁰ See *id.* (affirming the holding in favor of the creditor).

²²¹ *McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.)*, [2008] UKHL 21, [36], [2008] 1 W.L.R. at 863 (H. L.) (Lord Hoffmann) (appeal taken from Eng.).

²²² See *id.* at [30] (stating "the primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century.").

²²³ *Id.* at [1].

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *McGrath*, [2008] UKHL 21, [62], 1 W.L.R. at 872.

²²⁸ *Id.* at [81].

²²⁹ *Id.* at [1].

²³⁰ *Id.* at [11].

²³¹ *Id.*

Although the Lords all agreed that the assets should be remitted to Australia, they each issued separate opinions, offering different rationales. ²³² They fell largely into two camps: the common law camp and the § 426 camp. Lord Hoffmann relied on principles of common law, ²³³ and Lords Scott and Neuberger relied on § 426 of the Act. ²³⁴ We focus on Lord Hoffmann's ruling, which relied on principles described as the "golden thread running through English cross-border insolvency law since the eighteenth century." ²³⁵

Lord Hoffmann began with a nod to universalism. As he had earlier observed in *Cambridge Gas*, he noted that a long line of English decisions, applying universalism, authorized the relief sought in this case. ²³⁶ He said it this way:

The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of the law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of laws may point in a different direction ... the present case involves neither **[*550]** an extension of the English jurisdiction or an application by the English court of a foreign law. ²³⁷

Lord Hoffmann continued:

The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal. ²³⁸

Ultimately, English insolvency law provides English courts with: (i) the authority to remit the assets to Australia, and (ii) the discretion to do so depending on the circumstances. ²³⁹ The key is the discretion element. In many ways, compared to the issue discussed in this article, the task for the court in *HIH* was simple. Australian law treats insurance creditors better than it treats non-insurance creditors, while under applicable English law, insurance creditors do not have priority. Thus, from the standpoint of English creditors with an interest in the assets to be remitted, sending the assets to Australia was likely to reduce their recovery, given that a priority would likely significantly reduce the assets remaining available to satisfy their claims. However, Lord Hoffmann noted that

it seems to me that the application of Australian law to the distribution of all the assets is more likely to give effect to the expectations of creditors as a whole than the distribution of some of the assets according to English law. Policy holders and other creditors dealing with an Australian insurance company are likely, so far as they think about the matter at all to expect that in the event of insolvency their rights will be determined by Australian law. Indeed, the

²³² *Id.* at [1], [12], [14], [26].

²³³ See McGrath, [2008] UKHL 21, [37]-[44], 1 W.L.R. at 863-64 (demonstrating that Lord Phillips of Worth Matravers seemed to agree with Lord Hoffmann's analysis but his agreement was summarily stated without additional substantial analysis).

²³⁴ *Id.* at [55]-[62], [66].

²³⁵ *Id.* at [30].

²³⁶ *Id.* at [6]-[8].

²³⁷ *Id.* at [28] (emphasis added).

²³⁸ *Id.* at [30].

²³⁹ McGrath, [2008] UKHL 21, [24], 1 W.L.R. at 860.

preference given to insurance creditors may have been seen as an advantage of a policy with an Australian company.²⁴⁰

In other words, even if the creditors in question could claim their entitlements arose under English law, their expectations regarding where an insolvency proceeding might take place pointed to Australia. That, in turn, means that they should reasonably have anticipated that, in the event of an insolvency for the debtor, their claims would be subordinated to the priority scheme of the Australian proceeding. Under principles of universalism, the remittance request should be honored.

Yet modified universalism is a doctrine of legal realism, one that recognizes that national laws embody certain national policies that are unlikely to be overcome, even **[*551]** by courts committed to the principles of cooperation and centralized administration. The key is to moderate those policies, to confine them to the preservation of truly fundamental rights. In *HIH*, Lord Hoffmann said that he did not see how English public policy would be prejudiced by the application of Australian law to the distribution of English assets:

There is no question of prejudice to English creditors as such, since it is accepted that although [the application of Australian law] gives creditors whose debts are payable in Australia a first call on Australian assets, this provision will not in practice prejudice the interests of creditors in the English assets. Furthermore, if there were to be a separate liquidation of the English assets in England, all creditors would be entitled to prove But UK public policy does not require them to be afforded this facility The fact that the assets are in England is principally the result of the companies having placed their reinsurance business in the London market. For the purposes of deciding how the assets should be distributed, that seems to me an entirely adventitious circumstance. Indeed, it may not be to the advantage of London as a reinsurance market if the distribution of the assets of insolvent foreign reinsurance companies is affected by whether they have placed their reinsurance business in London rather than somewhere else.²⁴¹

This is a case in which a court ought:

to give the principle of universalism full rein. There are no grounds of justice or policy which require this country to insist upon distributing an Australian company's assets according to its own system of priorities only because they happen to have been situated in this country at the time of the appointment of the provisional liquidators.²⁴²

The observation echoes the point made by Judge Glenn in *Atlas Shipping*, that the mere advantages of timing and location should not be sufficient to undermine the administration of a properly opened insolvency proceeding pending in the country that is properly the center of the debtor's main interests - not even when the advantage is in the nature of a security interest.²⁴³

Public policy will still protect rights that would be effectively destroyed by turnover, as it should. That, in fact, is the real story behind the English court's earlier decision in *In re Bank of Credit and Commerce International*.²⁴⁴ In *BCCI*, monies in the hands of English ancillary liquidators were not remitted to principal liquidators in Luxembourg because Luxembourg did not recognize the rights of set-off that, under rule 4.90 of the Insolvency Rules 1986 of English law, were automatically conferred on English creditors.²⁴⁵ In *BCCI*, Lord Scott said:

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²⁴⁰ *Id.* at [33].

²⁴¹ *Id.* at [34]-[35].

²⁴² *Id.* at [36].

²⁴³ [*In re Atlas Shipping A/S*, 404 B.R. 726, 738 \(Bankr. S.D.N.Y. 2009\)](#).

²⁴⁴ *In re Bank of Credit and Commerce Int'l SA* (No. 10), [1997] Ch 213 at 213-14.

²⁴⁵ *McGrath*, [2008] UKHL 21, [15]-[19], 1 W.L.R. at 858-59.

The accumulation of judicial endorsements of the concept of ancillary liquidations have, in my judgment, produced a situation in which it has become established that in an "ancillary" liquidation the courts do have power to direct liquidators to transmit funds to the principal liquidators in order to enable a pari passu distribution to worldwide creditors to be achieved But the judicial authority which has established the power of the court to give, in general terms, the direction to which I have referred has certainly not established the power of the court to disapply rule 4.90 or any other substantive rule forming part of the statutory scheme under the Act and Rules of 1986. Nor, in my opinion, has this line of judicial authority established the power of the court to relieve English liquidators in an ancillary winding up of the obligation to determine whether proofs of debt submitted to them should be admitted or to see to it, so far as they are able to do so, that creditors whose claims they do admit receive the pari passu dividend to which, under the statutory insolvency scheme, they are entitled.²⁴⁶

Although Lord Scott's holding in BCCI could be read to mean that remittance should be denied whenever the foreign court's scheme would result in a different distribution than would be available under the ancillary court's own insolvency regime, the facts of the case belie that broad a read. BCCI denied remittance because Luxembourg law did not recognize setoff rights at all.²⁴⁷ Nor could English claimants with setoff rights in England appear in Luxembourg to assert those rights in that court (as, for example the creditors in Atlas Shipping could).²⁴⁸ In other words, it was not that the English creditor's setoff rights were lower on the priority scale under the Luxembourg proceeding that pushed Lord Scott to deny turnover; instead, it was that those rights were extinguished in their entirety.²⁴⁹

As mentioned previously, in HIH Lord Hoffmann agreed with Lord Scott's decision in BCCI to not remit assets to the Luxembourg principal liquidators because

the mutual debts which were set off against each other appear to have been entirely governed by English law, which regards set off as a matter of substantial justice between the parties ... The court of the principal winding up in Luxembourg had made it clear that it was going to apply its lex fori and disallow the set off, notwithstanding the close connection of the transactions with England.²⁵⁰

Lord Hoffmann noted that he too would not likely have sent the money back to Luxembourg because "the mutual debts were too closely connected with England."²⁵¹ Yet he disagreed with Lord Scott's rationale in the BCCI decision [***553**] because it was based upon the notion that "he had no jurisdiction to do otherwise because creditors in an English liquidation (principal or ancillary) cannot be deprived of their statutory rights under English law."²⁵² If the main proceeding will apply choice of law rules that respect the source of the claim and its entitlement to repayment, turnover to that court is easier to grant, as it is less likely to run into public policy resistance. Certainly, Lord Hoffmann is consistent in his opinion that

the whole doctrine of ancillary winding up is based upon the premise that in such cases the English court may "disapply' parts of the statutory scheme by authorising the English liquidator to allow actions which he is obliged by

²⁴⁶ In re Bank of Credit and Commerce Int'l S.A. (No. 10), [1997] Ch 213 at 247-48.

²⁴⁷ See id. at 236-37 (describing Luxembourg and English law and finding that "the respective disadvantages to the net creditors and net debtors of depriving them of the benefits of rule 4.90 and applying to them the Luxembourg winding up rules is clear").

²⁴⁸ See id. at 237 (noting procedural problems preventing the Luxembourg court from reviewing the claims).

²⁴⁹ See id. at 248 (stating that the court's "conclusion...is reinforced by a consideration of the practical consequences that would follow in the present case if the court had the power to disapply rule 4.90 and purported to exercise that power.").

²⁵⁰ McGrath, [2008] UKHL 21, [17], 1 W.L.R. at 858-59.

²⁵¹ Id.

²⁵² Id. at [18].

statute to perform according to English law to be performed instead by the foreign liquidator according to the foreign law (including its rules of the conflict of laws).²⁵³

Thus, another learning emerges - remittance is easier when made to a court that will, under its conflict of laws rules, respect the law under which the creditor's entitlement arises.

In *Rubin v. Eurofinance S.A.*, the English High Court of Justice reversed a lower court's determination that the judgment by default taken in foreign adversary proceeding was not enforceable in England against the defendant.²⁵⁴ While the legal issue decided in the case is tangential to the issues at the heart of this article, the analysis used by the court relied heavily on Lord Hoffmann's decisions in *Cambridge Gas* and *HIH* and sheds additional insight into how we ought to approach our issue.

The facts are as follows. In March 2002, Eurofinance S.A. created an entity known as The Consumers Trust (TCT).²⁵⁵ The law of England and Wales was to apply to TCT.²⁵⁶ The "beneficiaries" of the TCT were consumers that participated in sales promotion owned and operated by the settlor of TCT.²⁵⁷

The Consumers Trust was part of an apparent scam.²⁵⁸ It offered customers in the United States and Canada cashable vouchers (through certain participating merchants) that promised a 100% rebate of the purchase price of various product so long as certain, almost impossible, conditions were met, but actually counted on the high probability that very few customers would meet those conditions.²⁵⁹ The merchants paid TCT 15% of the face value of each voucher, but TCT retained only 40% of that value (just 6% of the face value of the vouchers) for actual redemption costs, holding that money in a bank account in the United States.²⁶⁰ The balance was paid out to a number of parties, including Eurofinance, effectively Adrian Roman, and parties involved in the management of the scheme (lawyers, accountants, etc.).²⁶¹

[*554] TCT attracted the unwelcome attention of states attorneys general, one of whom sued them for a violation of the state's consumer protection laws.²⁶² Ultimately, they settled, with TCT paying \$ 1.65 million and \$ 200,000 in costs, but other states attorneys general were already following suit, and TCT elected to file a Chapter 11 petition in the Southern District of New York.²⁶³ On September 25, 2007, a joint plan of liquidation was approved, under which certain causes of action were to be prosecuted to recover funds for the estate.²⁶⁴ On December 3, 2007, avoidance actions under [§ 548 of the Bankruptcy Code](#) were filed in the United States against, inter alia, Adrian Roman, his sons Justin and Nicholas Roman, and Eurofinance S.A. (the "Respondents") to avoid and recover

²⁵³ *Id.* at [19].

²⁵⁴ *Rubin v. Eurofinance S.A.*, [2010] EWCA (Civ) 895, [63]-[65], (Eng.).

²⁵⁵ *Id.* at [3]. The entity was a business trust that, under U.S. law, is eligible for bankruptcy relief. Such trusts are not eligible for relief in the United Kingdom, and on that basis, it was argued that the U.K. court should not grant recognition. That argument was carefully considered and rejected by both courts, but is not further discussed here because its resolution is not relevant to our analysis.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at [3]-[4].

²⁵⁸ *Id.* at [4].

²⁵⁹ *Id.*

²⁶⁰ *Rubin v Eurofinance S.A.*, [2010] EWCA (Civ) 895, [5].

²⁶¹ *Id.*

²⁶² *Id.* at [6].

²⁶³ *Id.* at [6]-[7].

²⁶⁴ *Id.* at [9].

payments made to them. ²⁶⁵ On the advice of counsel, the Respondents deliberately chose not to submit to the jurisdiction of New York and not to defend. ²⁶⁶ As a result, on July 22, 2008, judgments (the "Judgments") were entered against them. ²⁶⁷

On November 3, 2008, the appellants (with the authorization of the U.S. Bankruptcy Court) applied for recognition of the Chapter 11 case in England, under the Cross-Border Insolvency Regulations of 2006 (England's version of the Model Law). ²⁶⁸ They also sought enforcement of the Judgments against the Respondents. ²⁶⁹ The court below granted recognition but denied enforcement of the Judgments. ²⁷⁰ The High Court of Justice reversed the denial of enforcement. ²⁷¹

The High Court placed heavy reliance on Lord Hoffmann's opinions in *Cambridge Gas and HIH*. ²⁷² The court noted that, in a later case, *Pattni v. Ali*, ²⁷³ their Lordships reiterated Lord Hoffmann's position in *Cambridge Gas* that the purpose of bankruptcy is to "simply establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established." ²⁷⁴ The court acknowledged that the ordinary rule for enforcement of foreign judgments on these facts would have been that England would not have enforced them, because the English defendants had not submitted to the foreign court, from England's point of view. ²⁷⁵ These judgments, however, were not ordinary; they were avoidance actions that are deemed a part of the collective process of bankruptcy. ²⁷⁶ Thus, the rules for enforcement would be those applicable to granting relief to a foreign insolvency case. ²⁷⁷

[*555] The court, in support of its conclusion that enforcement should be given to judgments of this sort, part and parcel of the collective proceeding pending in the domicile of the debtor, said:

There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets. That is the law stated in *Cambridge Gas and HIH Insurance* and I would follow it. Add to that the further principle that recognition carries with it the active

²⁶⁵ *Id.* at [11].

²⁶⁶ *Rubin v. Eurofinance S.A.*, [2010] EWCA (Civ) 895, [11].

²⁶⁷ *Id.* at [12].

²⁶⁸ *Id.* at [14].

²⁶⁹ *Id.*

²⁷⁰ *Id.* at [2].

²⁷¹ See *id.* at [62] (extending judicial assistance to enforcement).

²⁷² *Rubin v. Eurofinance S.A.*, [2010] EWCA (Civ) 895, [62].

²⁷³ *Pattni v. Ali* [2006] UKPC 51, [2007] 2 A.C. 85 (appeal taken from the Isle of Man) (U.K.).

²⁷⁴ *Rubin v. Eurofinance S.A.*, [2010] EWCA (Civ) 895, [45] (quoting *Pattni v. Ali* at [23]).

²⁷⁵ At common law, an English court could not accede to a request by a foreign insolvency court to enforce a judgment in personam contrary to the rules of English private international law." *Id.* at [29] (quoting the lower court).

²⁷⁶ *Id.* at [50].

²⁷⁷ While at common law "an English court could not accede to a request by a foreign insolvency court to enforce a judgment in personam contrary to the rule of English private international law." *Rubin v. Eurofinance S.A.*, [2009] EWHC (Ch) 2129, [59] (Eng.). "Some degree of international co-operation in corporate insolvency had been achieved by judicial practice." *Id.* at [61] (internal citation omitted). Moreover, Articles 25 and 26 of the UNCITRAL Model Law mandate cross-border cooperation and are "designed to overcome the widespread problem of national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies." *Id.* para. 174.

assistance of the court which should include assistance by doing whatever this Court could have done in the case of domestic insolvency. ²⁷⁸

Pointedly, the court noted its concern that the Model Law's provisions regarding cooperation do not make provision for enforcement of judgments of the sort involved in this case. ²⁷⁹

What troubles me is that the specific forms of cooperation provided by Article 27 do not include enforcement. Indeed there is no mention anywhere of enforcement yet the Guidance clearly had it in mind. On the other hand cooperation "to the maximum extent possible" should surely include enforcement, especially since enforcement is available under the common law. ²⁸⁰

Lord Hoffmann's articulation of the nature of bankruptcies, and the support he received in Eurofinance, is remarkably similar to the United States' articulation of comity vis-a-vis insolvency proceedings; to wit:

We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding. "Since 'the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding,' American courts regularly defer to such actions." In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and (consistent with the principles of Lord Mansfield's holding) do not contravene the laws or public policy of the United States. ²⁸¹

The similarity is unsurprising because both countries subscribe wholeheartedly to modified universalism and the principles underlying that doctrine. For that reason, the English decisions discussed in this article, and their articulation of modified universalism in practice, are worthy of our attention.

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V. Concluding Thoughts

What can be gleaned from the foregoing analyses, it seems, is that sacred cows can be herded, they can be put on a diet, they can be sold, or sent out to pasture, or returned to their owners. They just can't be slaughtered. The holders of secured claims will always cry foul whenever their full and complete access to their collateral, with all the leverage they thought they had an inviolate right to exercise, is somehow impinged. The story is no different when the impingement takes the form of being subjected to the insolvency rules of another country. If anything, the protests are even louder, and take on a nearly religious fervor. Yet, at the end of the day, if modified universalism is to function at all - and the author acknowledges that there are those who insist it is fated not to work - then it must of necessity permit a foreign representative to obtain some access to and control over assets subject to a security interest. Lord Hoffmann's insightful comments in both Cambridge Gas and HIH lay the conceptual groundwork for that conclusion, even if neither case involved the turnover over assets subject to a security interest. So when a court entertaining an ancillary proceeding, and committed to the principle of modified universalism, as so elegantly stated by Lord Hoffmann, is faced with a turnover request, what sort of test ought the court to employ when attempting to give content to the notion of "sufficiently protected" in § 1521(b) and § 1522(a)? At what point should that court invoke the public policy exception in § 1506? And does the court ever dare to employ § 1507 as a substitute for (or, worse, an end-around of) § 1521?

The answers to these questions are not easy, of course. In part, the author suffers under the habit of shying away from advisory rulings - principles announced outside a set of concrete facts. But the tension in this arena is quite

²⁷⁸ Rubin v. Eurofinance S.A., [2010] EWCA (Civ) 895, [62] (emphasis added).

²⁷⁹ Id. at [22].

²⁸⁰ Id. at [63].

²⁸¹ [JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.](#), 412 F.3d 418, 424 (2d Cir. 2005) (citations omitted).

high, as well. After all, secured creditors comfortable in their ability to resist turnover can effectively undermine or destroy the efficacy of a unified reorganization effort whenever that effort is taking place in a forum different from the forum under which their security interest arises. They can, in effect, force us into a scheme of cooperative territorialism, as Professor LoPucki predicts will occur in any event. That, in turn, compels the instigation of multiple parallel proceedings, imposing higher transaction costs on the insolvency process. True, such proceedings can be coordinated under the cooperation provisions of Articles 25 through 27 of the Model Law, but if that is the only practical course left to an insolvent debtor, then modified universalism is indeed a dead letter, and with it, much of the Model Law.

The authors optimistically believe that that is not, and should not be, the only way that an insolvency matter can be resolved. Principles already begin to emerge even from the relatively few cases that have been decided already. Here, for consideration, is a suggested listing:

Is the insolvency regime, under which the assets are to be administered, sufficiently "like" one would expect a modern insolvency regime to look like? The question, as posed, is not whether "they look like us," but rather whether they look like members of the family of modern commercial regimes, as measured by, for example, the UNCITRAL Legislative Guide on Insolvency Law.

Is the insolvency case a "main proceeding"? A system of modified universalism contemplates ancillary proceedings lending assistance to a "main" proceeding - which, in turn, ought to be located in a place that is the center of the debtor's main interests, as that term is used in the Model Law. And this should be true despite the [*557] fact that Article 21 of the Model Law would accord the turnover remedy to the representative of a foreign non-main proceeding.

Does the insolvency regime under which the assets are to be administered, include choice of law rules that can be said to give fair consideration to the local origins of a given security interest? In other words, does the insolvency regime superimpose non-insolvency law of the forum on the treatment of creditor claims that have their origin in the ancillary forum?

Does the insolvency regime, under which the assets are to be administered, function such that the security interest would be effectively destroyed, without opportunity to defend the interest in the host forum? The test here is not one of alteration - not even significant alteration - but rather one of destruction.

Did the security interest arise within a suspect period, such that a refusal to turn over the asset would effectively frustrate the administration of the foreign insolvency regime's avoidance rules? If it did, then it is less deserving of special protections.

Is the source of law for the determination of the validity and extent of the security interest the forum of the ancillary proceeding? Given the nature of security interests, the answer to this question will, in most cases, easily be in the affirmative, because the right to enforce a security interest is typically tied to the location of the assets. Still, there may be instances in which the security interest purports to extend to assets extraterritorially.

All the foregoing summary points can find support in the concepts and authorities that have been discussed in this article. All are attempts at reconciling the potentially competing notions of cooperation with a single main proceeding and appropriate protections for the property rights that are the basis for secured creditors' claims to special protection. We do not grant special deference to these rights out of an obeisance to the sanctity of contract - contract rights are routinely altered in the collective process of insolvency. Nor do we necessarily grant special deference out of some lofty notion of the importance of secured credit in the commercial world - were there no secured credit, insolvency would be that much easier to manage. But secured credit is a fact of commercial life, and the laws of most nations accord it special protection because of the secured creditor's presumed shared interest in property of the debtor.

While it might be said, at least in the United States, that we accord special treatment to secured credit because of its constitutional underpinnings, that is a slim and unstable reed on which to premise the argument - other countries do not necessarily accord such rights constitutional protections, and we ought to be somewhat wary of elevating the

rights of secured creditors, on that basis, to a level deserving of public policy protections (within the meaning of § 1506), lest we be compelled solely on that basis to grant similar treatment to rights in other countries that also enjoy constitutional protections. Indeed, we already know (from the Ephedra case) that, at least in this country, a constitutional entitlement will not necessarily assure that public policy will ride to the rescue. Finally, we know that not all the "sticks" that make up a secured creditor's "bundle of rights" need be preserved in the event of an insolvency proceeding. If a case is a main proceeding, then a secured creditor should not be surprised that its claim will be treated in accordance with the insolvency regime of that forum (though this observation makes it especially important that the center of a debtor's main interests be predictable in [*558] advance - perhaps it is even important that, if a debtor attempts to change that center, the change ought to be an event of default under the security instrument).

By the same token, however, we should know that the complete destruction of a secured creditor's property rights in the event of a turnover (other than in the case of a security interest obtained within a suspect period before the filing) ought to be grounds to resist. Something less than complete destruction will of course trigger increased concern by a court (as it should) but Article 22 (§ 1522 of Chapter 15) makes provision for the granting of a security or bond, and the notion of "sufficiently protected," while not to be presumed to be the same as "adequate protection" as used in the rest of the U.S. Bankruptcy Code, gives a court enough latitude to craft the right remedy to protect the secured creditor's rights in the property that collateralizes its debt. The foreign insolvency regime may do things to a secured creditor that a U.S. proceeding would not - but that is not and should not be the test. The U.S. system permits radical alteration of the creditor's bargain. Another system's laws may do so as well, though in ways different than those in our law. That is to be expected, as Lord Hoffmann points out in *Cambridge Gas*. The fact that those alterations cause a secured creditor to howl and cry foul should be treated by a court as the expected bawling and bellowing of cattle being herded. A hurt cow or a cow in danger is not the same as a fearful cow. And none of them are sacred.