INTERNATIONAL INSOLVENCY IN THE NEW MILLENIUM

THE TOP TEN TRANSNATIONAL INSOLVENCY DECISIONS IN THE UNITED STATES

PREPARED BY

EVELYN H. BIERY
FULBRIGHT & JAWORSKI L.L.P.
1301 MCKINNEY, SUITE 5100
HOUSTON, TEXAS 77010-3095
TELEPHONE 713.651.5544
FACSIMILE 713.651.5246

EVELYN H. BIERY
FULBRIGHT & JAWORSKI L.L.P.
300 CONVENT STREET, SUITE 2200
SAN ANTONIO, TEXAS 78205-3792
TELEPHONE 210.270.7130
FACSIMILE 210.270.7205

THE INTERNATIONAL INSOLVENCY INSTITUTE
NEW YORK CONFERENCE
JUNE 11-12, 2001

THE AUTHOR IS THE HEAD OF THE BANKRUPTCY,
REORGANIZATION & RIGHTS DEPARTMENT
OF
FULBRIGHT & JAWORSKI L.L.P.
A FIRM OF OVER 750 ATTORNEYS IN THE FOLLOWING CITIES:

AUSTIN HONG KONG LONDON MINNEAPOLIS SAN ANTONIO
DALLAS HOUSTON LOS ANGELES NEW YORK WASHINGTON, D.C.

THE AUTHOR ACKNOWLEDGES, WITH APPRECIATION THE CONTRIBUTIONS OF
STEVE A. PEIRCE AND JOHNATHAN C. BOLTON,
BOTH OF FULBRIGHT & JAWORSKI L.L.P., TO THIS PAPER.
SECTION II

THE TOP CROSSBORDER INSOLVENCY CASES

I. INTRODUCTION

The following cases demonstrate the responses of the United States Court to foreign insolvency proceedings. The cases have been selected for their historical significance in establishing standards for crossborder insolvency matters, primarily because of their precedential value. Case summaries are arranged in chronological order to show the progression of the law on crossborder insolvency in the United States.

In order to achieve consistency, brevity and reading ease, proper nouns are generally replaced with generic descriptions. And, because insolvency proceedings in foreign countries take on different names depending on the country of origin, in this paper they are generally referred to as “insolvency proceedings.” The term “bankruptcy,” on the other hand, will be used to refer to a case under the United States bankruptcy laws regardless of whether the case is a liquidation case or a reorganization case. Likewise, foreign representatives of foreign debtors, whether they have been called trustees, receivers, liquidators, or something else under the foreign law, will generally be referred to as “representatives.”

Many of the cases deal with the application of 11 U.S.C. § 304, which allows a foreign representative to institute an “ancillary” proceeding in a United States bankruptcy court to obtain relief in aid of the foreign proceeding. Section 304 was enacted with the 1978 Bankruptcy Code and had no predecessor provision under the Bankruptcy Act. Section 304, unchanged since 1978, is printed below:

Sec. 304 Cases ancillary to foreign proceedings

(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

(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 alien 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 undersubsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with

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

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
(3) prevention of preferential or fraudulent dispositions of property of such estate;

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

(5) comity; and

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


In addition, the concept of “comity” is discussed at length in many of these opinions, whether the cases are pre or post 304. In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Supreme Court defined comity as follows:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has been often criticized, no satisfactory substitute has been suggested. 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.


In analyzing these cases, certain concepts recur:

- A 304 ancillary proceeding, if contested, is a trial that could be resolved by summary judgment, Rule 12 motion, or live testimony.

- An expert on the foreign law would seem essential, in that courts’ decisions often turn on a comparison between the United States bankruptcy laws and the foreign insolvency laws. In this regard, note that laws and decrees from “sister common law” jurisdictions such as England, Canada and the Bahamas are generally given deference because of their similarity to American law. On the other hand, if the foreign law would force American creditors’ claims to be treated in some manner inimical to the United States policy of equality among creditors, and if there is something inherently vicious, wicked, immoral or shocking to the prevailing American moral sense about the foreign law, then comity will likely be denied.

- Notwithstanding anything else, if adequate notice and an opportunity to be heard (due process) has been denied in the foreign proceeding, or under the foreign law, would likely be denied, relief or comity in favor of the foreign jurisdiction will likely be denied.

- If a party contracted with a foreign entity, it will likely not be heard to complain about the foreign law.

- Courts are loathe to let someone get away with a fraudulent transfer or raise their priority of claim by taking advantage of the confusion created by foreign proceedings.
Reciprocity — the idea that “the foreign country doesn’t recognize our laws, so we won’t recognize theirs” — seems to be a less important comity factor in the more recent decisions and plays no role under Section 304.

The universality rule, tempered by concepts of due process and comity, appears to be the philosophical center of the more modern decisions. The territoriality, or “grab” rule, is a philosophy more frequently found in earlier decisions. “Universality” is commonly defined in terms of a primary proceeding in a debtor's domiciliary country, with ancillary proceedings in other jurisdictions where the presence of assets or other matters require local assistance to the primary court. Universality places an emphasis on deference, through comity, to foreign insolvency proceedings. It is contrasted with "Territoriality" or the "Grab Rule" which describes the process whereby courts in each national jurisdiction sequester the property of a multinational in default and distribute it according to local rules. The foregoing is not a limiting definition of the two approaches; there are gradients of each, and many systems have characteristics of both. These have also been referred to as "secondary bankruptcy" or "modified universality" regimes. See, In re Hourani, 180 B.R. 58, 63 at n.9 (Bankr. S.D.N.Y. 1995) (citing Jay L. Westbrook, Choice of Avoidance Law in Global Insolvencies, 17 Brook. Int. L. J. 499 (1991)).

II. THE TOP CASES

1. Canada Southern Railroad v. Gebhard, 109 U.S. 527 (1883). This case is significant because it establishes an “estoppel” type rule that if you deal with a foreigner, you must deal with the foreigner’s laws.

In Gebhard, a Canadian railroad issued bonds to American creditors. The Canadian railroad became insolvent and issued a “scheme of arrangement” approved by the Canadian government that provided for new bonds. The American creditors did not participate in the Canadian proceedings. The American creditors then filed suit in the United States on the old bonds. The American creditors contended that they were not bound by the Canadian scheme of arrangement. The Supreme Court held that the American creditors were bound by the scheme of arrangement and that their suits in the United States could not be maintained. In so holding, the court noted that:

every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

109 U.S. at 370.

The court reasoned that every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.

2. Hilton v. Guyot, 159 U.S. 113 (1895). This case states the Supreme Court’s definition of comity. It is also significant because it denies comity based on lack of reciprocity.
In *Guyot*, French creditors sued Americans in France for overdue payments. The Americans removed all of their assets from France, and thereafter a judgment was rendered against them in France. The French representative then sued the Americans in the United States to enforce the French judgment. The Supreme Court held that:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has been often criticized, no satisfactory substitute has been suggested. 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

159 U.S. at 143.

Under the rules of comity, courts are allowed, but not required, to recognize foreign laws, judgments or proceedings, depending on the circumstances of each case. In this case, the American defendants argued that the court should not enforce the French judgment because the differences in procedure between the American and French law were so great that the basic principles of fairness would be violated. For instance, in the French proceeding, no oath was required of witnesses, no cross examination was allowed, and evidence that would have been inadmissible under American law was admitted. The court, however, did not deem these sufficient enough factors to impeach the foreign judgment. However, the court denied recognition of the foreign judgment on the basis of lack of reciprocity on the part of France, in that France failed to give effect to the judgments of the United States and other foreign countries.

3. *Disconto Gesellschaft v. Umbriet*, 208 U.S. 570 (1908). This case exemplifies the territoriality, or “grab” rule, when local courts favor local creditors.

In *Disconto*, a German named Terlinden moved to Wisconsin. Terlinden owed money to a German creditor. On July 27, 1901, insolvency proceedings were instituted against Terlinden in Germany. The German creditor obtained approval in the German proceedings to pursue Terlinden in the United States. On August 17, 1901, the German creditor sued Terlinden in state court in Wisconsin and at the same time garnished Terlinden’s Wisconsin bank account. On February 19, 1904, the German creditor obtained a judgment against Terlinden. On March 21, 1904, Terlinden’s United States lawyer, Umbriet, sued Terlinden for fees. Umbriet obtained a judgment against Terlinden on July 11, 1904. Ultimately, in an interpleader action over the garnished Wisconsin bank account, the Wisconsin Supreme Court gave the American Umbriet priority over the German creditor. The Supreme Court of Wisconsin adjudged that the fund attached could not be subjected to the payment of indebtedness due to the German creditor as against the claim asserted to the fund by an American citizen (Umbriet), although that American citizen’s claim arose after the attachment by the German creditor. The Supreme Court further held that the effect of the German creditor’s judgment would be to remove the fund to a foreign country to be administered in favor of foreign creditors and that this was against the public policy of Wisconsin, which forbade discrimination of that type against a Wisconsin citizen. The Court held that alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts of the United States for redress of wrong and the protection of their rights. But what property may be removed from a state and subjected to the claims of creditors in other countries is a matter of comity between nations and states and not a matter of absolute right in favor of creditors of another country when citizens of the local state and country are asserting rights against property within the local jurisdiction. In determining that the policy of Wisconsin would not permit the property to be appropriated for the benefit of foreign creditors as against the demands of the citizens of Wisconsin, the Wisconsin court did no more than has frequently been done by nations and states in refusing to exercise the doctrine of comity in such a way as to impair the right of local creditors to subject local property to their just claims.
4. **Clarkson Co. v. Shaheen, 544 F.2d 624 (2d Cir. 1976).** *This case points out that the citizenship of the foreign representative is used to decide the question of diversity. It also states the rule that sister common law jurisdictions are usually given deference.*

In *Clarkson*, the Canadian representative for corporate debtors from a Canadian insolvency proceeding filed a diversity suit in the United States federal court to obtain records in possession of officials of the Canadian corporate debtor who resided in New York. The Canadian corporate debitors had executive offices and did business in New York. The lower court issued a turnover order. On appeal, the court first determined that diversity jurisdiction was proper. The court held that as a matter of American bankruptcy law, the citizenship of the bankrupt, rather than that of the trustee in bankruptcy, is determinative for purposes of diversity jurisdiction. However, it is also true that the determination of diversity citizenship under the Bankruptcy Act is in derogation of the general common law rule that courts will look to the citizenship of a trustee, receiver, administrator, or other representative, and not the party which he represents, in determining diversity jurisdiction. Thus, a foreign representative may use his own citizenship in claiming diversity jurisdiction unless the foreign law poses its own restrictions. Since the Canadian representative was duly appointed in the Canadian insolvency proceeding and the defendants were citizens of New York, diversity jurisdiction existed. As to the merits of the case, the issue was whether the Canadian bankruptcy proceeding may be collaterally attacked by the American defendants in federal court. The court noted that comity recognizes the statutory title of a foreign representative, as long as the foreign court had jurisdiction over the bankrupt and the foreign proceeding would not result in an injustice to the American citizens, prejudice to the American citizen’s statutory remedies, or violation of the laws or public policy of the state.

The exceptions to comity are construed especially narrowly when the foreign jurisdiction is like Canada, a sister common law jurisdiction with procedures akin to those in the United States. The court noted that Canadian courts have given relief to trustees appointed in the United States. The American defendants, however, insisted that comity should not be given to the Canadian court’s designation of the Canadian representative because the appointment was tainted with fraud and therefore not cognizable as a foreign judgment. The court noted that a foreign judgment may not be collaterally attacked upon the mere assertion of the party that the judgment was erroneous in law or fact, much less upon a mere assertion of fraud. Clear and convincing evidence of fraud is required to successfully attack a foreign judgment, just as such proof is necessary before a court will set aside its own judgment. The court noted that there was no indication that the Canadian court gave the American defendants less than the full opportunity to present these questions. Accordingly, the court held that it would contravene the public policy of New York and the doctrine of comity not to recognize the Canadian judgment in these circumstances.

5. **In re Colorado Corp., 531 F.2d 463 (10th Cir. 1976).** *This case shows an example of a misdirected use of the reciprocity factor on a comity decision.*

*Colorado Corporation* involved a Luxemburg company called IIT and a Netherlands Antilles company called Venture Fund. A representative for IIT was appointed in a Luxemburg insolvency proceeding. A representative for Venture Fund was appointed in a Netherlands Antilles insolvency proceeding. The Canadian government played a large part in procuring the orders appointing these representatives in those two insolvency proceedings. Both IIT and Venture Funds held claims against an American corporation called Colorado Corporation. Colorado Corporation then filed for bankruptcy relief in the United States. The claims of the IIT and Venture Fund representatives were provisionally disallowed, and they were denied the right to vote for a trustee in the Colorado Corporation bankruptcy because the Canadian courts had failed to give reciprocity to United States courts. Accordingly, the Luxemburg and Netherlands Antilles orders were not given effect. On appeal, the Tenth Circuit held that the principal issue was whether the bankruptcy judge abused his discretion in provisionally disallowing the claims of IIT and Venture Fund for the purpose of voting for a trustee in bankruptcy in the Colorado Corporation. It held that reciprocity has been a consideration in the granting or withholding of comity, although it has been abandoned by some courts. In this case, the bankruptcy court had denied comity to the Netherlands Antilles decree concerning IIT because of actions by Canadian courts in not giving comity to American court orders. The Tenth Circuit held that denying comity to the Netherlands Antilles order because of lack of reciprocity in Canada is such a misdirected view of the reciprocity consideration as to constitute an abuse of discretion. The court could not see how allowing foreign creditors to vote for a trustee subject to the duties imposed by American law could prejudice American citizens. Because the Luxemburg company Venture Fund claim...
was denied comity based on the denial of comity of the orders of the Netherlands Antilles court, it was an abuse of discretion to deny Venture Fund representatives the right to vote their claim as well. Colorado Corporation also argued that Luxemburg and Netherlands Antilles courts would not grant comity to orders of American bankruptcy courts. However, the Tenth Circuit noted that this was the burden of Colorado Corporation to prove and it had introduced no evidence to support such an argument. Accordingly, it was an abuse of discretion not to grant comity to the Netherlands Antilles and Luxemburg decrees.


In *Israel*, a British bank did no banking business in the United States and was not licensed to do business in the United States; however, it borrowed money from American banks and maintained deposits in American banks. One American bank obtained an attachment that would have been voidable under the United States Bankruptcy Act. In the meantime, the British bank filed an insolvency proceeding in the United Kingdom. A representative was appointed in the British court with authority to institute a United States bankruptcy case for the British bank, which the representative did. The issue was whether the British bank was an eligible debtor under the United States Bankruptcy Act because the Act prohibited banking corporations from filing for bankruptcy relief. It was held that the British bank could be a debtor. The exclusion for banking corporations applied only to American banks subject to American banking regulations. Since the British bank was not subject to those regulations or bound by them in the United States, it could file for bankruptcy relief in the United States.

7. *In re Banque de Financement, S.A. (Finabank)*, 568 F.2d 911 (2d Cir. 1977). *This is a pre-304 case that allowed a foreign representative to file a United States bankruptcy case in aid of the foreign insolvency proceeding.*

In *Finabank*, a Swiss bank called Finabank had no place of business or office in the United States. Finabank had filed a reorganization type insolvency case in Switzerland. American creditors had received a preferential transfer from Finabank, so Finabank also filed a Chapter XI case in the United States for the purpose of avoiding the preference. In the meantime, Finabank hoped to reorganize in Switzerland and make its Swiss reorganization part of the United States Chapter XI plan. As it turned out, the Swiss insolvency proceeding went into liquidation. The preferred American creditors moved to dismiss the Chapter XI case under the "inherent power" of the bankruptcy court because Finabank had been unable to reorganize in Switzerland and because, due to Swiss bank secrecy laws, Finabank could not submit a list of creditors in the Chapter XI case. The American creditors also argued that comity should not be exercised to the prejudice of American creditors. The bankruptcy court dismissed the Chapter XI case and Finabank appealed. On appeal, it was held that the bankruptcy court was clearly erroneous in finding that Finabank never intended to pursue its Chapter XI proceedings for purposes of rehabilitation and that therefore the inherent dismissal power lacked the necessary underpinnings. In finding that Finabank never intended to pursue the Chapter XI proceeding to obtain confirmation of a plan of arrangement, the bankruptcy court had improperly looked to post-petition events. Although such post-petition events may be probative if there was an absence of intent to seek an arrangement at the time of the filing, they fell short of supporting the bankruptcy court's exercise of inherent power to dismiss the case. The court noted that in filing its Chapter XI petition, Finabank instituted a proceeding which was in effect ancillary to the pending insolvency proceeding in Switzerland. At the time of the filing of the Chapter XI petition, the Swiss court was still in the process of determining the feasibility of Finabank's reorganization. It was not until almost a year later that the hope of reorganization in Switzerland was formally abandoned. The court noted that, as a practical matter, rehabilitation in the United States depended upon the approval of a plan in Switzerland, so Finabank realistically had no choice but to delay the filing of a plan of arrangement in the bankruptcy court. The court noted also that a Chapter XI reorganization petition was necessary because a liquidating bankruptcy would have conflicted with the Swiss rehabilitation proceeding. As to the issue of Finabank's failure to complete a list of creditors, the court noted that Finabank's reason for seeking relief from the creditor list requirement was not to obtain some advantage over the creditors, but to protect them. Nor was Finabank attempting to pass on to a trustee the task of straightening out badly kept records. Rather, Finabank was constrained by the criminal law of its domicile not to reveal the creditor list. Since
the United States bankruptcy proceeding was in aid of a corresponding Swiss proceeding, a list of creditors did exist, albeit in the Swiss case. Finabank suggested reasonable possibilities of coordinating the two proceedings. First, the bankruptcy court would take jurisdiction, set aside the preferences and then suspend its proceeding and permit the assets located in the United States to be administered in the Swiss proceeding. The other alternative would have been a full administration in the United States coordinated with the Swiss proceeding. The Swiss court could notify the creditors who would then elect whether to appear in the United States proceeding. The court found that these proposals were a reasonable response to the secrecy law problem. The American creditors also urged as an alternative ground for dismissal of the bankruptcy case the bankruptcy court’s discretion that suspension or dismissal be considered with regard to the rights and convenience of local creditors. The court noted that this rule was not intended to be the instrument by which jurisdiction over a foreign domiciliary could be undercut for the purpose of validating preferential transfers to United States nationals. The purpose of the rule rather is to guard against forcing American creditors to participate in foreign proceedings in which their claims would be treated in some manner inimical to the American policy of equality among creditors.

8. Matter of Culmer, 25 B.R. 621 (Bankr. S.D. N.Y. 1982). This is one of the early Section 304 cases providing a detailed comparative analysis between the foreign law and the bankruptcy law in reaching a comity decision. This case is often cited for its use of a “blank check” analogy to describe Section 304 relief.

In Culmer, a Bahamian bank was in an insolvency liquidation proceeding in the Bahamas. The Bahamian representatives filed a 304 proceeding, essentially to obtain 362 type relief. Some of the creditors supported the relief, but American bank creditors opposed the relief. The court first addressed the procedure for a 304 proceeding and noted in what would become oft-quoted language that, pursuant to 304(b), “the court is free to broadly mold appropriate relief in near blank check fashion” without the necessity of trial when a party in interest does not controvert the petition, or after trial, if there is controversy. The court also noted that summary judgment and Rule 12 motion practice would also be appropriate in a 304 controverted proceeding. This case shows the necessity for becoming familiar with the foreign law and having an expert available on the foreign law. The court went through an extensive analysis of Bahamian law as compared to the United States bankruptcy laws. The court concluded that affording comity to the Bahamian proceeding would not violate American law or public policy. The court noted that whether or not Bahamian law is identical in application to American law, there is nothing inherently vicious, wicked, immoral or shocking to the prevailing American moral sense in the Bahamian laws. Like Canada, the Bahamas is a sister common law jurisdiction with procedures akin to the United States procedures. One who invests in a foreign corporation subjects his investment to foreign law and may not seek to obtain greater rights than his co-creditors by suing in a United States court. Section 304 does not require a United States administration of assets of a foreign debtor located in the United States simply because creditors appearing in the United States request such relief.

9. Angulo v. Kedzep Ltd., 29 B.R. 417 (S.D. Tex. 1983). This case shows that a Section 304 proceeding may be instituted where the witnesses are located for the purpose of obtaining discovery.

In Angulo, a Canadian corporation called Kedzep was the subject of a Canadian insolvency proceeding. Kedzep was a subsidiary of a company called ISC. ISC maintained its principal place of business in Houston. Kedzep had no property in Houston except for some accounts receivable. However, former officers of Kedzep and ISC were located in Houston. The Canadian representative filed a 304 action in the Southern District of Texas for the purpose of obtaining discovery from the former officers and directors of Kedzep and ISC. The bankruptcy court allowed the discovery, and the deponents appealed. The first issue was whether venue was proper in Houston. The court held that venue was proper because Kedzep owned accounts receivable located in Houston. Alternatively, the court held that under 28 U.S.C. § 1477, even if the bankruptcy proceeding is filed in the wrong district, the bankruptcy court may retain the action if it is in the interest of justice and for the convenience of the parties. Here, the witnesses and assets relevant to the witnesses were located in Houston. Venue was therefore proper. The court also held that it was not an abuse of discretion to order the discovery because 304's is “other appropriate relief” language was broad and flexible enough to allow for an ancillary suit to be filed for the purpose of discovery. Letters rogatory and 28 U.S.C. § 1782 were not the exclusive methods for conducting international discovery.
10. Cunard Steamship Co. Ltd. v. Salen Reefer Services AB, 773 F.2d 452 (2d Cir. 1985) [Salen I].

This case holds that Section 304 is not an exclusive remedy for a foreign representative. As in the pre-
section 304 cases, the doctrine of comity alone may still be used as a ground for relief.

Cunard involved a Swedish company called Salen. Cunard was an English contract creditor of Salen. The 
Salen-Cunard contract provided for the arbitration in London of any dispute arising under the contract. Salen filed an 
insolvency proceeding in Sweden. Cunard then filed suit in federal court in the United States and obtained an 
attachment of assets of Salen located in the United States. Salen moved to vacate the federal attachment order because of 
the Swedish insolvency proceeding. Salen's relief was granted and Cunard appealed. On appeal, the threshold issue 
was whether, when a debtor is involved in a foreign bankruptcy proceeding, 304 of the Bankruptcy Code is the exclusive 
remedy for the foreign representative who wishes to stay or enjoin creditor actions in the United States. The Second 
Circuit held 304 was not the exclusive remedy and that the doctrine of comity would apply. The court noted that it did 
not find in the statute or the legislative history a clear congressional mandate, either express or implied, that 304 was 
to be the exclusive remedy for a foreign debtor. Accordingly, the district court could extend comity to the Swedish 
insolvency proceeding by vacating the federal attachment order and staying creditor actions.

Cunard argued that the granting of comity was improper because the Swedish court lacked personal jurisdiction 
over Cunard and lacked in rem jurisdiction of the assets in the United States. The Second Circuit held, however, that 
jurisdiction over the debtor, Salen, was all that was necessary for the granting of comity. No court has required that 
foreign insolvency courts obtain in personam jurisdiction over each creditor. As to the comity analysis, the granting of 
comity to a foreign insolvency proceeding enables the assets of the debtor to be disbursed in an equitable, orderly, and 
systematic manner, rather than in a haphazard, erratic, or piecemeal fashion. American courts have consistently 
recognized the interest of foreign courts in liquidating or winding up the affairs of foreign business entities. It has long 
been established that foreign representatives are granted standing as a matter of comity to assert the rights of the foreign 
debtor in American courts. Although early cases upheld the priority of local creditor attachments, the modern trend has 
bteen toward a more flexible approach that allows the assets to be distributed equitably in the foreign proceeding. In 
analyzing the comity issue, the Second Circuit noted that principles of Swedish insolvency law are not dissimilar to 
those of the Bankruptcy Code. Although Cunard does business and has a presence in the United States, it is 
incorporated and based in England. Furthermore, the contract at issue had no connection with the United States. Even 
if Cunard were viewed as a citizen of the United States, thus invoking the rule of not granting comity that is prejudicial 
to United States citizens, there was no indication that Cunard would be prejudiced or treated unjustly if it were to 
participate in the Swedish insolvency proceedings. There was no indication that the Swedish insolvency proceedings 
are inimical to the American policy of equality among creditors.

for purposes of Section 304 generally mean court-supervised proceedings, this case holds that a 
proceeding supervised by a foreign regulatory body is sufficient.

In Banco de Descuento, an American bank financed Ecuadorian transactions guaranteed by an Ecuadorian 
bank. The transactions failed and the American bank filed suit against the Ecuadorian bank in federal court in New 
York and obtained a prejudgment attachment. The Ecuadorian bank then went into a non-court-supervised liquidation 
procedure similar to an FDIC-type procedure in the United States. The Ecuadorian representative then filed a 304 
proceeding seeking to enjoin the American bank from disposing of the assets it had seized. The court held that the 
Ecuadorian procedure was a “foreign proceeding” within the meaning of 304. The court ordered a 362 type stay on 
the disposal of assets pending further order of the court based on what would best assure the economical and expeditious 
administration of the assets of the Ecuadorian bank. In so holding, the court cited the case of Canadian Southern 
Railway vs. Gebhart, 109 U.S. 527 (1883) and its holding that every person who deals with a foreign corporation 
impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the 
corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.

shows that section 304 does not invoke the chapter 5 avoidance powers; however, if similar powers 
are available in the main foreign proceeding, they may be asserted under 304.
In Metzeler, an American creditor received a preferential trial transfer from a German company. The German company then filed a German insolvency proceeding. The German representative then filed a 304 action in New York bankruptcy court seeking to avoid the preferential transfer. The German company had no place of business or assets in the United States. The American creditor moved to dismiss the 304 proceeding on the grounds that the German representative could not bring a 547 preference action in a 304 proceeding. The court held that a foreign representative may assert in a 304 proceeding only those avoiding powers vested in him by the law applicable to the foreign country—here, German law. There was indeed a preference type action available under German law, however. The court declined to dismiss the 304 action, holding that the fact that the German preference action in the United States was enough under U.S. vs. Whiting Pools to support jurisdiction in a United States bankruptcy court. The court also held that the filing of the 304 proceeding tolled limitations under the German preference law.

13. In re A. Tarricone, Inc., 80 B.R. 21 (Bankr. S.D. N.Y. 1987). This case also shows that 304 does not invoke the Chapter 5 evidence powers; in this instance, however, the German representative failed to provide proof of the similar German law preference provisions.

In A. Tarricone, Inc., ATI was an American company that received payments from a German company in July of 1984. Later that month, the German company filed a German insolvency proceeding. In July of 1985, the German representative filed a 304 petition in bankruptcy court in the Southern District of New York, and in September 1986 he filed an adversary proceeding against ATI seeking recovery of the 1984 transfers under sections 547 and 548 of the Bankruptcy Code. The court held that the German representative was not a trustee under title 11 and could not file any avoidance actions under the Bankruptcy Code, noting that a foreign representative has only those avoiding powers that the foreign law would give him and that it would be proper for a foreign representative to file a 304 action for the purpose of bringing an avoidance action under foreign law. Accordingly, the court dismissed the adversary proceeding.

14. In re Enercons Virginia, Inc., 812 F.2d 1469 (4th Cir. 1987). This is another case that holds that section 304 does not abrogate the doctrine of comity and accordingly that section 304 is not the exclusive means by which a foreign representative may obtain relief. The case also highlights the requirement that foreign proceedings must provide for due process if they are to be recognized.

In Enercons, an Italian principal of an Italian corporation allegedly had defrauded creditors via his corporation and was living in Virginia. Insolvency proceedings were filed against the Italian corporation in Italy. An Italian representative was appointed and given by Italian court order the sole authority to bring claims on behalf of the Italian corporation against the principal. The principal then filed bankruptcy in Virginia. In the Virginia bankruptcy, the Italian representative and Italian banks both filed the same claims against the principal. The Italian representative argued that, under the Italian court order, he had the exclusive authority to bring the claims. Accordingly, in a declaratory judgment action, the Italian representative asked that the United States bankruptcy court disallow any proofs of claims filed by the four Italian banks. The court applied the doctrine of comity to the Italian court order appointing the Italian representative. It held that the United States bankruptcy courts should respect the Italian representative’s authority to act as the exclusive representative of the Italian debtor corporation and its Italian creditors. Because the objection to the proofs of claims was done by way of a declaratory judgment action in a bankruptcy rather than a proceeding under 304, the Italian banks argued that 304 was the exclusive or preferred remedy of a foreign representative who wished a United States bankruptcy court to cooperate with the foreign court in its administration of a foreign debtor’s estate. The court held that Section 304 is not an exclusive remedy because the section was not meant to abrogate the doctrine of comity. The same comity analysis applies regardless of whether a proceeding is brought under 304 or not, or whether it is brought in a bankruptcy court or a nonbankruptcy court. The Italian banks also argued that it was error for the bankruptcy court to extend comity to the Italian court order because the Italian proceedings were unfair to the Italian banks. The Italian banks argued that the Italian court order was an ex parte order and they received no notice or opportunity to be heard. The court noted that, it is true, in determining whether to apply comity to a foreign court order, the United States court must consider its own laws and public policy, such as the principle of due process, on the question of comity. On this point, however, the court found that the original Italian order appointing the Italian representative was given with due process to the Italian banks and that the second ex parte Italian order merely clarified the exclusive authority of the Italian representative inherent in his appointment. It was appropriate to grant comity to the Italian order because the Italian proceedings were sufficiently analogous to the fundamental concepts of justice as to warrant an extension of comity.
Remington involved a fight over the “know-how” relative to the SR-101 typewriter. This know-how was represented by about 3,000 documents that would fill several Boeing 747s. Remington US was an American company that owned the know-how. Remington US had a Dutch subsidiary called Remington BV that held a license to the know-how that was subject to a confidentiality agreement. That know-how was used at Remington BV’s Den Bosch plant. On March 25, 1981, Remington BV filed an insolvency reorganization proceeding in the Netherlands. On March 28, 1981, Remington U.S. filed a chapter 11 case in New Jersey. The Remington BV Dutch insolvency case went into liquidation and a Dutch representative was appointed. The Remington US Chapter 11 case successfully reorganized. On June 4, 1981, the Remington BV Dutch representative, pursuant to an order from the Dutch court, sold the Remington BV Den Bosch plant along with the SR-101 know-how to a Dutch company called BSI BV, which had a United States affiliate called BSI US. Remington US was not a party to the Dutch court proceeding where the sale was authorized. On August 17, 1981, Remington US filed an adversary proceeding in its Chapter 11 case against BSI BV, and, by amended complaint, against BSI US too for misappropriation of the SR-101 know-how. On August 17, 1983, BSI BV filed an insolvency reorganization proceeding in the Netherlands, but on February 13, 1985, BSI BV went into liquidation in the Dutch proceeding and had a representative appointed. The bankruptcy court ruled in favor of Remington US for damages and injunctive relief against BSI. On September 6, 1984, the district court adopted the bankruptcy court’s findings on liability and injunctive relief. Accordingly, the district court ordered BSI BV and its Dutch representative to turn over copies of know-how documents; when they did not comply, they were held in contempt. As part of the contempt order, the Dutch representative was denied a defense. On November 14, 1986, BSI US filed a Chapter 11 case in the United States. The major issue on appeal was the effectiveness of the Dutch court order in the Remington BV proceeding that allowed the sale of the Den Bosch plant. The Third Circuit held that the propriety of the BSI BV representative’s acts should be measured by Dutch law; however, it found, as a matter of fact, that Remington US owned the know-how, so it was improper, even under Dutch law, for the Dutch representative to sell it. To determine whether BSI BV committed an inappropriate act, the court looked to New Jersey law, alternatively to Dutch law, and held that because of the knowledge of the confidentiality agreement, BSI BV knew or should have known that it could not buy the know-how. BSI argued that the Dutch representatives were protected by the Act of State Doctrine. The court held that the Act of State Doctrine did not apply to trustees, receivers and the like because they do not make policy decisions to give effect to their government’s political and public interests. The Dutch order approving the sale was not entitled to comity. First, the order did not mention the intellectual property in general or the SR-101 know-how in particular, and no comity is required on issues not decided. Second, the Dutch order was not entitled to comity because Remington US did not have due process because it did not have notice or an opportunity to be heard on the sale order. Finally, the court noted that there was no guarantee that the US judgment would be recognized by the Dutch court. BSI BV also contended that the district court should have refrained from granting turnover relief against BSI BV because of BSI BV’s Dutch insolvency proceeding. The Third Circuit held that the turnover did not offend comity because BSI BV voluntarily submitted to the jurisdiction of the bankruptcy court, because the district court ruled on the issue of turnover, and because there was no contrary ruling of ownership by the BSI BV Dutch court. Another aspect of the district court’s order was the imposition of a constructive trust on typewriters, parts, and proceeds of BSI BV, and a finding that BSI BV engaged in a continuing tort. The effect of the constructive trust would be to grant a security interest in BSI BV’s assets; the effect of the continuing tort ruling would be to grant at least a part of the damage award administrative expense type priority in the BSI BV Dutch proceedings. The Third circuit held that a far reaching constructive trust in favor of Remington U.S. on BSI BV assets anywhere in the world was in conflict with the BSI BV insolvency proceedings. Therefore, it was error for the district court to hold the BSI BV representative in contempt. Because the contempt ruling was in error, the contempt sanction of striking the “lead time” defense of BSI BV was wrong, so a remand to the district court on the issue of damages was appropriate. The Third Circuit, however, refused to lift the attachment on BSI BV assets located in the United States, primarily reasoning that attachment preceded the institution of the BSI BV insolvency proceeding. The Third Circuit further ruled that, after Remington U.S. reduced its claim to judgment after remand, it should carry the judgment to the Netherlands to seek recognition of it. In the event that the Dutch court recognized the Remington U.S. judgment, the United States district court could consider what portion of the BSI BV assets under constructive trust in the United States would be forwarded to the Dutch court for distribution. In the event that the Dutch court would not recognize the Remington U.S. judgment, the United States district court would be free to reconsider a proper remedy.
16. *In re Banco Nacional De Obras Y Servicios Publicos*, 91 B.R. 661 (Bankr. S.D.N.Y. 1988). In this case, the court denied comity because the foreign court would not be able to effectively apply a specialized United States labor law, and also because of inconvenience to the American creditors.

*Banco National* involved Aeronaves, the Mexican company that operated Aeromexico Airlines. Aeronaves had 350 workers in the United States who were members of a union. Aeronaves had a collective bargaining agreement with the union. There was a disagreement over the collective bargaining agreement that involved a question of whether there was a collective bargaining agreement at all. Accordingly, the union filed a declaratory judgment action against Aeronaves in federal court in New York, contending that Aeronaves was a common carrier under the Railway Labor Act ("RLA"), 45 U.S.C. § 181, and that, accordingly, there was a collective bargaining agreement. While that action was pending, Aeronaves filed an insolvency proceeding in Mexico and the Mexican court permitted the rejection of labor contracts, including the union contract with the American union workers. The Mexican representative then filed a 304 action seeking to enjoin any creditors, including the union, from pursuing any remedies in any court other than the Mexican court or the United States bankruptcy court in the 304 proceeding. The union argued that it should have the right to argue the questions of American labor law in the United States court and also that it is unfair to force individual workers who resided in the United States to litigate in Mexico on whether there existed under United States law a collective bargaining agreement and what its terms may have been. After weighing the factors for deciding 304 relief, the court agreed with the union and held that the federal court proceeding is the best proceeding to hear the question of whether there was a collective bargaining agreement because these were issues that turned on the RLA, a specialized area of law laced with strong policy considerations. The court held that a collective bargaining agreement is not an ordinary contract for the purposes of goods and services nor is it governed by the traditional common law concepts that control private contracts. Congress fashioned a specialized statutory scheme to effectuate its policy of self-adjustment of the common carrier industry’s labor problems. If comity were granted, the result would be to force American creditors to participate in foreign proceedings in which their claims would be treated in some manner inimical to the United States policy of equality among creditors. On the issue of relative prejudice, the court noted that the prejudice to the Mexican representative by litigating in New York is minimized by the presence of New York bankruptcy and labor counsel. On the other hand, American creditors would be severely prejudiced both if they must litigate individually their claims emanating from a disputed collective bargaining agreement in Mexico and if the Mexican court is called upon to construe and apply United States labor law in an area in which traditional contract principles are not strictly applied and in which policy considerations abound.

17. *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988). This is another case holding that the foreign debtor (here, a decedent’s estate) is not required to be eligible as a bankruptcy debtor for its foreign representative to file a Section 304 proceeding.

*Georg* involved a German named Guenther who owned property in Georgia and Germany. Guenther died with an insolvent estate, and German insolvency proceedings were instituted against his estate. Under the German law, insolvency proceedings are permitted to be brought with respect to an insolvent decedent’s estate. A representative was appointed in the German proceedings. In the meantime, the Georgia probate court appointed an administrator to administer the Georgia assets. The German representative filed a 304 ancillary proceeding in bankruptcy court in Georgia seeking to enjoin the Georgia administrator from administering the estate. The issue was the propriety of filing a 304 action when the entity that is the subject of a foreign insolvency proceeding does not fall within the Bankruptcy Code’s definition of “debtor” -- in that the Bankruptcy Code does not recognize insolvent decedent’s estates as debtors under the Bankruptcy Code. The problem was that the definition of foreign proceeding under the Bankruptcy Code makes reference to the term “debtor” and a decedent’s estate is not a debtor under the Bankruptcy Code. The court held that a 304 proceeding could be filed by a foreign representative whose debtor would not be eligible to be a debtor under the United States Bankruptcy Code. The Code definition of “foreign proceeding” need not be a “bankruptcy” proceeding either under foreign or United States law, and the definition of foreign proceeding includes a proceeding that is for the purpose of liquidating an estate. The court also used the rule of statutory construction that a statute susceptible of more than one meaning must be read in the manner which effectuates, rather than frustrates, the major purpose of the legislative drafters. The purpose of 304 was to help further the efficiency of foreign insolvency proceedings involving worldwide assets. In aid of such proceedings, federal bankruptcy courts may, within the constraints imposed by 304, apply their processes and expertise to marshal property of the foreign debtor’s estate.
located in this country. Because the focus is on making the United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject of the foreign proceeding qualify as a debtor under United States bankruptcy law. Under 304, a debtor does not receive the benefits of a full bankruptcy administration. For example, in a 304 proceeding, the debtor is not entitled to an automatic stay, nor is the debtor entitled to discharge. Ultimately, in the 304 proceeding, a debtor may receive no relief at all because all relief is within the discretion of the bankruptcy court. Accordingly, debtor eligibility under the Bankruptcy Code is not a prerequisite to 304 ancillary assistance.

18. Ma v. Continental Bank N.A., 905 F.2d 1073 (7th Cir. 1990). This case is interesting because a foreign representative obtained results in the United States without seeking the aid of a United States court.

Ma was a Chinese citizen. Ming, also a Chinese citizen, obtained a judgment in Hong Kong against Ma for $4.5 million. Ma then transferred $150,000 to Continental Bank in Illinois and went to Canada. Without notice to Ma (because he had fled the country), Ming commenced an involuntary insolvency proceeding against Ma in Hong Kong, and a Hong Kong representative was appointed. The Hong Kong representative simply asked Continental Bank (through its subsidiary) for the $150,000, which the bank turned over to him. After expenses of the Hong Kong representative, Ma’s creditors received only about half of the $150,000. Ma sued Continental Bank for the difference, alleging that Continental Bank should not have turned over the funds to the Hong Kong representative without a 304 proceeding, and if a 304 proceeding had been filed, turnover relief could have been blocked because of the lack of notice to Ma. The court held that Ma was not damaged because the Hong Kong representative was legitimate and because Ma’s creditors received the benefit of the money transferred. There was no requirement that a 304 proceeding be initiated, and comity would have required recognition of the Hong Kong representative’s authority. The lack of notice did not amount to a lack of due process, which might have defeated comity recognition, because notice was mailed to Ma’s last known address. Therefore, the lack of an opportunity to raise a collateral attack on the Hong Kong insolvency proceeding in a 304 proceeding was irrelevant, since such an attack would have failed. Note that the dissent describes a preference for 304 proceedings: “There is absolutely no legal basis for the Bank to release funds at the request of a foreign receiver unless a petition has been filed under 11 U.S.C. § 304 to authorize ancillary proceedings in Illinois.... To allow banks, willy nilly, to ship their depositor’s funds on demand to foreign receivers in the hope that the requests will subsequently prove legitimate seems to me very bad policy indeed.” 905 F.2d at 1077.

19. In re Axona International Credit & Commerce Ltd., 115 B.R. 442 (S.D. N.Y. 1990), appeal dismissed, 924 F.2d 31. This case is an example of the use of settlement of a 547 preference action in a chapter 7 case followed by 305 abstention and delivery of the settlement proceeds to a foreign representative.

Axona was the debtor in an insolvency winding up proceeding in Hong Kong and also a chapter 7 debtor in New York. In the chapter 7 case, the trustee had settled an avoidance action against Chemical Bank, and Chemical Bank paying the trustee $2.8 million. Subsequent to that settlement, the Hong Kong representative and the chapter 7 trustee filed a joint application in the chapter 7 case asking the bankruptcy court to exercise its discretion and suspend the United States chapter 7 case under 305(b) of the Bankruptcy Code and direct the turnover of assets of the chapter 7 estate to the Hong Kong representative for distribution in the Hong Kong proceeding. Chemical Bank appealed the bankruptcy court’s ruling suspending the case and directing the turnover of assets. Chemical Bank argued that a 304 ancillary proceeding was the only mechanism for a foreign representative to act and a foreign representative could not act in a plenary case and then utilize 305. The court held that, under 305, the bankruptcy court may suspend any proceeding regardless of what chapter it is filed under. Chemical Bank also argued that 305 may not be invoked after the avoiding powers are invoked because the avoiding powers do not apply in 304 ancillary proceedings. The court held that use of avoidance powers is only one element that the court should consider in making a decision under 305 to suspend a proceeding, and did not deem it fatal to 305 suspension.

20. Koreag, Controle Et Revision S.A. v. Refco F/X Assoc., Inc. (In re Koreag, Controle et Revision S.A.), 961 F.2d 341 (2d Cir. 1992), cert. denied, 506 U.S. 865. This case stands for the proposition that a bankruptcy court, faced with a turnover request under section 304, must make a decision on the ownership of the property rather than putting the issue to the foreign court.
In Koreag, an American creditor named Refco did currency exchange business with a Swiss bank and was owed money. The Swiss bank filed an insolvency proceeding in Switzerland and a Swiss representative was appointed. Refco then sued the Swiss bank in federal court in New York and obtained an attachment of a New York bank account. The Swiss representative intervened and moved to dismiss the federal court action. The federal court invited the Swiss representative to file a 304 proceeding in bankruptcy court, which he did, seeking turnover of the New York bank account and an injunction against prosecuting the federal court case. The bankruptcy court granted the 304 relief, but in the process, declined to decide whether the New York bank account was owned by the Swiss bank, leaving that decision to the Swiss court. On appeal, the Second Circuit held that 11 U.S.C. § 304(b)(2) required a determination of ownership of the New York bank account. In making such a determination, the court followed the New York rules of conflicts of laws, which require the application of the laws of the jurisdiction with the greatest interest in the litigation. In this case, that was New York. Accordingly, the Second Circuit reversed and remanded for an analysis of the ownership of the New York bank account under New York law.


In Linter, an Australian company named Linter allegedly defrauded American investors in a public offering, then went into insolvency proceedings in Australia. American investors sued Linter (“Linter I”) and sued Linter and Linter’s banks (“Linter II”) in federal court in New York. On the motion of the foreign representative, Linter I was dismissed on grounds of comity in favor of the Australian insolvency proceedings, and Linter II was dismissed on grounds of comity and forum non conveniens. The American investors appealed. The Second Circuit held that the lower court did not abuse its discretion in dismissing the American investors’ actions on the grounds of comity and forum non conveniens.

Comity is an affirmative defense and the extension or denial of comity is within the court’s discretion. Comity is particularly appropriate where the court is confronted with a foreign insolvency proceeding. To determine whether the Australian insolvency proceedings warranted comity, the court focused on several factors as indicia of procedural fairness. These factors included (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the foreign liquidators are required to give notice to the debtor’s potential claimants; (5) whether there are provisions for creditors’ meetings; (6) whether a foreign country’s insolvency laws favor its own citizens; (7) whether all assets are marshaled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stay to facilitate the centralization of claims. The fact that the Australian law provided for a stay that was not “automatic” like 11 U.S.C. § 362, but was rather subject to leave of court was irrelevant because there was no indication of prejudice to the American plaintiffs. The court is not required to split hairs to determine that Australian law in general provided a fair forum in which to litigate the American investor’s claims. The Australian liquidation proceedings were not required to be identical to United States bankruptcy proceedings. What was important was that the Australian proceedings generally conformed with fundamental standards of procedural fairness and that the granting of comity to a foreign insolvency proceeding would enable the assets of the debtor to be disbursed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. On the issue of forum non conveniens and dismissing Linter II, the court listed the private and public interest factors on the issue of forum non conveniens as including (1) the ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) practical problems involving the efficiency and expense of a trial; (5) enforceability of judgments; (6) administrative difficulties flowing from court congestion; (7) imposing jury duty on citizens of the forum; (8) the local interest in having controversies decided at home; and (9) the avoidance of unnecessary problems in the application of foreign law. In this case, it was more convenient for the litigation to take place in Australia. Most of the witnesses and other sources of proof were located in Australia. Many of the officers, directors and key witnesses of the Linter companies were no longer within the subpoena reach of the federal court and therefore could not be compelled to appear at trial in New York. This was particularly important because the American investors alleged fraud, and live testimony of key witnesses was necessary so that the trier of fact could assess the witnesses’ demeanor. Furthermore, the cost of bringing witnesses to the United States for trial, assuming that they would be willing, would have been prohibitive. Also, the court noted that there would
have been no point in trying Linter I in Australia and Linter II in the United States because much of the work would be repetitive and thus economically inefficient. Finally, if the trial were held in Australia, the co-defendant banks would be able to assert their crossclaims simultaneously with the American investors' claims, thus avoiding a situation where the banks would have to pursue their crossclaims in Australia while defending against the American investors' claims in the United States, with the attendant risk of inconsistent judgments.

22. **In re Petition of G.C.K. Tam, 170 B.R. 838 (Bankr. S.D. N.Y. 1994).** This case holds that an unsupervised foreign winding up proceeding will not be recognized as a "foreign proceeding" for purposes of Section 304.

In Tam, a Cayman Islands corporation, by vote of a third of its shareholders, pursuant to the Cayman Islands insolvency law, passed a special resolution that the company be wound up voluntarily. Under this procedure, a representative is appointed to wind up the affairs of the company. This winding up procedure is not done under the supervision of any court or regulatory agency, although a court-supervised Cayman Islands winding up proceeding was an available option. The representative for the Cayman Islands filed a 304 proceeding seeking to enjoin an action by an American creditor. The bankruptcy court dismissed the 304 proceeding, holding that the voluntary winding up pursuant to Cayman Islands law was not a "foreign proceeding" for the purposes of 304. The court noted that this proceeding is conducted without any regulatory oversight and virtually no creditor participation. The court compared other types of winding up or liquidation proceedings that are at least supervised by a regulatory agency and also noted that a Cayman Islands court winding up proceeding would have been a proper foreign proceeding.

23. **In re Petition of Evans, 177 B.R. 193 (Bankr. S.D. N.Y. 1995).** This case holds that a foreign representative need not file a separate 304 proceeding in a different venue once he has first established section 304 venue elsewhere.

In Evans, a British insurance company was undergoing insolvency proceedings in the United Kingdom. The British representative filed an ancillary proceeding under 304. The 304 proceeding was filed in New York because the insurance company's principal place of business and principal assets were located in New York. The British representative then commenced an adversary proceeding in the New York 304 proceeding to compel the turnover of escrowed funds located in San Francisco, California. The defendants argued that the turnover action should have been filed as an independent ancillary proceeding in the Northern District of California instead of in New York as part of the pending ancillary proceeding, the court held that, once a foreign representative commences an ancillary proceeding that is properly venued under 28 U.S.C. § 1410(c), he may sue in his home court (here, New York) to recover estate property that is located in another district.

24. **In re Petition of Hourani, 180 B.R. 58 (Bankr. S.D. N.Y. 1995).** This case stands for the proposition that comity will not be extended where the foreign law is vastly different from United States law as to creditor notice and distribution.

An American creditor sued a Jordanian bank in New York federal court and attached the Jordanian bank's holdings in the United States. The Jordanian bank then went into insolvency proceedings in Jordan. The Jordanian representative filed a 304 proceeding in New York seeking turnover of the attached funds. Comparing both bankruptcy law and United States bank liquidation laws to Jordanian law, the court refused to grant 304 relief. In this regard, the court noted that predictability of claim treatment was missing in the Jordanian law because the Jordanian committee reviewing claims had broad power to dispose of assets and claims as it deemed appropriate, without giving any reason. Also, there was no means to equitably subordinate claims under Jordanian law. There were also no provisions for recovery of fraudulent or preferential transfers under the Jordanian law. Furthermore, there was no differentiation between secured claims and unsecured claims. Finally, under the Jordanian law, the procedure for notice under Jordanian law was inadequate in that it only provided for publication notice in the Jordanian papers. Even though the American creditor was known in this particular case, the American creditor found out about the case only through an informal inquiry.
In *Hackett*, American creditors sued a Bahamian bank in New York state court. The Bahamian bank then filed an insolvency proceeding in the Bahamas and a Bahamian representative was appointed. The Bahamian representative then filed a 304 action seeking 362 type relief. The American creditors objected to the 304 relief in that it would be inconvenient, burdensome and expensive for them to litigate in the Bahamas. The court held that such inconvenience is present in all cross-border cases, so inconvenience alone does not warrant denial of 304 relief. Accordingly, the court granted the 304 relief.

In *Maxwell*, British media magnate Robert Maxwell controlled Maxwell Communications Corp ("MCC"), an English company. MCC functioned as a holding company for Robert Maxwell’s public holdings. MCC was headquartered and managed in England, but 80% of its assets were in the United States. These United States assets were held most notably through MCC subsidiaries. Using the sale of MCC American subsidiaries (as going concerns) for funds, MCC made multimillion dollar transfers to several European banks. MCC then filed a Chapter 11 petition in New York within 90 days of those transfers, on December 16, 1991. The next day, it filed an insolvency reorganization proceeding in England. The United States bankruptcy court appointed attorney Richard Gitlin as examiner to deal with the dual case issue, and the British court appointed members of the London office of Price Waterhouse as representatives to manage the affairs of MCC in England. Gitlin and Price Waterhouse coordinated their efforts into a so called “protocol.” This protocol resulted in appointment of the British administrators as debtor in possession and a United States plan of reorganization and an English scheme of arrangement as interdependent documents that were approved by both courts. The British and American plan administrators then brought a 547 preference action in the bankruptcy court against the European banks. The plan and scheme of arrangement, however, did not specify which substantive law would govern the resolution of disputed claims or the debtor’s ability to set aside prepetition transfers. The issue of whether a 547 preference action could be brought against the European banks was significant. The British equivalent of a preference action had a scienter requirement that likely would have provided a defense for the European banks. Additionally, 11 U.S.C. § 502(d), requiring the disallowance of claims for nonreimbursing transferees of preferences would have meant that the European banks’ claims would not be allowed. Using principles of comity and conflict of laws, the Bankruptcy Court, District Court, and Second Circuit all agreed that the 547 preference action could not be brought. British law applied because England had a much closer connection to these disputes than the United States. The debtor, most of the creditors, and the transferees were British. MCC was incorporated under British laws, controlled by British nationals, governed by a British board of directors, and managed in London by British executives. These same considerations had been the basis for appointing the British as debtor in possession in the bankruptcy case. Most of the aspects of the preference transaction took place in England. The most substantial connection of the transaction to the United States was the fact that American subsidiaries were sold to create the fund for the transfers. However, the impact on the United States was minimal because the subsidiaries were sold as going concerns, and therefore the impact on the local economy was not implicated.

*Davis* involved two Canadian companies, one called Polinex and the other Packman. Polinex and Packman hired Davis as a consultant to deal with secured creditor Hong Kong Bank. Hong Kong Bank was obligated to indemnify Davis for his actions taken while serving as consultant, which would add to Hong Kong Bank’s secured claim. In this process, Glorioso, an American, alleged that he was defrauded and accordingly filed an action in federal court in New York seeking damages from Davis and Packman under fraud and RICO counts. Polinex and Packman then filed insolvency proceedings in Canada, and Davis was appointed representative in each case. Davis, as Canadian representative, then filed a 304 action seeking to enjoin Glorioso from continuing with the litigation anywhere in the United States. Glorioso then dismissed the federal court litigation without prejudice, but indicated that he would file
the litigation again to seek relief against Davis in his individual capacity for acts taken prior to his appointment as representative. The court first decided whether the matter was moot in light of the dismissal. The court held that it was not moot because the dismissal was without prejudice and because Glorioso conceded that it intended to litigate against Davis in the United States. There was thus a real, substantial controversy between parties having adverse legal interests. On the issue of enjoining actions against Davis individually, the court noted that one factor that is considered when an injunction is requested to protect a nondebtor is whether the estate will bear the cost of any judgment taken against the nondebtor. In this case, because of the indemnification agreement with Hong Kong Bank, the cost of defending Davis, even in his individual capacity, would be applied to the Hong Kong Bank’s secured claim and, according to the affidavit of Davis, would also be an administrative type claim in the Canadian bankruptcy proceeding. Noting that the Canadian bankruptcy law was a sister common law jurisdiction with procedures similar to American proceedings, the court issued the injunction protecting Davis.

28. In re Petition of Laitasalo, 193 B.R. 187 (Bankr. S.D. N.Y. 1996). There is a line of cases that concern foreign insurance companies in foreign insolvency proceedings and the right of American insurance regulators or creditors to obtain relief. This case is one of the most recent of those cases and discusses the preceding cases.

In Laitasalo, a Finnish insurance company did business in New York and was subject to New York state insurance laws that provided for a prejudgment security deposit to pay any eventual judgment. The New York Insurance Commissioner filed a $6 million suit against the Finnish insurance company and sought to have the insurance company make the prejudgment security deposit. The Finnish insurance company then filed an insolvency proceeding in Finland. The Finnish representative filed a 304 petition in New York bankruptcy court seeking to enjoin the suit. The insurance commissioner moved to dismiss the 304 proceeding stating that the McCarin-Ferguson Act, 15 U.S.C. § 1012 providing for reverse preemption in favor of state insurance laws, supersedes 304. The court noted that the insurance commissioner was seeking to use the New York state insurance law to convert its unsecured claim against the Finnish debtor to a secured claim. The court held that the McCarin-Ferguson Act did not elevate the New York State insurance law over 304 of the Bankruptcy Code. This was because 304 reflects an equally important federal concern, international insolvency. The court also held that to allow the insurance commissioner to proceed against the Finnish company under the New York state law would convert the unsecured claim into a secured claim to the detriment of other United States creditors and would violate the equity principles under the Bankruptcy Code. The court held that the insurance commissioner may continue the prosecution of her claim in the New York state court. However, the court granted 304 relief in that it denied the insurance commissioner the right to require the debtor to pay the security deposit. Additionally, the court stayed any postjudgment actions by the insurance commissioner.

29. Matter of Rimsat, Ltd., 98 F.3d 1956 (7th Cir. 1996). This is a recent circuit level case, authored by Posner, that is an example of comity not being granted. It also underscores the importance of having an expert on the foreign law.

In Rimsat, an American citizen named Hilliard was the director and shareholder of Rimsat, a corporation organized under the laws of Nevis, but having its principal place of business in Indiana. Most of Hilliard’s financial assets were in Indiana, but its nonfinancial assets, principally leaseholds in satellites, had no terrestrial site. Hilliard had a dispute with the other insiders of Rimsat over control of the corporation. In December 1994, Hilliard obtained an injunction in Nevis against Rimsat’s declaring bankruptcy and placing Hilliard in charge of Rimsat. Approximately two weeks later, creditors filed an involuntary chapter 11 petition against Rimsat in Indiana. A chapter 11 trustee was appointed, and he filed an adversary proceeding against Hilliard and obtained orders requiring the turnover of assets and documents. Hilliard refused to comply with the turnover order and was held in contempt. On appeal, Hilliard argued that he was an organ of the foreign court and that the bankruptcy court order conflicted with the Nevis order and that the Nevis order should be allowed comity. The Seventh Circuit held that there was jurisdiction over Hilliard because he was a United States citizen. It also held that comity was a matter of discretion. There was no abuse of discretion here because Hilliard had provided no description of Nevis insolvency proceeding law and there were also no assets of Rimsat except for $1,700 in a bank account in Nevis.

Kaminski involved an Australian corporation called Kaminski. Kaminski was a manufacturer of fashion accessories. MAP was an American company that had a distribution agreement contract with Kaminski under which MAP had the exclusive right to distribute Kaminski goods in America. On September 2, 1996, Kaminski sued MAP in Australia seeking a declaration that the distribution agreement was invalid and terminated. On November 29, 1996, MAP filed for chapter 11 relief in New York. MAP then filed an adversary proceeding in bankruptcy court to declare that the automatic stay of 362 applied to Kaminski. The court held that Kaminski was bound by the automatic stay and that there was no authority cited that 362 of the Bankruptcy Code should not have extraterritorial effect. The court noted that it is a general principle that all claims against a debtor should be handled in a single proceeding to ensure equitable and orderly distribution of the debtor’s property.


Tradewell was a New York corporation. American Sensors was a Canadian corporation. Tradewell sued American Sensors in federal court in New York. American Sensors then filed an insolvency proceeding in Canada under the Company’s Creditors’ Arrangement Act (CCAA). In the Canadian insolvency proceeding, the Canadian court issued an order requesting the cooperation of the United States courts. This case is significant because it is the first case that analyzes the Canadian CCAA, as opposed to proceedings under the Canada Bankruptcy and Insolvency Act. The court went through an analysis of the comity factors and found that, because of due process creditor protection provisions in the Canadian court order, rather than the CCAA, comity should be extended to the Canadian court order.

32. *In re Hakim*, 212 B.R. 632 (N.D. Ca. 1997). This case contains an excellent analysis of considerations on whether to grant relief from the stay to allow a foreign lawsuit to proceed.

This case concerned a dispute over entitlement to $12 million held in a Swiss bank account. The $12 million constituted the proceeds of the secret activities of Iranian businessman Hakim and his partners, retired Air Force Major General Richard Secord and Marine Corps Lieutenant Colonel Oliver North in connection with the events commonly known as the Iran Contra affair. The United States Department of Justice claimed ownership of the $12 million, but creditors of Hakim also had attached the funds. The United States procured a Swiss court order freezing the funds and also filed an action in federal court in the Eastern District of Virginia seeking similar relief. In the meantime, Hakim, who lived in the United States, filed for chapter 11 relief in California. The United States sought relief from the stay to continue the litigation in Switzerland or the United States over entitlement to the funds. The court granted the relief from stay for the limited purpose of determining ownership of the $12 million. In so holding, the court went over an extensive analysis of various factors on the issue of granting relief from the automatic stay to allow litigation to proceed elsewhere. In particular, the court focused on factors involving whether litigation should be allowed to continue in an international forum. Those factors are (1) whether the foreign court has assumed jurisdiction over the res at issue; (2) the inconvenience of the federal forum; (3) the avoidance of piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) which law controls in a choice of law analysis; and (6) the adequacy of the alternative forum.


Four brothers, who were Mexican citizens, but had residences and assets in the United States, defaulted on over $300 million of debt in promissory notes owed by the brothers’ ten companies in Mexico, which were guaranteed (by Mexican “avals”) by each of the brothers personally. After defaulting on the notes in Mexico, the brothers fled to the United States. Seven Mexican Banks and a California bank, owned by a Mexican parent bank, filed involuntary chapter 7 petitions, pursuant to 11 U.S.C. § 303, against the brothers in the United States. One of the brothers challenged the U.S.’s Court’s personal jurisdiction over him, since he was a Mexican citizen. The Bankruptcy Court found that “an involuntary case can be filed a foreign person who qualify[s] under Section 109.” The Court also found that the “minimum contacts” test was satisfied as to the brother contesting personal jurisdiction since (a) the brother left Mexico two years earlier and had resided in Miami or Houston ever since; and (b) his company in the U.S. owned a condominium in Houston from which telephone calls were frequently placed to the Mexican businesses he was running from Houston. The Court held that abstention under 11 U.S.C. § 305 was not warranted because the interest of the
creditors would not be served by dismissal since, "[b]y transferring their residences from Mexico, the Xacurs have stymied any further activity in individual civil proceedings [against them]... in Mexico." The District Court and Fifth Circuit Court of Appeals affirmed the Bankruptcy Court's decision. The United States Supreme Court denied certiorari.

34 In re Xacur, 219 B.R. 956 (Bankr. S.D. Tex. 1998). This case contains a good discussion of the circumstances in which a bankruptcy court will abstain from putting a foreign debtor into involuntary bankruptcy in the U.S.

This case involved an involuntary proceeding against a fourth Xacur brother, Nicolas. Nicolas was a citizen of Mexico, where he owned a home in Mexico City, and also owned condominiums in Houston and in Vail, Colorado. The Court found that (a) Nicolas spent 20% of his time in the U.S., (b) his children were schooled in the U.S., (c) he was listed in the Houston residential telephone directory, (d) owned two cars registered in Houston, and (e) held a Texas driver's license. The Bankruptcy Court found, however, that Nicolas had maintained a domicile in Mexico. Notwithstanding that, the Court found that Nicolas' ownership of property in the U.S. for over 17 years justified finding that he was eligible to be a debtor under 11 U.S.C. § 109. As to personal jurisdiction and due process concerns, the Bankruptcy Court found service of the involuntary petition at Nicolas' Houston condominium was proper, since it was his dwelling house (even though he may have had more than one dwelling house). Although the Court found that Nicolas's contacts with the United States were "purposeful, continuous and systematic," the Bankruptcy Court held that exercising its jurisdiction over Nicolas would not be "fair and reasonable" in this instance, since the Court believed that the enforceability of its orders in this instance in Mexico would be doubtful, given his domicile in Mexico. The Court also explained that the interest of comity also supported abstention under 11 U.S.C. § 305. The Court also dismissed the case on the grounds of forum non conveniens, since (a) all of the parties were subject to the jurisdiction of the Mexican court; (b) the majority of Xacur's property is located in Mexico, and (c) Mexico would provide an adequate alternative forum. However, the Court dismissed the case, "without prejudice to creditors" future involuntary petition to the extent that Nicolas Xacur permanently removes himself from the jurisdiction of the Mexican courts at some future date so as to prevent prosecution of the civil cases in Mexico." The District Court reversed the bankruptcy court's finding of no personal jurisdiction over Nicolas Xacur, but affirmed the other provisions of the order.

35. Schimmelpenninck v. Byrne (Matter of Schimmelpenninck), 183 F.3d 347 (5th Cir. 1999). This case is a reminder that a section 304 proceeding is not a full US bankruptcy case, just a means to provide relief to coordinate with the foreign proceeding using principals of equity and comity.

HACBV was a Dutch company that was a debtor in a Dutch bankruptcy. HACBV had a subsidiary called HANS. Byrne filed a "reverse veil piercing" suit in Texas against HANS alleging that HANS was an alter ego of HACBV and was therefore responsible for HACBV's debt to Byrne. The Dutch trustees filed a section 304 ancillary proceeding in bankruptcy court in the Northern District of Texas, seeking to enjoin Byrne from prosecuting the alter ego suit. The bankruptcy court denied the Dutch trustees' request for the injunction, and the district court affirmed. The bankruptcy and district courts analyzed the case based on whether a reverse veil piercing action was property of the estate, and concluded that it was not, so the automatic stay did not apply to Byrne's suit. The 5th Circuit reversed and remanded for the issuance of the injunction. The Fifth Circuit reasoned that there was no domestic bankruptcy case involved, but only a foreign bankruptcy with a section 304 ancillary proceeding. Section 304 does not create a legal concept of property of the estate. Under section 304, equitable principals apply. One overarching equitable principal under the bankruptcy code is that all creditors be treated equally. The court found that Byrne's alter ego complaint is one that would be a general grievance of all creditors, so that if Byrne would be unjustly enriched, and the other creditors unfairly disadvantaged, if Byrne were to be allowed to prosecute the alter ego action for his own benefit.

36. In re Treco, 240 F.2d 148 (2d Cir. 2001). This case is another example that shows that you can beat principles of comity by showing that the foreign law is repugnant to the US law, especially if the US law is of constitutional magnitude.

A Bahamian bank called MIBL was indebted to Bank of New York. MIBL pledged an account at Meridian Tanzania Bank to secure an obligation of $15.15 million to Bank of New York. In April 1995, MIBL was placed into bankruptcy in the Bahamas. In June of 1995, Bank of New York filed suit in federal district court in New York seeking declaratory relief as to its rights to the $15.15 million and the Meridian account. In September 1995, the foreign
liquidators of MIBL filed an adversary proceeding in bankruptcy court in New York seeking relief under section 304 to enjoin all judicial actions against MIBL and turn over to the liquidators all assets of MIBL, including the Meridian account. The bankruptcy court issued the injunction. Bank of New York appealed. The district court affirmed. The Second Circuit reversed and remanded. The critical fact in this decision was that Bank of New York alleged that its claim was secured by the account. Under US bankruptcy law, a secured creditor’s collateral cannot be invaded to pay for administrative expenses of the bankruptcy; under Bahamian law, it could. The Second Circuit found that principles of comity were overridden by the fact that this aspect of Bahamian law was repugnant to the US bankruptcy code and the takings clause of the US constitution. The case was reversed and remanded to determine whether Bank of New York was secured.