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INTRODUCTION TO AND OVERVIEW OF

UNITED STATES CROSS-BORDER INSOLVENCY ISSUES

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INTRODUCTION TO AND OVERVIEW OF CROSS-BORDER INSOLVENCY ISSUES

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I. Introduction

Cross-border insolvency issues have become more frequent, more complex and more important since the same entity, concurrent, full parallel proceedings exemplified by Maruko, filed in 1991, first in the Tokyo District Court and then in the Bankruptcy Court in San Diego, and by Maxwell Communications, filed first in the Southern District of New York as a chapter 11, and the next day in the High Court in England. Recently, many foreign headquartered companies have filed a full chapter 11 in the United States or an ancillary §304 proceeding; most notably the full stand alone chapter 11 of Yukos, filed in Houston, Texas in December 2004, and now subject to a motion to dismiss to be heard February 16th and 17th, 2005. The Motion to Dismiss is annexed as attachment "A"; the response of Yukos is due January 31, 2005.

II. The Key Issues

The key issues in transnational insolvency cases have been identified as:

1. Standing for the foreign administrator
2. Moratorium on secured and unsecured creditor actions
3. Creditor participation
4. Executory contracts
5. Coordinated claims procedures
6. Priorities and preferences
7. Avoiding powers
8. Discharges
9. Choice of law and conflicts of laws

10. Abstention or dismissal

11. Forum non conveniens

III. The Four Options Available To The Foreign Debtor/Foreign Administrator

If a debtor corporation has its headquarters in the foreign country, but has assets or a subsidiary in the U.S., or is threatened with litigation here, there are four options available to the foreign debtor, or its trustee or administrator:

1. Commence a full, voluntary chapter 7 liquidation or a chapter 11 reorganization for the foreign debtor, based upon having either an office or property in the United States, pursuant to Code §109. The case may be a "stand alone" U.S. proceeding or parallel to a foreign case.
2. File an involuntary chapter 7 or chapter 11 pursuant to Code § 303(b)(4)
3. Initiate an ancillary proceeding pursuant to Code § 304.
4. Invoke international comity without commencing a bankruptcy case or an ancillary proceeding.

A § 304 ancillary case does not provide the benefits of a plenary bankruptcy case, such as the discharge of debts or the automatic stay, and does not involve the filing of schedules or the proposing of a reorganization plan. Some bankruptcy courts have given the foreign representative the power to assume or reject executory contracts pursuant to Code § 365 and to sell assets free and clear of all claims and liens pursuant to Code § 363. The foreign representative does not have the "full panoply of powers" of a trustee or Debtor in Possession in a full case, and no estate is created as in a full case.

IV. Full Chapter 11 or Chapter 7 Cases

A. § 109 Criteria

*In re Iglegias***,** 226 B.R. 721 (Bankr. S.D. Fl. 1998)

A foreign corporation headquartered in the foreign country can initiate its own full chapter 11 reorganization case in the United States provided it meets the criteria of Bankruptcy Code § 109, which provides that: "… only a person that resides or has a domicile, a place of business, or property in the United States… may be a debtor under this title." *Iglegias* held that an Argentine citizen with a bank account of about $500 located in Florida could begin a full bankruptcy case in Florida pursuant to Code § 109 because the money on deposit in the Florida bank was deemed "property in the United States". Congress had not established any particular criteria for the amount of property and thus a bank account of $500 qualified. *See*, to the same effect, *In re McTague*, 198 B.R. 428 (Bankr. W.D.N.Y. 1996). Similarly, it is not necessary that the foreign corporation have its "principal place of business" in the United States, but merely "a place of business," and some cases have interpreted that quite liberally.

If the foreign parent has a United States subsidiary, does that constitute "property in the United States"? What is the *situs* of the stock in the United States subsidiary? One looks to state law to determine questions with regard to title to property in the United States; for example, Delaware law provides that the *situs* of the stock in a Delaware corporation is deemed located in Delaware. Ownership of a United States subsidiary should qualify the foreign parent corporation to be a debtor under §109.

The United States bankruptcy court has the discretion to determine that the chapter 11 reorganization case was a "bad faith filing" or the court can exercise its discretion to abstain completely on the ground that it is not appropriate for the matter to be handled by a United States court. Code § 109 does not require that there be a bankruptcy proceeding pending in the

principal place of business of the foreign corporation; a §304 ancillary requires that there be a foreign insolvency proceeding pending.

The full case in the United States can be initiated by a voluntary petition, or a foreign representative may file an involuntary bankruptcy petition pursuant to Bankruptcy Code § 303(b)(4).

The test for eligibility is determined as of the date the bankruptcy petition is filed, *see Global Ocean Carriers, Ltd., 251 B.R. 31 (Bankr. D. Del. 2000); In re Axona International Credit & Commerce, Ltd*., 88 B.R., 597 (Bankr. S.D.N.Y. 1988) and the test must be applied to each debtor, so that even if the parent is eligible to file, the subsidiary must be tested separately to see if it is eligible, *see Bank of America v. World of English*, 23 B.R. 1015 (N.D. Ga. 1982).

Having some business in the United States (and even being physically present in the United States for thirty percent of the year) is insufficient to constitute having a place of business in the United States.

Claims by subsidiaries to funds in their parent bank account located in the United States has been deemed sufficient property in the United States for § 109 eligibility purposes.

B. Dismissal, Abstention Or Suspension Of The United States Case

In re Laura Farmer, 288 B.R. 31 (Bankr. N.D.N.Y. 2002)

The debtor was eligible to file a chapter 7 pursuant to Bankruptcy Code §109(a) because the debtor maintained a savings account in a New York bank with a balance of $400.00 and a checking account with a balance of $200.00. The debtor was married to a non-United States citizen and lived outside the United States, but the existence of United States assets was enough to make the debtor eligible under §109, regardless of the quantity of those assets and the U.S. Trustee's motion to dismiss did not contend that the bank accounts were recently opened for the purpose of manufacturing eligibility for the debtor. [Compare the Motion to Dismiss in the

Yukos Chapter 11] The debtor was a citizen of the United States. The court followed the M*cTague* analysis in 198 B.R. 428 (Bankr. W.D.N.Y. 1996).

> Under the *McTague* analysis, Ms. Farmer is qualified to be a debtor. Unlike the UST in *McTague*, however, in the case *sub judice* the UST has asked the Court to consider dismissal pursuant to Code §707 and Fed.R.Bankr.P. 1014(a)(2), not Code §109(a).
>
> Code §707(a) provides that a court may dismiss a case for "cause." The Section further states that "[t]here shall be a presumption in favor of granting the relief requested by the debtor." 11 U.S.C. §707(b). Fed.R.Bankr.P. 1014(a)(2) gives the Court the discretion to dismiss a case which is filed in an improper district if it is determined to be in the interest of justice or for the convenience of the parties.
>
> The UST, who has the burden of proof in seeking dismissal of the case, has not offered any proof to dispute the existence of the bank account(s)…Nor have there been any allegations that the bank accounts had been opened simply to manufacture eligibility for the Debtor.
>
> The Court does not view the filing by this United States citizen as a substantial abuse of the provisions of chapter 7 and certainly filing for bankruptcy relief in the United States is much more convenient to the majority of the Debtors' creditors, as noted above.

1. While The Bankruptcy Court Has Very Broad Authority To Dismiss Or Suspend A Chapter 11 Filed By A Foreign Debtor, It Should Do So Only If The Interest Of <u>Both</u> Creditors And Of The Debtor Would Be Better Served By Dismissal Or Suspending The Proceedings.

In re Aerovias Nacionales de Columbia S.A. Avianca, 303 B.R. 1 (Bankr. S.D.N.Y. 2003)

The Aerovias case is an outstanding example of the flexibility of the U.S. Bankruptcy Court in retaining, and refusing to dismiss a chapter 11 case filed by an airline organized under the laws of Columbia, which had only 28 employees in the United States and more than 4,000 in Columbia, but which had approximately one-quarter of its international service involving flights between Columbia and the United States and had substantial property in the United States. <u>The airline had not filed a case in Columbia</u>. The court noted that Avianca leased its entire fleet of 31

aircraft and 16 spare engines from lessors located, or doing business in, the United States. The debtor contended that its potential debt to aircraft lessors located primarily in the United States, was approximately 290 million dollars, that it owed an additional 15 million dollars to other creditors in the United States, other than noteholders, and owed 115 million dollars to creditors located in Columbia, largely pension and tax obligations and had debt of approximately 12 million dollars to creditors outside of both Columbia and the United States.

Shortly after the commencement of the chapter 11 case, two of the aircraft lessors filed motions to dismiss and several other creditors, including small vendors located in the United States, filed supporting motions to dismiss. The debtor, in response to the two aircraft lessor's motions to dismiss, filed a motion to reject the aircraft leases and to return the aircraft. Subsequently, the debtor and the aircraft lessors reached a settlement and the lessors withdrew their motions to dismiss.

The motion to dismiss argued that the debtor engaged in forum shopping and chose to file the petition in the Southern District of New York to the prejudice of the U.S. creditors, sought dismissal under Bankruptcy Code §305(a) and argued that Avianca should be compelled to file in Columbia; that the choice of forum in the United States created delay and uncertainty for all creditors and demonstrated bad faith by the debtor.

> The movants further argue, citing §1112(b) of the Bankruptcy Code, that the Debtors will never be able to confirm an effective plan of reorganization when a majority of their creditors are not subject to this Court's effective jurisdiction and there is no parallel proceeding in Columbia.
>
> All of the opposing parties argue that while a Law 550 proceeding may be available in Columbia, the law would not provide effective relief in this case. It is pointed out that the Debtors' largest creditors are subject to jurisdiction in the United States, not in Columbia, and would not likely agree to submit to a Columbian proceeding, thus making an effective restructuring there unlikely…

Section 109(a) of the Bankruptcy Code permits a Chapter 11 filing by a person (defined in §101(41) as including a corporation) "that resides or has a domicile, a place of business, or property in the United States, or a municipality…" Cases that have construed the "property" requirement with respect to foreign corporations and individuals have found the eligibility requirement satisfied by even a minimal amount of property located in the United States. [*Citing In re Global Ocean Carriers Ltd*., 251 B.R. 31 (Bankr. D. Del. 2000)][;] *See also Maxwell Communications Corp. plc v. Societe Generale plc (In re Maxwell Communication Corp.)*, 186 B.R. 807, 818-19 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2nd Cir. 1996); *In re Axona Int'l Credit & Commerce Ltd*., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d(2nd Cir. 1991); *Bank of America, N.T. & S.A. v. World of English, N.V.*, 23 B.R. 1015, 1019-23 (N.D. Ga. 1982)(bank account); *In re Iglesias*, 226 B.R. 721, 722-23 (Bankr. S.D. Fla. 1998) ($500 in a bank account [is a] sufficient predicate with respect to a citizen of Argentina)…

First, citing §305(a)(1), movants contend that the interests of creditors and the Debtors would be better served by dismissal or suspension of this case. With respect to §305(a)(2), they recognize that a foreign proceeding involving Avianca is not pending as required by the terms of that subsection, but they argue that in order to carry out the statute's purpose, the court should[,] in effect[,] impose an obligation on a foreign debtor to file in its "home" jurisdiction and then consider whether a plenary filing here is appropriate…

Movants' argument based on §305(a)(1) can be easily dealt with. Section 305(a)(1) grants the Court very broad authority to dismiss or suspend proceedings in a case if "the interests of creditors and the debtor would be better served by such dismissal or suspension." The test under §304(a)(1), however, is whether "both the 'creditors and the debtor' would be 'better served' by a dismissal." *Eastman v. Eastman, (In re Eastman)*, 188 B.R. 621, 624-25 (9th Cir. BAP 1995); Courts have stressed that dismissal or suspension under §305(a) is a form of "extraordinary relief." *See In re RCM Global Long Term Capital Appreciation Fund, Ltd.*, 200 B.R. 514, 524 (Bankr. S.D.N.Y. 1996). Here, Avianca demonstrated that it would not be "better served" by dismissal of this case and, presumably, the filing of a proceeding under Law 550.

2. Forum Non Conveniens

***a)* Although The Alleged Debtor, Against Whom Four Mexican And One California Bank Had Filed An Involuntary Petition, Would Be Eligible To Be A Debtor Under §109, The Court Abstained Or Declined Jurisdiction Under The Doctrines Of *Forum Non Conveniens* and Comity.**

In re Xacur, 219 B.R. 956 (Bankr. S.D. Tex. 1998)

In *Xacur*, the court stated:

> A foreign entity or individual domiciled abroad but owning property in the United States is eligible to be a debtor under 11 U.S.C. §109. *See e.g. Bank of America N.T. & S.A. v. World of English, N.V.*, 23 B.R. 1015 (N.D. Ga. 1982); *In re McTague*, 198 B.R. 428 (Bankr. W.D.N.Y. 1996); *In re Spanish Cay Co., Ltd*., 161 B.R. 715 (Bankr. S.D. Fla. 1993).
>
> Nicholas Xacur has owned property in the United States for over 17 years. The property is substantial in value and justifies the finding that he is eligible to be a debtor under section 109…
>
> In analyzing both specific and general jurisdiction, the court must evaluate whether the exercise of jurisdiction would be fair and reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985); *Bearry v. Beech Aircraft Corp*. 818 F.2d 370, 377 (5th Cir. 1987). In evaluating whether the exercise of jurisdiction over an alien defendant would be fair and reasonable, the court may consider the burden on the defendant, the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985); *General Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F.Supp. 656, 666-67 (E.D. Mich. 1996)…
>
> The Court finds that the exercise of jurisdiction in this involuntary proceeding would be unfair to Xacur and would bring ineffective relief to the petitioning creditors. Only Xacur's assets located in the United States may be subject to the involuntary bankruptcy. After considering the testimony of the Mexican law experts, the Court concludes that there exists a substantial possibility that the courts in Mexico may not recognize the jurisdiction of this Court. The powers and rights of a United States bankruptcy trustee may not be recognized in Mexico. The question of the recognition of a foreign bankruptcy against a Mexican citizen, domiciled in

> Mexico[,] is a unique issue of Mexican law. It is possible that after years of costly litigation, the administrative expenses of the bankruptcy estate would consume the value of the United States assets. Direct litigation against Xacur is a preferable, recognized, and cost effective legal remedy available to the banks in Mexico.

The Court finds that the best interest of the creditors and the alleged debtor would be better served by dismissal or abstention. A Mexican court may not recognize the automatic stay of a United States bankruptcy proceeding and may not recognize the enforceability of orders issued from a United States bankruptcy court in an involuntary proceeding against a Mexican citizen and domiciliary. The interests of comity support abstention in this case because of the conflict between United States law and Mexican law concerning the enforceability of United States court orders in a case involving a Mexican national and domiciliary in Mexico.

3. In Personam Jurisdiction and World Wide Power

In re Global Comunicacoes E Participacoes S.A., 317 B.R. 235 (Bankr. S.D.N.Y. 2004).

In a very recent, involuntary chapter 11 petition filed in the Southern District of New York against a Brazilian holding company, the bankruptcy court dismissed the case, but on appeal the district court vacated and remanded based on the finding that the bankruptcy had *in personam* jurisdiction over the debtor, and therefore, the power to take control over the world wide properties of the debtor's estate. Bankruptcy Code §105(a), which provides that the court may take any action necessary or appropriate to prevent abuse of process, was not intended to provide the bankruptcy court with unfettered discretion to dismiss a case merely because it would be difficult to adjudicate, or it may ultimately fail to provide full relief to the creditors. On appeal, the district court chastised the bankruptcy court for reaching a conclusion that the involuntary petition amounted to an abuse of process because the bankruptcy court failed to make any analysis of the bankruptcy court's ability to subject the debtor to personal jurisdiction and "without evaluating whether the bankruptcy court could grant effective, if not perfect, relief to creditors, notwithstanding the apparent hostility of Brazilian law to foreign proceedings concerning Brazilian companies." The district court emphasized that the bankruptcy court has

power over all of the debtor's assets wherever located, *citing* 11 U.S.C. §1334(e) and Bankruptcy Code §541, which "…enumerates categories of property, wherever located and by whomever held, comprising a bankruptcy estate".

> Congress intended these jurisdictional provisions to have global reach. *See Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir, 1998), *cert. denied*, 525 U.S. 1141, 119 S.Ct. 1032, 143 L.Ed.2d 41 (1999).("Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate"); *In re Gucci*, 309 B.R. at 683 (declaring that "Section 1334(e)…embodies a Congressional determination that bankruptcy courts should determine rights in property of bankrupt estates regardless of where that property may be found"); *Nakash v. Zur, (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (enforcing automatic stay against foreign receiver related to foreign assets of foreign debtor).

The appellate court cited the House Report with regard to 28 U.S.C. §1334 to conclude that Congress created a statutory rule "designed to reflect that the totality of *in personam* and *in rem* jurisdiction should be exercised by the bankruptcy court in order to avoid fragmentation of litigation and in furtherance of the spirit of economy in administration of bankruptcy estates".

The court drew the distinction between the bankruptcy courts *in personam* jurisdiction over a debtor and its *in rem* jurisdiction and concluded Code §303 "enables a bankruptcy court to exercise control over and distribute the worldwide assets of a debtor, against that debtor's will, by first asserting *in personam* jurisdiction over the debtor". In passing, the district court stated its disagreement with the conclusion reached by the bankruptcy court in *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 522 (Bankr. S.D.N.Y. 2004) and stated:

> The *Multicanal* court's analysis inverts the proper consideration of a bankruptcy court faced with an uncooperative foreign debtor by focusing on the current location of the debtor's assets rather than the nature and extent of the debtor's contacts with the United States. While *Hood* did conclude that a distribution of a debtor's assets under the Bankruptcy Code constituted a form of *in rem* proceeding, it explicitly noted that the bankruptcy court's jurisdiction was premised on jurisdiction over the *debtor* as well as

> the debtor's estate, and concluded further that the reorganization could be effective even if the Bankruptcy Court could not assert personal jurisdiction over, or obtain cooperation from, all creditors. See *Hood*, ____ U.S. at ___, 124 S.Ct. at 1910 ("A bankruptcy court is able to provide the debtor a fresh start in this manner, despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the *debtor and his estate* and not on the creditors.") (emphasis added).

With regard to abstention or dismissal under Bankruptcy Code §305(a)(1 the court noted at page 255:

> Section 305(a)(1) of the Bankruptcy Code provides that a court, "after notice and a hearing," may dismiss or suspend all proceeding in a case at any time if "the interests of creditors and the debtor would be better served by such dismissal or suspension." Courts that have construed Section 305(a)(1) are in general agreement that abstention in a properly filed bankruptcy case is an extraordinary remedy, and that dismissal is appropriate under that provision only where the court finds that both "creditors and the debtor" would be "better served" by a dismissal. *See, e.g., In re RAI Marketing Services, Inc*., 20 B.R. 943, 945-46 (Bankr.D.Kan.1982); *In re Martin-Trigona*, 35 B.R. 596, 598-99 (Bankr.S.D.N.Y.1983); *In re Pine Lake Village Apartment Co*., 16 B.R. 750, 753 (Bankr.S.D.N.Y.1982). This test requires that both creditors and debtors benefit from the dismissal, rather than applying a simple balancing test to determine whether dismissal is appropriate*." See In re Eastman*, 188 B.R. 621, 624-25 (9th Cir BAP 1995).

4. Although Yukos Qualified To Be A Debtor Under Code §109(a) Based Upon $480,000 In Company Funds Deposited In A Texas Bank Prior To Filing The Petition, Cause Existed To Dismiss The Chapter 11 Case, Pursuant To Code §1112(b).

In re Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tx. February 24,2005)

Although Yukos technically qualified to be a debtor pursuant to §109 because it had property in the United States consisting of a bank account, nevertheless the court had the discretion and authority to dismiss a case for cause pursuant to Bankruptcy Code §1112(b). The court noted that Yukos, a Russian company, with only minimal contacts with the United States, had deposited company funds in a United States bank less than one week before the debtor filed

its chapter 11 petition and it was an apparent and obvious attempt to create jurisdiction in the United States Bankruptcy Court for the purpose of substituting United States law in place of Russian law, to utilize the pro-debtor provision of United States chapter 11 law and to utilize the judicial structures of the United States courts in an effort to alter the creditor priorities that would be applicable in a Russian jurisdiction.

Yukos filed its voluntary petition under chapter 11 on December 14, 2004. The petition was signed by the CFO of Yukos and by an attorney. The petition had a resolution of the Management Board of Yukos authorizing the filing of the petition. Deutsche Bank filed a motion to dismiss the case contending that Yukos was not eligible to be a debtor under §109(a), but that even if it were, that the case should be dismissed for cause pursuant to §1112(b). In addition, Deutsche Bank contended that the case should be dismissed under the doctrine of *forum non conveniens*, that it should be dismissed because Yukos would be unable to comply with the duties of a chapter 11 debtor-in-possession, on the grounds of international comity and based upon the act of state doctrine. The court rejected all of the grounds for dismissal except only §112(b), which authorizes a court to convert a case under chapter 11 to a case under chapter 7 or to dismiss a case, whichever is in the best interests of creditors and the estate, for cause. In addition to the specific grounds set forth in §1112(b), case law holds that the court may consider the "totality of the circumstances" *citing In re Chaffin*, 816 F.2d 1070 (5th Cir. 1987). The Yukos court stated: "courts are required to consider the debtors' good faith, which depends largely upon the bankruptcy courts on the spot evaluation of the debtors' financial condition, motives, and the local financial realities".

V. § 304 Ancillary Proceedings: Conditions, Precedent and Purpose

A. Property In The U.S. Is Not A Condition To A §304 Ancillary [Some Cases Contra]. Voidable Transfers May Satisfy The Requirement Of Property In The District.

Haarhuis v. Kunnan Enterprises, 177 F.3d 1007 (D.C.Cir. 1999)

Some courts have held that a foreign representative may not initiate an ancillary proceeding in the United States unless the foreign debtor owns property in the United States and particularly within the very district where the ancillary is instituted. *See, In re Phoenix Summus Corporation*, 226 B.R. 379 (Bankr. N.D.Tex. 1998), but in the first opinion at a Court of Appeals level, *Haarhuis* held that a foreign representative may commence an ancillary proceeding and enjoin breach of contract actions pending in the United States, although the foreign debtor did not have any property in the United States.

Although *In re Toga Manufacturing Ltd*., 28 B.R. 165 (Bankr. E.D. Mich. 1983), appears to hold that a § 304 ancillary is not applicable unless the foreign bankruptcy case concerns debtor's assets in the United States, the Court of Appeals read Toga as addressing the venue requirements of 28 U.S.C. § 1410 and not jurisdiction.

Under §§ 304 (b)(1)(A)(ii) and (b)(1)(B) and (b)(2), assets in the United States would appear to be a necessity, but §§ 304(b)(1)(A)(i) and (b)(3), which provide for enjoining an action against the debtor, as distinguished from against the debtor's property, refer to property ”involved” in a foreign bankruptcy or reorganization proceeding and not to property necessarily located in the United States.

The *Haarhuis* Court of Appeals held that the Bankruptcy Court has ancillary court jurisdiction, even when no assets of the debtor are present in the United States. *See, also In re Manning*, 236 B.R. 14 (BAP 9th Cir. 1999), holding that the bankruptcy court had subject matter jurisdiction to enjoin actions against the debtor, even though the debtor had no assets in the U.S.

In Re Metzeler, 78 B.R. 674 (Bankr. S.D.N.Y. 1987) concluded that under Bankruptcy Code Section 541(a), property is any property of the estate, including choses of action available to a trustee under the Bankruptcy Code. *See, United States v. Whiting Pools, Inc*., 462 U.S. 198 (1983).

In re Petition of Gross, 278 B.R. 557 (Bankr. M.D .Fla. 2002) held that voidable property transfers satisfy the requirement of property in the district.

Gross stated that "property" in Section 304 should "… be interpreted in the broadest sense, including properties available to the estate of the debtor."

It is sufficient in this case that the German Trustee has alleged that respondents, who reside in this district, received funds transferred by the debtor, which may be subject to a recovery as a fraudulent transfer.

B. Property Involved In A Case Is A Broader And More Flexible Definition Than Property Of The Debtor Estate.

In re Garcia Avila, 296 B.R. 95 (Bankr. S.D.N.Y. 2003)

Code section 304(b) permits the ancillary bankruptcy court to enjoin the commencement or continuation of any action against a foreign debtor with respect to property "involved in" the foreign proceeding which is broader than "property of the debtor estate". The power to order turnover is limited to property of the debtor estate, but the ancillary court may issue an injunction to protect the debtor's interest in property which is not estate property, if, at a minimum, the proceeds of the non-debtor estate property will be paid directly to the creditors or otherwise "enhance their recovery" *Citing In re Schimmelpenninck,* 183 F.3d 347 (5th Cir 1999). *Als,o see In re Koreag,* 961 F.2d 341 (2nd Cir. 1992); *In re Manning,* 236 B.R. 14 (9th Cir BAP 1999) and *In re Rubin,* 160 B.R. 269 (Bankr. S.D.N.Y. 1993).

The court then analyzed whether the bond proceeds in question might be used to pay the claims of creditors, including the debtor's creditors, and held that although the bond proceeds in question were property of a trust rather than property of the debtor's estates, the proceeds were involved in the Mexican bankruptcy case and a substantial portion of the proceeds of the bonds were intended for the debtor's creditors through a plan of reorganization under the Mexican bankruptcy act.

Ordinarily under the Federal Rules Of Civil Procedure, a party seeking a preliminary injunction must show irreparable harm and either a likelihood of success on the merits, or a sufficiently serious question going the to the merits to make it a fair ground for litigation and that the balance of hardships tip decidedly in the movants favor. The court concluded that the petitioner is likely to succeed on the merits if it is likely to prevail under Bankruptcy Code §304(c), which sets forth the criteria that govern the grant or denial of relief under Code §304(b). *See In re MMG, LLC*, 256 B.R. 544 (Bankr. S.D.N.Y. 2000)

The court discussed the conflict between universality and territoriality and stated that Code §304(c) reflects a modified universality requiring the court to weigh the various factors before deferring to a foreign court and the factors are designed to give the court maximum flexibility.

The court then discussed comity as follows:

> "[C]omity is the ultimate consideration in determining whether to provide relief under §304…[A] court's function under §304 is to determine whether comity should be extended to the foreign proceeding in light of the other factors" *Id.*[1] The first three factors

[1] "Comity" is separately listed as a factor under §304(c). Some have proposed that it be eliminated as a factor, and included in the preamble to §304(c). *See Treco*, 240 F.3d at 157 n. 7. This change would reflect the view, endorsed by the *Treco* Court, that the decision whether to grant comity is the result of the application of the other factors. *Accord in re Axona Int'l Credfit & Commerce Ltd*., 88 B.R. 597, 608 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2nd Cir. 1991); *In re Culmer*, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982); *see Allstate Life Ins. Co. v. Linter Group Ltd*., 994 F.2d 996, 999 (2nd Cir. 1993) (listing factors).

> under §304(c) focus on the fairness and impartiality of the foreign proceeding. *See id*. at 158. The foreign proceeding must treat all creditors and interest holders justly, §304(c)(1), protect United States creditors against prejudice and inconvenience in processing their claims, §304(c)(2), and prevent preferential and fraudulent distributions. S304(c)(3).

The court concluded that the debtor's Mexican bankruptcy proceeding met the concerns of comity.

C. While A Valid Foreign Proceeding Is Necessary To Support A §304 Ancillary Case, The Phrase "Foreign Proceeding" Is To Be Broadly Construed And Encompasses A Broad Array Of Different Types Of Proceedings.

In re Netia Holdings S.A., 277 B.R. 571 (Bankr. S.D.N.Y. 2002)

A §304 ancillary was commenced by the members of the management board of Netia Holdings, a Polish corporation. Certain bondholders moved to dismiss the case on the ground that there was no foreign proceeding as defined by Bankruptcy Code §101(23), which is a prerequisite to commencing an ancillary under §304.

After a lengthy analysis of the Polish proceedings, the court stated that Bankruptcy Code §101(23) defining a foreign proceeding is broad, and encompasses a broad array of types of proceedings and nothing in §101(23) compels a particular procedural status. The Polish proceedings clearly meet §101(23) because it entails a judicial process to adjust the debtors debts and effect its restructuring, and it is pending in the foreign country where the debtor is domiciled and has its principle place of business.

The United States court should consider the amount of judicial involvement and supervision in the foreign proceeding to determine whether it satisfies §101(23). *See, In re MMG, supra* at 256 B.R. 544, 549 (Bankr. S.D.N.Y. 2000; *In re Board of Directors of Hopewell International Insurance*, 238 B.R. 25,50 (Bankr. S.D.N.Y. 1999) *Aff'd*, 275 B.R. 699 (S.D.N.Y. 2002). The moving bondholders rely upon *In re Tam*, 170 B.R. 838 (Bankr. S.D.N.Y. 1994) and

In re Master Home Furniture Co., 261 B.R. 671 (Bankr. C. D Cal. 2001), but neither of those cases was deemed applicable to the facts in this case. *In re Tam* concerned a voluntary winding up of a Cayman Islands corporation, with almost no judicial or administrative supervision and it was conducted without any regulatory oversight and virtually no creditor participation.

Here the process clearly fit within §101(23).

D. The Philosophy And Purpose Of Ancillary Proceedings Under §304 Is That Of Deference To The Country Where The Primary Insolvency Case Is Located And Flexible Administration Of Assets. Section 304 Contains No Reciprocity Requirements. In Order For The Ancillary Court To Grant Relief, The Ancillary Court Must First Consider The Six Statutory Factors Set Forth In Code §304(c).

In re Petition of the Board of Directors of Hopewell International Insurance, Ltd., 272 B.R. 396 (Bankr. S.D.N.Y. 2002)

In a very long opinion arising out of the complex insolvency proceedings of a Bermuda reinsurance company (Hopewell International), the ancillary court rejected an anti-suit injunction issued by the Bermuda court prohibiting certain creditors from taking any step in the ancillary case as a:

> direct infringement of this court's jurisdiction and wholly at odds with the developing law of cooperation and international insolvencies. It requires a response that appropriately protects this Court's jurisdiction while recognizing that, as *Hopewell* argues, this is the "ancillary" and not the "main" proceeding in this insolvency. For the reasons set forth hereafter, this Court holds that, at least until Hopewell desists from conduct that is in contempt of the appropriate jurisdiction of this Court, the 1999 Order, [recognizing and enforcing the Bermuda Scheme of arrangement] issued by this Court, should not be enforceable.

The order of 1999 gave full force and effect to the scheme of arrangement in the United States and enjoined certain captive insurers and other creditors from acting in contravention to the Bermuda Scheme of Arrangement, but the order also contained a clause reserving jurisdiction to modify or amend the order in the ancillary court. The legal issues decided by the ancillary court, included the following:

1. The ancillary courts of the United States have been highly receptive to the recognition and enforcement of foreign insolvency proceedings and it was the intent of Congress in adopting Code §304 to provide coordination of international insolvency proceedings and to aid the principle foreign case. *Citing, In re Goerg*, 844 F.2d 1562 (11th Cir. 1988); *In re Axona Intern*., 88 B.R. at 604; *Universal Casualty & Surety Co v. Gee*, 53 B.R. 891, 896 (Bankr. S.D.N.Y. 1985).
2. The ancillary court may grant broad relief, including an injunction against the commencement or continuation of an action against the foreign debtor's property and may order turnover of such property to the foreign representative. The purpose of the ancillary proceeding is that of deference to the country where the primary insolvency proceeding is located and provide flexible administration of the assets. *Citing, In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998); *In re Manning*, 236 B.R. 14 (9th Cir. BAP 1999)
3. Bankruptcy Code §304 contains no reciprocity requirement. Cooperation in international insolvencies gained momentum when UNCITRAL approved a model law in cross border insolvency and recommended its adoption by member countries. The ancillary court recognized that not only is the court bound by United States law to carry out to full effect the principles underlying §304, but that such principles had played an important role in rationalizing a significant area of international law.
4. Notwithstanding the foregoing provisions, neither the UNCITRAL model law nor §304 provide for automatic recognition of a foreign insolvency case. *Citing, In re Treco*, 240 F.3d 148, 154 (2nd Cir. 2001). Rather, to grant relief under §304, the ancillary court must consider the six factors set forth in §304(c).
5. In considering the six factors, the fifth factor, comity, weighs very heavily in the balance and while it does not automatically override the other factors, it is the ultimate consideration in whether to grant relief under §304.
6. The Bermuda debtor, in going to the Bermuda court and obtaining an injunction affecting the United States creditors in the ancillary case, did so without regard to the express reservation of jurisdiction in the Tina Brozman order of 1999. The United States Bankruptcy Court has the power to alter or amend its own orders pursuant to F.R.C.P. Rule 60, made applicable in bankruptcy cases by Bankruptcy Rule 9024.

7. The Bermuda debtor relies upon the *In re Simon, supra, cert den*. 525 U.S. 1141 (1999). That is misplaced because *Simon* affirmed a United States court's injunction against a creditor, that had filed a proof of claim and participated fully in a United States case, from attempting to collect, in Hong Kong, on a debt that had been discharged in the United States proceeding. There was no competing bankruptcy case in Hong Kong and thus, there was no "true conflict" with any other case. The injunction in question here enjoins the various creditors in the United States from taking action in the United States court that is specifically permitted under the terms of the 1999 order and therefore, the Bermuda injunction purports to prohibit the United States creditor from doing what it is authorized to do under prior orders of the United States court and "it offends this Court's inherent jurisdiction to determine the nature, extent and duration of the relief available to Hopewell in the United States. For the first time it creates a "true conflict" between the Bermuda Court and this Court." *See, In re Maxwell*, 93 F.3d at 1048.

In re Rimsat Ltd, 98 F.3d 956 (7th Cir. 1996), concerned reconciling competing insolvency proceedings in the United States and in Nevis. The court there held that the Bankruptcy Code does not require the United States court to abstain in or suspend a proceeding in the United States merely because a foreign proceeding is pending.

8. Finally, the court concluded that, when one court (the Bermuda court) enters an anti-suit injunction that offends the jurisdiction of another court (the ancillary court) one form of relief is for the offended court to issue a counter-injunction. *Citing, Laker Airways*, 731 F.2d at 927. Such circular action would be inherently absurd in this case. A counter injunction would provide the parties with no remedy, since they could each be liable for contempt in one court for appearing in the other. Finally, the court concluded that the ancillary court did not need to protect its jurisdiction by issuing an injunction against Hopewell. It can protect it by refusing Hopewell relief in the ancillary court.

E. Bankruptcy Code § 304 Provides A Forum For A Foreign Representative To Invoke The Powers Of The United States Bankruptcy Court, In Aid Of A Foreign Judicial Or Administrative Bankruptcy Proceeding, Including To Enjoin The Commencement, Or Continuation, Of Any Action Against The Foreign Debtor, Or Against Property Of The Debtor, And In An Undefined "Catch All," May "Order Other Appropriate Relief."

In re Petition of Bird, 222 B.R. 229 (Bankr. S.D.N.Y. 1998)

In determining whether to grant the relief requested by the foreign representative, Code § 304(c) states that the Court should 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 proceedings;
3. prevention of preferential or fraudulent dispositions of property of such estate;
4. distribution of proceeds of such estate substantially in accordance with the priority prescribed by U.S. bankruptcy law;
5. comity; and
6. if appropriate, the provision of an opportunity for a fresh start for the individual in such foreign proceeding.

If there is a foreign proceeding pending and the factors specified in Code § 304 (c) are satisfied, Code § 305 permits the Court, after notice and a hearing, to dismiss a U.S. case or suspend all proceedings. The foreign representative does not submit to the jurisdiction of the U.S. Bankruptcy Court by commencing an ancillary proceeding. *See In re Petition of Bird, supra*.

If the foreign representative commences a voluntary or involuntary chapter 11, it will probably be able to retain control of the case as debtor in possession, unless an examiner or trustee is appointed. If, however, a chapter 7 liquidating case is commenced, either by voluntary or involuntary petition, then the foreign representative is going to be displaced by a trustee, resident in the district, appointed by the Office of the United States Trustee.

If the foreign representative commences an ancillary proceeding under Section 304, it will, presumably, remain in control. An ancillary case may be initiated by a foreign representative, even though the debtor would not be eligible to be a debtor under the requirements of Code Section 109. Further, since the ancillary proceeding debtor need not qualify under Bankruptcy Code § 109, which precludes foreign and domestic banks and insurance companies, those entities can seek relief under § 304. *See Petition of Laitasalo*, 196 B.R. 913 (Bankr. S.D.N.Y. 1996) and *In re Hourani*, 180 B.R. 58 (Bankr. S.D.N.Y. 1995).

F. One Of The Principle Functions Of The §304 Ancillary Court Is To Assist In The Efficient Administration Of The Primary Foreign Proceeding By Preventing Domestic Creditors From Pursuing Or Executing Upon Assets In The United States. Although The Foreign Representative In An Ancillary Case Does Not Have The Full Panoply Of Powers And Rights That A Trustee In A Full Case Would Have, Nevertheless, The Ancillary Court Has The Power To Apply Virtually Any, Or All, Of The Bankruptcy Code Provisions. The Debtor Need Not Have Any Assets In The United States.

In re Artimm, S.r.l., 278 B.R. 832 (Bankr. C.D. Cal. 2002)

The debtor, an Italian corporation, was in a bankruptcy case in Italy. The foreign representative commenced a §304 ancillary case to stay creditors and to administer United States interests consistent with the Italian bankruptcy case. The debtor had assets in the district of the ancillary court. Under Italian law, there was an automatic stay issued upon the commencement of the case, which applies to all creditors in the United States. The foreign representative sought a stay under Code §304(b) to prevent a creditor from entering a default judgment in the Los Angeles Superior Court.

The court noted that one of the principle functions of the ancillary court is to assist in the efficient administration of the foreign proceeding by preventing domestic creditors from pursuing or executing on assets in the United States. A §304 ancillary is not a full-scale bankruptcy case and does not confer on the foreign representative the "full panoply of powers

and rights that are available to a trustee in a traditional bankruptcy case under United States law". But the ancillary court does have the power to apply virtually any (or all) of the Bankruptcy Code provisions in a particular §304 case. *Citing, In re Rubin*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993).

The court held that there was no requirement under §304 that the debtor have assets in the jurisdiction where the 304 case is filed, or indeed anywhere in the United States. *Citing, In re Metzeler*, 78 B.R. 674 (Bankr. S.D.N.Y. 1987).

Bankruptcy Code §304(b) is constrained by 304(c) and in addressing the six factors in 304(c), comity is the most important factor, but comity was not at issue in this particular case. Comity comes into play only when there is a true conflict between the United States law and that of the foreign jurisdiction.

The creditor, whose action in the California state court was restrained, argued that she would have few, if any, rights in the Italian bankruptcy case, and that the rights in Italy were not equal to her rights in a bankruptcy case in the United States. By way of response, the ancillary court authorized the creditor, and any other United States creditor, to file a claim in the ancillary court under the same procedure as if this were a full domestic chapter 7 case, and the claim would be presumed allowed, unless and until an objection is filed and if an objection is brought to the claim, the ancillary court will decide the objection as a contested matter. (This seems inconsistent with other cases, holding that it is not the job of the ancillary court to determine the allowance or disallowance or amount of claims). The court found that the requirements of Bankruptcy Code §304(c) were met and accordingly, it issued the injunction similar to a §362 automatic stay.

Where the case is sufficiently complicated, or it needs the full bankruptcy powers and rights of a trustee in bankruptcy, then it is better for the foreign representative to file a full chapter 7 or chapter 11 case. The chapter 7 or chapter 11 creates a debtor estate and triggers the automatic stay, which takes effect immediately.

G. The Foreign Administrator Of Foreign Banks Not Eligible To Be Debtors Under Code §109 May Nevertheless Invoke §304 Ancillary Proceedings.

In re Agency for Deposit Insurance v. Superintendent of Banks, 310 B.R. 793 (Bankr. S.D.N.Y. 2004)

The foreign administrator of failed banks that were seeking relief under Yugoslav insolvency law and initiated §304 ancillary proceedings to seek injunctive relief to preserve the banks New York assets, had standing to seek the 304 injunction even though the foreign banks were not eligible to be debtors under Bankruptcy Code §109. Section 109 expressly excludes foreign banks from the definition of who may be a debtor, but under §304 it is available to any qualified foreign representative whether or not it qualifies as a debtor under §109. The district court reversed the bankruptcy courts ruling which had dismissed the foreign administrator's complaint for injunction. The court stated: "the legislative history of section 304 confirms that Congress sought to assist foreign debtors in marshaling their assets to allow for a single, coordinated foreign distribution…the fact that, under section 109, a foreign bank cannot avail itself of the full benefits of chapter 7 liquidation in the United States in no way implies that its estate may not obtain the benefits of a foreign bankruptcy by invoking the remedies afforded by section 304".

VI. Venue In An Ancillary

In re Thornhill Global Deposit Fund, Ltd., 245 B.R. 1 (Bankr. D. Mass. 2000)

Thornhill held that: venue for cases arising under Section 304 depends upon the type of relief requested in the petition. If the ancillary proceeding seeks to enjoin an action in a state or federal court, venue is proper only in the district where the action is pending and if the parties require the turnover of property of a foreign debtor's estate, the action may be commenced only in the court for the district in which the property is located.

Venue for cases arising under § 304 is prescribed by 28 U.S.C. § 1410; when the foreign representative seeks to enjoin an action in a state or federal court, venue is proper only in the district where the action is pending, *citing In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992). If the foreign representative seeks the turnover of property of the foreign debtor's estate, the action may be commenced only in the court for the district in which the property is found. Accordingly, the venue was proper in the Massachusetts court. The foreign proceeding need not be a bankruptcy proceeding. [See Code § 101(23)] United States bankruptcy courts have consistently recognized that the compulsory winding up under Bahamian law qualifies as a foreign insolvency proceeding.

VII. Powers Available in a §304 Ancillary

A. Bankruptcy Rule 2004, Providing For Discovery And Depositions, May Be Invoked By The Foreign Representative In A §304 Ancillary Case. The Scope Of The Examination Under Rule 2004 Is Broader Than Under The F.R.C.P., May Be In The Nature Of A Fishing Expedition, And Is Not Constrained By The Rules Of Discovery In The Foreign Main Court.

In re Petition of Gross, 278 B.R. 557 (Bankr. M.D. Fla. 2002)
In re Hughes, 281 B.R. 224 (Bankr. S.D.N.Y. 2002)
Proposed new chapter 15, pending before Congress, and the UNCITRAL model law on cross border insolvency, both specifically permit a recognized foreign representative to examine witnesses and take evidence regarding the debtor's assets, its financial affairs, and its assets and liabilities. Title 28 U.S.C.A. §1782(a), enables a district court to order a person, residing or

found in the district, to give testimony for use in a proceeding in a foreign tribunal, and specifically provides that the testimony shall be taken in accordance with the F.R.C.P. *See, In re Edelman v. Taittinger*, 295 F.3d 171 (2nd Cir. 2002).

It is proper to use a Section 304 ancillary for the purpose of facilitating discovery, rather than to commence litigation, and *Hughes* noted that Section 304 has no provision for a meeting of creditors under Bankruptcy Code § 341 and that discovery is essential to assure an economical and expeditious administration of the foreign estate, consistent with comity. *See, Petition of Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992); and *In re Kojima*, 177 B.R. 696 (Bankr. D. Colo. 1995).

B. Bankruptcy Court Has Power, In A Case Ancillary To Foreign Proceedings, To Preliminarily Enjoin Local Actions Against Foreign Debtor, Assuming (1) That Issuance Of Injunction Under Facts Presented In A Particular Case Is Consistent With Statutory Standards; And (2) That Circumstances Otherwise Meet Requirements For Entry Of Preliminary Injunction.

In re Petition of Caldas, 274 B.R. 583 (Bankr. S.D.N.Y. 2002).

The Court granted the foreign representative's request to prevent a piecemeal dismemberment of the foreign bank's assets in the United States and to prohibit commencement of any other actions against the foreign bank, or its property, without prior relief from the ancillary court. However, the ancillary court permitted the respondent bank to continue its pending litigation in order to liquidate its disputed claims in the New York Court.

The Court quoted from *In re Treco* 240 F.3d 148 (2d Cir. 2001) that Section 304 was intended to deal with the complex and increasingly important problems involving the legal effect the United States Court will give to foreign bankruptcy proceedings and that it was designed to assist foreign representatives in administering the assets of the debtor located in the United States. While it is clear that the ancillary court has the power under Bankruptcy Code § 304(b)(1)(A) to preliminarily enjoin the New York State Court action, it should do so only if the

issuance of an injunction under the facts of the particular case are consistent with the standards for the exercise of § 304(c) power and with applicable case law, and that the circumstances "meet the requirements of entry of a preliminary injunction" *citing In re MMG LLC* 256 B.R. 544 (Bankr. S.D.N.Y. 2000), which held that it was appropriate for the Court to exercise its inherent power under §105(a) to maintain the status quo pending determination of the ancillary case, provided "…the traditional standards for preliminary injunctive relief [were] considered."

Citing In re Rubin, 160 B.R. 269, 274 (Bankr. S.D.N.Y. 1993), *Caldas* held that whether to grant relief under § 304 calls for a case specific exercise of discretion in the light of all circumstances. In *Treco*, one factor dominated all other factors, namely whether the subordination of a secured claim to the administrative expenses under Bahamian law would result in a distribution of proceeds that was not "substantially in accordance with the order of the Bankruptcy Code..." *Caldas* then considered the five relevant factors set forth in Bankruptcy Code § 304(c) and stated that comity does not require categorical deference to foreign proceedings and does not automatically override the other relevant factors.

*T*he court held it would issue the preliminary injunction if the foreign debtor could satisfy the requirements of Code Section 304(b) and the traditional preliminary injunction requirements of the 2nd Circuit Court of Appeals. To obtain the preliminary injunction the moving party must show:

a. that it will suffer irreparable harm in the absence of an injunction; and

b. either that there would be a likelihood of success on the merits, or that there was a sufficiently serious question with regards to the merits to provide a fair ground for litigation, and that a balance of the hardships tips decidedly in favor of the foreign debtor movant. Dissipation of the finite resources of an insolvent estate does constitute

irreparable injury, *citing Zervos v. Verizon N.Y., Inc*., 252 F.3d 163, 172 (2d Cir. 2001); also *In re Lines*, 81 B.R. 267, 270 (Bankr. S.D.N.Y. 1988); *In re Rubin*, 160 B.R. 269, 283 (Bankr. S.D.N.Y. 1993).

The court granted the preliminary injunction.

Although a § 304 ancillary proceeding does not provide for the automatic stay of § 362, it is now common for the foreign representative instituting the ancillary proceeding to seek "first day orders," which include generic preliminary injunctions to stay all actions in any court in the United States, whether state or federal, against the foreign debtor or its assets in the United States. Earlier on, it had been contended that any such injunction would have to be by an adversary complaint specifically naming the defendants to be enjoined, but more recent cases have held that the ancillary court may issue a "generic injunction" addressed to all persons. *See, Petition of Treco*, 205 B.R. 358 (S.D.N. 1997), which affirmed the Bankruptcy Court's order of injunction and held that the Court's authority to enjoin other proceedings under § 304 was not limited by the interpretation other courts had given to "... the contours of the automatic stay provisions of the Bankruptcy Code." A Bankruptcy Court is given broad latitude in fashioning an appropriate remedy in a § 304 proceeding, *citing*, *In re Koreag*, 961 F.2d 341 (2nd Cir.), *cert. den*., 506 U.S. 865 (1992). *See, In re Petition of Rukavina*, 227 B.R. 234 (Bankr. S.D.N.Y. 1998), which held that the foreign representative did not have to commence adversary proceedings in a United States bankruptcy court in order to obtain an injunction to protect the Debtor's United States assets.

C. Avoiding Powers

In re Wachsmuth, 272 B.R. 766, (Bankr. M.D. Fla. 2001)
*In re Metzeler*r, 78 B.R. 674 (Bankr. S.D.N.Y. 1987)
In re Grandote Country Club Co. Ltd., 208 B.R. 218 (D. Colo. 1997)

There remains unresolved whether the foreign representative in a § 304 ancillary has the avoidance powers of a trustee in bankruptcy or a debtor in possession pursuant to Code §§ 544, 547, 548 and 550.

In *Wachsmuth*, a German Trustee as the foreign representative commenced a §304 ancillary case in Florida. The German Trustee filed an adversary complaint in the ancillary proceeding against various defendants, including a Florida law firm, contending that the defendants were initial transferees of a transfer made with the actual intent to hinder, delay or defraud creditors of the German debtor. The complaint also invoked German fraudulent conveyance law. The foreign representative sought a turnover of debtor's funds in the possession of the defendants or under the defendants' control, and an accounting by the defendants of any disposition of funds of the foreign debtor. The complaint invoked both Bankruptcy Code §304 and Florida statutes with regard to fraudulent transfers.

Motions to dismiss were filed on the grounds that the plaintiff has no standing to assert any claims, either pursuant to the United States Bankruptcy Code or pursuant to the fraudulent transfer laws of the state of Florida, and to the extent the fraudulent transfer claims were based on German law, that they are barred by the statute of limitations under German law, and that under the applicable doctrine of choice of law, the German foreign representative is bound by the statute of limitations of German law.

The plaintiff primarily relied on the proposition that under the doctrine of choice of law, Florida law applied because all of the German debtor's contacts, relevant to the transactions involved in the complaint, occurred in Florida.

The power and jurisdiction of the ancillary court is based entirely on Code § 304 and the Court concluded that § 304(b) does not include:

> . . . a suit to utilize state law to recover money or property even though the transactions under consideration occurred in this state and even though the defendants are residents and citizens of the State of Florida.

Unless the plaintiff's claims fall within the turnover provisions of §304(b)(2), or the general provision that permits the Court to order "other appropriate relief", the claim of the plaintiff cannot be granted.

D. Compel Turnover Of Secured Creditor's Collateral

In re Petition of Treco, 240 F.3d 148 (2d Cir. 2001)

In *Treco*, the Bank of New York had made a loan to a Bahamian corporation, in New York, pursuant to a loan agreement governed by New York law. Pursuant to the loan agreement, the bank had a security interest and a right of offset against the money deposited by the Bahamian corporation into the Bank of New York. The Bank of New York, accordingly, was a secured creditor to the extent of the amount on deposit. The Bahamian liquidators commenced an ancillary proceeding under § 304 and demanded turnover of the amounts on deposit with the Bank of New York. (This discussion greatly simplifies the procedural history of this case, which is quite complex, involving District Court litigation).

The turnover motion by the foreign representative contended that the bank accounts of the Bahamian debtor were property of the estate, which must be administered in the Bahamian liquidation proceeding, and that just treatment of all creditors could only be insured by repatriating to the Bahamian proceedings the debtor's accounts because, otherwise, the debtor's estate would be:

> …dismembered and it will be impossible to distribute MIBL's estate in a fair and equitable way. Movants argue that U.S. creditors like BNY will not be unduly prejudiced or inconvenienced if we grant this motion because the claims processing and distribution procedures under the [Bahamian]

> Company's Act are fundamentally fair and substantially in accordance with the order prescribed in the Bankruptcy Code.

229 B.R. at 284.

Bankruptcy Code § 304(b)(2) provides that the United States ancillary bankruptcy court may order turnover of the property of the estate or the proceeds to the foreign representative, and the court is to be guided by what will best assure an economical and expeditious administration of the foreign debtor's estate consistent with the specific criteria set forth in Bankruptcy Code § 304(c).

On appeal to the District Court, the bank contended:

a. that it was an abuse of discretion to compel the turnover because the bankruptcy court failed to provide adequate protection for the bank's security interest and because it prevented the bank from exercising its setoff rights;

b. that the guidelines in the ancillary proceedings of Code § 304 do not permit a turnover order because the distribution under Bahamian procedures would not be substantially in accordance with United States bankruptcy law.

The District Court rejected all of the bank's arguments, finding that the trend among the United States courts is to grant deference to foreign proceedings and that it furthers the purpose of Code § 304 ". . . in promoting efficiency in international bankruptcies and encouraging other countries to defer similarly to U.S. proceedings."

The District Court held that turnover should be denied only where the foreign distribution scheme is "repugnant to some fundamental American legal principle." The District Court recognized that in a few cases, comity has been denied, such as *In re Toga Manufacturing Limited*, 28 B.R. 165, and *In re Papeleras Reunidas*, 92 B.R. 584.

The bank's brief on appeal to the Second Circuit raised the following issues:

1. The order directing the turnover to foreign liquidators of collateral in the actual physical possession of a United States secured party violated the bank's Fifth Amendment constitutional due process rights;
2. The lower court's order failed to provide the bank with its constitutional right to adequate protection of its secured property interests;
3. The granting of comity and ordering turnover violated Bankruptcy Code § 304(c) because it requires that distribution of proceeds be "substantially in accordance with United States law and must provide just and fair treatment of United States creditor claims, and protection against prejudice to United States creditors and the turnover order is inimical to United States policies';
4. The District Court destroyed the bank's statutorily protected right and remedy of offset by ordering turnover of the funds to the Bahamian liquidator;
5. The lower court rewrote the parties' contract by refusing to enforce the bank's contractual rights to retain the funds on deposit and to have all disputes resolved, exclusively, in New York with the application of New York and not Bahamian law.

The Second Circuit reversed both the bankruptcy and district court orders. The Court of Appeals concluded that if the Bank's claim was secured then turnover of the funds would be improper ". . . because of the extent to which the distribution of the proceeds of these funds in the Bahamian bankruptcy proceeding would not be 'substantially in accordance with the order prescribed by' the United States Bankruptcy Code…".

The bank's most persuasive argument was Code § 304 (c)(4), which ". . .directs the court to consider whether the distribution of proceeds of the debtor's estate in the foreign proceeding would be substantially in accordance with the order prescribed by the United States Bankruptcy Code".

Under Bahamian law, the secured claim of the Bank would be subordinated to administrative expenses of the liquidation whereas under United States law a secured creditor is

generally not subject to diminution based on administrative expense. Bahamian liquidators argued that comity is the most important factor under § 304(c) and that comity trumps the bank's claim that it will be "materially disadvantaged by the relative priority of a secured claim under Bahamian law."

The Second Circuit declined to follow *In re Culmer* or *In re Hackett* because they were bankruptcy court decisions not binding on the Court of Appeals and because "§ 304(c) calls for a case-specific exercise of discretion in light of all of the circumstances." Neither *Culmer* nor *Hackett* involved a secured claim.

The Bahamian liquidator's argument that principles of deference to the foreign court categorically outweigh differences in the order of priority accorded various types of creditors was rejected by the Second Circuit.

> "The principle of comity has never been categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies or rights of the citizens of the United States."

Citing, Pravin Banker Associates v. Banco Popular del Peru, 109 F.3d 850, 854 (2d Cir. 1997)" *See, Victrix S.S. Co. v. Salen Dry CargoA.B.*, 825 F.2d 709, 713 (2d Cir. 1987) which held that comity should not be extended when doing so would be contrary to the policies or prejudicial to the interest of the United States; *In re Schimmelpenninck*, 183 F.3d 347, 365 (5th Cir. 1999), which stated that foreign laws must not be repugnant to United States laws and policies.

While the first three factors of Code §304(c) do not bar affording comity to the Bahamian proceedings, §304(c) requires the court to consider the differences between American priority rules and the foreign priority rules, and stated: "while the priority rules of a foreign jurisdiction need not be identical to those of the United States . . . the plain language of §304(c)(4) directs the

court to consider whether the priority rules are 'substantially in accordance with United States law."

United States and Bahamian law treat administrative expenses differently, a difference that would have a substantial and adverse impact on the secured bank's claim. Accordingly, the Bahamian proceedings would not be substantially in accordance with United States law with respect to distribution. Indeed, secured creditors have special rights and protection and security interests are recognized as property rights protected by the United States constitution against taking without compensation, and because United States law affords strong protection to secured creditors, the difference in Bahamian law and United States law is even more significant. No prior § 304 case had been found which ordered the turnover of assets from a secured creditor. The court noted *In re Hourani*, 180 B.R. at 69 concerning Jordanian law, and *In re Papeleras Reunidas*, 92 B.R. 584, 593 (Bankr. E.D.N.Y. 1988), which denied relief under § 304 because a judgment lien creditor, who would have been 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. *Also see In re Toga Manufacturing Ltd*., 28 B.R. 165 (Bankr. Mich. 1983)

In conclusion, the Court of Appeals stated:

> "we are not announcing a rule that whenever §304(c)(4) is implicated, turnover over or other §304 relief should be denied. Second, we are not creating a presumption against affording comity to Bahamian bankruptcy proceedings. We expect that the case specific analysis required by §304 will in many, or most, cases support the granting of the requested relief."

See for example, *In re Hackett*, 184 B.R at. 660; *In re Culmer* 25 B.R. 621 (Bankr. S.D.N.Y. 1982) at 633.

E. Power to dismiss Pending U.S. case

In re Ionica Plc., 241 B.R. 829 (Bankr. S.D.N.Y. 1999)

In addition to the power of the foreign representative to commence an involuntary or voluntary chapter 11 or chapter 7 case in the United States on behalf of the foreign corporation, the foreign representative is specifically given the authority to ask the United States court to dismiss or suspend a United States bankruptcy proceeding if the foreign corporation is in a bankruptcy proceeding in its home country, and provided certain factors set out in Bankruptcy Code § 304(c) are satisfied.

VIII. Comity

A. Comity, Without Ancillary Or Full Bankruptcy Case

New Line International Releasing v. Ivex Films, 140 B.R. 342 (S.D.N.Y 1992)

Occasionally the foreign representative does not invoke either ancillary proceedings or a full chapter 7 or 11, but, rather, invokes international comity and asks that a United States court enjoin United States creditors from bringing any action on their claims, except in the foreign proceeding. Generally, it is appropriate to dismiss an action by a United States creditor brought in a United States court if the United States creditor would not be prejudiced by any substantial difference between the foreign proceedings and United States bankruptcy proceedings. This is true, even if a choice of law or choice of venue clause would otherwise be applicable in favor of the creditor. On the other hand, when the foreign liquidator seeks to enjoin the United States creditor from suing the foreign debtor in any court other than the foreign tribunal, the normal rule for injunctive relief applies, namely, that the party seeking the injunction must establish irreparable harm or injury.

New Line, *supra*, brought a diversity action in a United States court against a Spanish defendant (Ivex) for breach of a distribution agreement. Ivex was then a debtor in insolvency proceedings in Spain. Ivex moved for dismissal of the complaint based on the doctrine of

international comity and sought an injunction staying New Line from suing Ivex in any court other than the Spanish court, which had jurisdiction over the Ivex insolvency proceedings. *New Line* quoting from *Hilton v. Guyot*, 159 U.S. 113 (1895), stated:

> The purpose of extending comity to foreign bankruptcy proceedings is to enable the assets of a debtor to be disbursed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities... The modern view rejects parochial protection of local creditors in the absence of a demonstration that their rights are unprotected in a foreign forum.

The Spanish company had no place of business or property in the United States and, accordingly, could not have been a debtor under Code § 109 in a United States bankruptcy case, but probably qualified for a Section 304 ancillary proceeding. The court rejected New Line's argument that the venue provisions and choice of law provisions compelled the proceeding to go forward in the United States.

In *Smith v. Dominion Bridge Corporation*, 33 BCD 1263 (E.D. Pa. March 1999), the United States District Court stayed proceedings in a class action suit against the corporate defendant, which was a debtor under the Canadian Bankruptcy and Insolvency Act and had filed a "Notice of Intention to File a Proposal". The debtor filed a motion to stay the class action on the basis that under Canadian law, the filing of the Notice of Intention to File a Proposal automatically stayed the continuation of all suits against the corporate defendant, except by leave of the Canadian court, and asked the United States District Court to extend comity to the Canadian stay. The District Court granted the motion and denied the class action plaintiffs' request that the granting of the motion should be conditioned upon the production of certain documents by the defendants.

B. The Doctrine Of International Comity Does Not Compel The Bankruptcy Court In The United States To Recognize An Arbitration Clause Bankruptcy Code §362(a) Stayed All Proceedings, Including Arbitration, In Order To Centralize All Disputes.

In re United States Lines, Inc., 197 F.3d 631 (2d Cir. 1999)

This case concerned an adversary proceeding brought by the reorganization trust, as successor-in-interest to the reorganized debtor shipping companies, against certain domestic and foreign mutual insurance clubs that had insured the debtors' fleets under prepetition contracts. The adversary proceeding sought a declaratory judgment to establish the insured's' rights under the various insurance contracts. The bankruptcy court held that the declaratory judgment action was a "core" proceeding and that the bankruptcy court had discretion to stay the arbitration. On appeal, the district court reversed, but the Second Circuit held that the bankruptcy court's refusal to refer the proceedings to arbitration was not an abuse of discretion. The international comity issue concerned what appeared to be a conflict between the Federal Arbitration Act (9 U.S.C.A. § 1, *et seq*.) mandate, and the discretionary power provided by the United States Bankruptcy Code.

The Court of Appeals recognized that the parties had entered into valid agreements to arbitrate their contract disputes and some called for international arbitration. The court recognized that arbitration is favored in the United States judicial system, *citing Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220-221 (1985) and recognized that the Arbitration Act mandates enforcement of valid arbitration agreements, *citing Shearson-American Express, Inc. v. McMahon*, 42 U.S. 220 (1987)

The Court of Appeals stated that the Arbitration Act's mandate could be overridden by a contrary congressional command, even when international arbitration is concerned, *citing, The*

Convention On The Recognition And Enforcement Of Foreign Arbitral Awards . . . 21 U.S.C. 2517 (the New York Convention).

Finally, the Court of Appeals stated that:

> The court then declared that Bankruptcy Code § 362 (a) (the automatic stay) stayed all proceedings, including arbitration, and it was the intent of Bankruptcy Code §§ 105 and 362 to centralize all disputes concerning property of the debtor's estate so that the reorganization could proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.

The Arbitration Act as interpreted by the Supreme Court dictates ". . .that an arbitration clause should be enforced unless doing so would seriously jeopardize the objectives of the [Bankruptcy] Code."

C. The Exception To Comity That The Court Need Not Recognize A Judgment Of The Foreign State If That Judgment Is "Repugnant" To The Public Policy Of The United States Or The State Where Recognition Is Sought, Must Be Interpreted Narrowly

In re Hashim, 213 F.3d 1169 (9th Cir. 2000)

In *Hashim*, the judgment creditor had obtained an award of attorneys' fees and costs in an English court. The bankruptcy court disallowed the claims on the grounds that the English court's unliquidated award of court costs and attorneys' fees was "repugnant" to the principles of American jurisprudence.

The bankruptcy court determined that the English court award of costs and attorneys' fees was not entitled to comity, because the amount of the award was disproportionate to the successful claims of the Arab Monetary Fund ("AMF") against the debtors.

The Court of Appeals held that the validity of a creditor's claim is governed by the applicable state law in the judicial district where the bankruptcy is pending. Under Arizona law, the recognition of foreign judgments is guided by the *Restatement (Second) of Conflict of Laws § 98*, which favors recognition. Although the bankruptcy court need not recognize a judgment of a

foreign state if that judgment is repugnant to the public policy of the United States, that exception must be interpreted narrowly for "few judgments fall in the category of judgments that need not be recognized because they violate the public policy of the forum."

The Court of Appeals noted that the debtors here had voluntarily resided in England, had attended school there, and had held substantial property in England and, thus, could not contend that it would be shocking for them to be held to the judgment of the English court.

The Court of Appeals, then giving special recognition to the English court, stated:

> We must decline, absent grave procedural irregularities or allegations of fraud, to impugn the lawfulness of the judgments of that judicial system from which our own descended . . . we are, of course, mindful that the English system is the very fount from which our system developed; a system which has procedures and goals which closely parallel our own. Surely it could not declaim that the English system is any other than one whose system of jurisprudence is likely to secure an impartial administration of justice.

The Court of Appeals reversed the bankruptcy court order disallowing the AMF claims.

D. Conflicts between foreign primary court orders and U.S. law in full, concurrent, parallel Chapter 11.

Stonington Partners v. Lernout & Hauspie Speech, 310 F.3d 118 (3rd Cir. 2002)

In *Lernout*, 268 B.R. 395 (D. Del. 2001), the United States Bankruptcy Court, in a parallel, concurrent, same entity chapter 11, pending in both Belgium and the United States, refused to grant comity to the decision of a Belgian bankruptcy court, which had declined to subordinate stockholder rescission claims to general creditor claims as required by U.S. Bankruptcy Code §510(b). The debtor is incorporated under the laws of Belgium, and headquartered in both the United States and in Belgium. The United States Bankruptcy Court concluded that the claims of Stonington were pre-petition claims subject to U.S. Bankruptcy

Code §510(b) mandatory subordination to general unsecured claims. Stonington had filed a proof of claim in both the Belgian and U.S. proceedings.

The debtor filed a plan, which subordinated Stonington's claim, but the Belgian court rejected the plan, on the grounds that subordination of Stonington, which had acquired the debtor's stock in a fraudulently induced merger, was not permitted under Belgian law. After the Belgian court had rejected the plan, the United States Bankruptcy Court held that the "priority, treatment and classification of the Dictaphone Merger Claims . . . are matters to be determined exclusively by the [U.S.] Bankruptcy Court in accordance with the [U.S.] Bankruptcy Code."

The Bankruptcy Court also enjoined the United States merger partner from further prosecuting the issues of priority treatment and classification of the merger claims in the Belgian court under Belgian law. The Court of Appeals reversed and vacated the injunction.

Pursuant to the authority of *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1985), the doctrine of international comity requires the United States court to give effect to

> "executive, legislative and judicial acts of a foreign sovereign . . . the question of whether to extend international comity is relevant only when there is a true conflict between United States law and that of a foreign state (*citing, In re Maxwell Communications Corp.*, 93 F.3d 1037, 1049 (2d Cir. 1996). A true conflict exists where foreign law requires conduct that violates United States law. . . . In the face of a true conflict, the law of the sovereign who has the most significant contacts, that is, the 'center of gravity,' should be applied. . . . Furthermore, the United States should deny comity only if its acceptance would be prejudicial to the interests of the United States."

The creditor contended that the true center of gravity of the debtor's bankruptcy is in Belgium, because it is a Belgian corporation whose existence and governance is defined by Belgian law. The debtor contended that the center of gravity for the bankruptcy case is in the United States, because the merger partner is a United States corporation, with a principal place of business in the United States, and because the merger agreement was executed in the United

States with a choice of law provision identifying the jurisdiction of the United States. The Bankruptcy Court concluded that the center of gravity of the bankruptcy case was the United States.

The Third Circuit reversed the District Court and the Bankruptcy Court decisions and held that that portion of the bankruptcy court's order enjoining the creditor from further prosecuting the issue of priority, treatment and classification of it's claims in the debtor's parallel Belgium bankruptcy, and under Belgian law, amounted to an "anti-suit injunction" which became the equivalent of enjoining the proceedings in the Belgian court.

The Court of Appeals said that the task required here was to "accommodat [e] conflicting, mutually inconsistent national regulatory policies while minimizing the amount of interference with the judicial processes of other nations." *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 914 (D.C. Cir. 1984).

> Despite the parties' and the Courts' focus on a "choice-of- law' analysis and their reliance on Maxwell, we conclude that the fashioning of relief in this situation does not merely call for a choice between United States and Belgian law as applicable to the priority of Stonington's claims in the Delaware bankruptcy proceedings. It requires more. In our view, the Bankruptcy Court did not simply make a "choice-of-law determination" but also imposed an "anti-suit injunction".
>
> Based on a "serious concern for comity," we have adopted a restrictive approach to granting such relief. *General Electric Co. v. Deutz Ag*, 270 F.3d 144, 161 (3rd Cir. 2001). The principles of comity are particularly appropriately applied in the bankruptcy context because of the challenges posed by transnational insolvencies and because Congress specifically listed "comity" as an element to be considered in the context of such insolvencies, albeit in relation to ancillary proceedings. *See* 11 U.S.C. §304; *Maxwell, supra* at 1048; *Remington Rand Corp. v. Business Sys. Inc*., 830 F.2d 1260, 1271 (3rd Cir. 1987)
>
> … the heart of the inquiry in *Maxwell* involved the Court's assessment of the nature of the respective countries' policies and the principles animating the laws, so as to determine which country

> actually had a stronger interest in its policy's being advanced. The Court considered the strength of the policies underlying the Bankruptcy Code's avoidance provisions and concluded that the policies of "equal distribution to creditors and preserving the value of the estate" were effectuated by the English equivalent. *Maxwell, supra* at 1052

Finally, the Court recommended that in such parallel proceedings that an actual "dialogue occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least an understanding as to the policy considerations underpinning salient aspects of the foreign laws."

The Court of Appeals remanded the case back to the bankruptcy court for further proceedings consistent with Court's opinion. In a concurring opinion, Judge Rosenn held that there was no basis, or necessity, for remanding the proceeding to the Delaware Bankruptcy court and urged the courts in Delaware and in Belgium to develop a protocol for overseeing and harmonizing the dual proceedings.

IX. Personal Jurisdiction Over The Foreign Defendant.

A. Personal Jurisdiction Over A Foreign Defendant Depends Upon Whether The Defendant Has The Requisite Minimum Due Process Contacts With The United States. The Filing Of A Proof Of Claim By Foreign Creditor Is A Submission To The Bankruptcy Court's Jurisdiction And Triggers The Process Of Allowance And Disallowance Of The Claim. An Adversary Proceeding Seeking Recovery Against The Creditor Becomes Part Of That Process.

In re Cruisephone, Inc.,B. R. 325 (Bankr. E.D.N.Y. 2002)

The debtor filed a chapter 11 petition in 1999, which failed and led to the sale of the debtor's assets. In June of 2000, the debtor rejected certain executory contracts, including one with the defendant; the order fixed a time for filing of proofs of claim arising out of the executory contract rejections. Pursuant to that order, the defendant filed a general unsecured claim in an unliquidated amount for damages for breach of contract pursuant to Bankruptcy Code

§365. Subsequently, the defendant withdrew its claim and thereafter adversary proceedings were initiated against the defendant with jurisdiction based upon the filing of the proof of claim. The adversary complaint was hand delivered by service of process upon the counsel for the defendant in New York. The defendant, a Netherland Antilles company, contended that it had never transacted business in New York or anywhere in the United States, and moved to dismiss pursuant to Federal Rule 12(b)(2).

The filing of a proof of claim by a creditor is a submission to the Bankruptcy Court's jurisdiction, but withdrawal of the proof of claim removes the proof of claim as a basis for jurisdiction. Accordingly, whether the bankruptcy court, as any other federal court, can exercise jurisdiction depends upon whether the foreign defendant has the requisite minimum due process contacts with the United States. A minimum contacts analysis is used to determine whether the exercise of personal jurisdiction would offend 'traditional notions of fair play and substantial justice' *see Asahi Metal Industries, Co. Ltd. v. Superior Court of California*, 480 U.S. 102, 113 (1987). The Second Circuit has stated that three different types of actions by a foreign corporation may satisfy the minimum due process contacts requirement:

6. transacting business in the United States
7. doing an act in the United States or
8. having an effect in the United Stated by an act done elsewhere

Citing, Lesco Data Processing Equipment v Maxwell, 468 F.2d 1326, 1340 (2nd Cir. 1972).

The court found the evidence inadequate to determine that there had been minimum due process contacts and noted a distinction between the court having personal jurisdiction and sufficiency of process, that is, the service of the summons and complaint. The court held that the service of process here was inadequate.

Withdrawal Of A Claim After An Action Has Been Brought Against The Creditor Does Not Permit The Defendant Creditor To Make A Jury Demand. *See In re EXDS, Inc*., 316 B.R. 817 (Bankr. D. Del. 2003)

B. The U.S. Bankruptcy Court Can Exercise Personal Jurisdiction Over A Mexican Trucking Company In An Adversary Case Brought By The Trustee To Set Aside Voidable Preference Transfers To The Mexican Company.

In re Tandycrafts, Inc., 317 B.R. 287 (Bankr. D. Del. 2004)

The liquidating trustee brought a voidable preference adversary case against a Mexican trucking company which moved to dismiss for lack of personal jurisdiction. The preference defendant had been properly served pursuant to Bankruptcy Rule 7004(d), which authorizes nationwide service of process by first class mail. In determining whether there was personal jurisdiction, the court looks to the Federal long arm statute and must determine whether the Mexican defendant had minimum contacts with the United States, but not with regard to any particular state in the United States, *citing* Bankruptcy Rule 7004(d). The court held that the Mexican trucking company was engaged in cross border trucking and in providing services to another company in the United States and therefore had established minimum contacts sufficient to satisfy the due process requirements of the U.S. Constitution.

X. Extra-Territorial Effect Of United States Laws

In re Simon, 153 F.3d 991 (9th Cir. 1998)

Simon held that the discharge provisions of United States bankruptcy law had worldwide effect, especially with regard to the Hong Kong and Shanghai Bank ("Bank"), which had filed a proof of claim in the United States Bankruptcy Court and, thus, had "fully participated in the debtor's case." *Simon* distinguished *Maxwell*, because in *Maxwell*, there were two parallel

concurrent proceedings, whereas, in *Simon*, there was no proceeding pending in Hong Kong and there appeared to be no conflicts between the laws of Hong Kong and the United States with regard to the issues in question.

Simon had guaranteed the debt of a corporation incorporated in the British Virgin Islands, but which maintained offices in Hong Kong. Simon was the major stockholder in the corporation. The loans made by the Bank to the corporate entity and Simon's guarantee both provided that Hong Kong law would be the governing law and that the courts in Hong Kong would have jurisdiction over all disputes arising under the guarantee. The guarantee provided for the appointment of a Hong Kong law firm to be agents for the purpose of accepting service of process. At the time that the guarantee was executed, Simon lived in, and operated his company from, Hong Kong and the loan proceeds were disbursed in Hong Kong. When Simon found himself facing personal debts of over (US) $200 million, he traveled to the United States and thereafter filed a personal bankruptcy under chapter 7 in San Francisco.

The Bank filed a proof of claim in the *Simon* case in the amount of more than US $37 million, being the Bank's share of a $200 million syndicated bank loan made to Simon's corporate entity. The Bank had an opportunity to either object to the granting of a discharge in favor of Simon and/or to object to the dischargeability of the particular debt, but the Bank did neither. The Bankruptcy Court entered an order granting Simon a discharge of all of his debts and issued an injunction enjoining all creditors from instituting or continuing, any action or employing any process, in any attempt to collect the discharged debt.

Thereafter, the Bank filed a complaint for declaratory judgment asking that Simon's discharge and injunction against the Bank were effective only within the United States, but were not enforceable outside of the United States.

The Bankruptcy Court dismissed the declaratory judgment complaint.

The Court of Appeals held that the United States Congress "... has the unquestioned authority to enforce its laws beyond the territorial boundaries of the United States," and whether Congress has so exercised that authority is a matter of statutory construction in a particular case. The usual presumption is that the legislation of Congress "... unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."

The Court of Appeals noted that the presumption against extra-territoriality is generally not applied where "... the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States," and, secondly, the presumption is not applicable when the regulated conduct is "intended to, and results in, substantial effects within the United States" *Laker Airways Limited v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). The Court held that as to actions against the bankruptcy estate, Congress clearly intended extra-territorial application of the Bankruptcy Code. The bankruptcy estate consisted of all of the debtor's legal or equitable interests, wherever located and by whomever held. Further, the court in which the bankruptcy case is commenced obtains exclusive "... *in rem* jurisdiction over all property in the estate." Thus, all property of the debtor, wherever located, is *in custodia legis* of the Bankruptcy Court, including property outside the territorial jurisdiction of the United States.

Protection of *in rem* or *quasi in rem* jurisdiction is a sufficient basis for a court to restrain another court's proceedings.

The more difficult problem is "... whether a bankruptcy court may enjoin a foreign collection action against the debtor personally, or as to assets which do not form part of estate property, if the creditor was not a party to United States bankruptcy proceedings."

By filing the claim in the *Simon* bankruptcy, the Bank had fully participated and had submitted itself to the jurisdiction of the Bankruptcy Court. While there are provisions for limited appearances by foreign representatives, such as in an ancillary proceeding and pursuant to Bankruptcy Code § 306, the usual creditor asserting its own rights is not a "foreign representative" entitled to make a limited appearance. The United States Supreme Court had previously held that filing a proof of claim on any debt is sufficient to subject a creditor to the general jurisdiction of the Bankruptcy Court.

With regard to international comity, the Court held that comity does not require the court to vacate the Bankruptcy Court's injunction and that the Bank's reliance on *Maxwell Communications* was misplaced. The Court of Appeals rejected the view that the United States Code supports either the territorial theory of international bankruptcy law [sometimes known as the "grab rule"], or the "universalist philosophy," which contemplates one transnational proceeding completely governing the administration of assets worldwide, but rather the Bankruptcy Code provides a flexible approach to international insolvency.

This decision raises several questions:

1. Suppose the case were a chapter 11 and the Bank's claim was properly scheduled as liquidated, not contingent and not disputed? The Bank would then participate in any distribution without filing a claim.
2. Suppose there would be no dividend to creditors, would the Bank be deemed to have participated?
3. If Simon were concurrently in a Hong Kong bankruptcy case, would the decision be different?

XI. Choice of Law Provisions May Not Be Enforceable Against Creditors Or The Trustee In Bankruptcy; Some Cases Contra.

A. Governing Law Clause Not Enforceable.

In re Eagle Enterprises, Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998)

In *Eagle*, the bankruptcy court held that the governing law provisions in a lease of equipment entered into in Germany, between a German lessor and a Pennsylvania corporation lessee, were not enforceable as against a trustee in bankruptcy or creditors of the lessee. The question was whether the leases were "true leases" or disguised security agreements, and if disguised security agreements, then the German lessor had lost title to the equipment because of the failure to perfect a security interest pursuant to Pennsylvania Article 9 provisions. The basic holding of the bankruptcy court was that while parties to a contract may make choice of law decisions, they do not impact the rights of third parties who have not signed the contract. The court stated that:

> A third party,... cannot have his rights altered, compromised or redefined by the provisions of a contract he has not accepted... In the context of the instant chapter 7 bankruptcy proceeding, the trustee stands in the role of a third party as a representative of all creditors... and is specifically given the powers of a judicial lien creditor under § 544. The trustee, thus, is a third party whose rights cannot be governed by [the lessor's] contract with the debtor.

The District Court at 237 B.R. 269 (E.D. Pa. 1999) affirmed the Bankruptcy Court decision.

The District Court held that the lessor and lessee's agreement that German law would govern, does not prejudice the rights, under United States bankruptcy law, of creditors or of a trustee in bankruptcy, who never agreed to the choice of law provisions.

In conclusion, the District Court stated: "The Bankruptcy Court correctly concluded that contracting parties' choice to apply foreign law generally does not bind persons who never agreed to that choice."

B. Transactions Which Are International In Character And Contain A Choice Of Law And Choice Of Forum Provision Should Be Enforced Unless That Provision Is Unfair, Unjust Or Unreasonable

In re Millenium Seacarriers, Inc. 292 B.R. 25 (S.D.N.Y. 2003)

This is an appeal from the bankruptcy court opinion and arises from the chapter 11 cases of Millenium Seacarriers, Inc. and its wholly owned subsidiary companies, which are the owners of 19 ocean-going merchant vessels. Each of the vessels is owned by one of the subsidiaries and was subject to a foreign preferred ship mortgage in favor of the foreign mortgagees from whom Millenium had received financing.

The bankruptcy court determined that in as much as the transactions in question were international in character, the forum selection and choice of law clause are presumed valid and should control, *citing, The Bremen, et al. v. Zapata off-Shore Co*.,407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Roby, et al. v. Corporation of Lloyd's, et al*., 996 F.2d 1353, 1362 (2nd Cir. 1993); *cert. denied*, 510 U.S. 945, 114 S.Ct 385, 126 L.Ed.2d 333 (1993); *Sembawang Shipyard Ltd. v. M/V Charger*, 955 F.3d 983 (5th Cir. 1992). It also noted that such clauses applied not only to *in personam* actions but to *in rem* actions brought to determine whether plaintiff holds a maritime lien, *citing Sembawang*, *supra* at 986 and *The Bremen*, 407 U.S. at 20, 92 S.Ct 1907.

XII. The Enforceability Of Forum Selection Clauses

In re Commodore International, Ltd., 242 B.R. 243 (Bankr. S.D.N.Y. 1999)

In *Commodore,* an unsecured creditors' committee, acting pursuant to the grant of authority by the liquidators of a Bahamian debtor, commenced an adversary proceeding in the New York Bankruptcy Court to recover preferential and/or fraudulent transfers. The defendant moved to dismiss the complaint on the basis of lack of jurisdiction, lack of standing, collateral estoppel, comity, *forum non conveniens* and, in particular, the contractual obligation to litigate in the Bahamas and that the Bankruptcy Code's avoiding powers have no extraterritorial reach. After a very lengthy discussion of *Maxwell*, the court here concluded that the Bahamas' Supreme Court was the more appropriate forum to adjudicate the claims because the debtor was

incorporated in the Bahamas and there was no evidence that the defendant had conducted any business in the United States or that the loans in question had any United States nexus.

With regard to the forum selection clause, the defendant argued that the New York court was compelled to enforce the forum selection clause in the loan documents, which prescribed the exclusive jurisdiction of the Bahamian courts and contended that the creditors' committee, which brought the action, was bound by the forum selection clause

On analysis, the court here held that as a general rule, a freely negotiated forum selection clause in an international contract unaffected by undue influence or unequal bargaining power, should be given full effect, but a proceeding to avoid or recover assets, based upon fraudulent or preferential transfers, is within the core subject matter jurisdiction of the bankruptcy court and, neither a debtor in possession nor a trustee is bound by a forum selection clause in an agreement provided that the litigation "at issue amounts to a core proceeding and is not inextricably intertwined with non-core matters" *citing, In re N. Parent, Inc*., 221 B.R. 609, 620-21 (Bankr. D. Mass. 1998); *In re Mercury Masonry Corp*., 114 B.R. 35 (Bankr. S.D.N.Y. 1990); *In re Wheeling-Pittsburgh Steel Corp*., 108 B.R. 82 (Bankr. W. Pa. 1989).

Accordingly, the court held that the creditors' committee is not bound by the forum selection clause in the loan agreement.

XIII. Conclusion

Foreign corporations with property or offices in the United States, or with United States subsidiaries, have a little recognized opportunity to invoke debtor favorable chapter 11 proceedings, subject, however, to dismissal or abstention. Ancillary proceedings appear to provide unexpected flexibility and power to the foreign representative with many of the powers of a trustee in a full bankruptcy case and without some of the limitations and restrictions of a full

chapter 11, and without the foreign representative submitting to jurisdiction of the United States Courts.