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Breaking Away: Local Priorities and Global Assets

Jay L. Westbrook

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Breaking Away: Local Priorities and Global Assets

Jay Lawrence Westbrook
"There are no grounds of justice or policy which require this country to insist upon distributing an Australian company's assets according to [English] priorities only because they happen to have been situated in this country at the time of the appointment of the provisional liquidators."

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1. McGrath v. Riddell (In re HIH Cas. & Gen. Ins., Ltd.), [2008] UKHL 21, [36], 1 W.L.R. 852 (H.L.) 863 (Lord Hoffmann) (appeal taken from Eng.).
I.  INTRODUCTION

Like an adolescent struggling with clothes that no longer fit, the growing field of international insolvency has not so far put aside the old notion that local priorities must always be applied in distributing local assets. Yet the great variation in the distribution rules from one nation to another means that application of local priorities creates a serious obstacle to multinational cooperation, puts both maximization and fairness at risk, and exacerbates the likelihood of forum stashing.

The problem of conflicting distribution rules is part of the larger discourse pitting territorialism against universalism in the insolvency proceedings of multinational corporations. That aspect of territorialism that would apply local priority rules to locally seized assets may be called “localism.” If fully realized, localism would create a separate pool of the assets seized in each jurisdiction and distribute its value under local priority rules, while universalism would create a single global asset pool and distribute its value worldwide under a single set of rules. Some of the authors in this symposium believe localism is the inevitable rule, while others incline toward universalism. Professor Edward Janger has advocated a form of localism that would mitigate its more glaring defects through a choice of law rule that would permit some less parochial results. I share his sense that any general rule we might adopt requires exceptions, but I think there are compelling arguments against adopting a territorial rule as the general rule in multinational cases. I would propose a universalist rule with some exceptions that recognize legitimate local expectations. But an approach from such a different beginning has a quite different ending as well. That is, to start with a central rule and make exceptions produces results different from a regime that has no central rule at all.

Two crucial points underlie the argument. First, localism does not favor local creditors per se, but rather privileges the application of local rules that might often benefit foreign multinationals as much or more than the local contractor. Thus
localism cannot be justified by protection of local creditors, leaving aside the difficulty of defining that category in a globalizing world.

The second point is that localism would apply local rules to all locally controlled assets whether or not those assets bear any significant relationship to the claims given priority under local law. Absent such a relationship, a creditor has no legitimate expectation that these assets will be distributed under local rules. It follows that the application of local rules to those assets is often adventitious and unprincipled, because it is not related to legitimate expectations. For these reasons, the proper general rule is universalist, with local rules to be applied only where there is a substantial connection to specific assets and therefore arguably a legitimate reliance on local rules. These instances are not necessarily rare. They would include workers' reliance on the assets associated with their workplace and customers' reliance on funds required by regulators to be maintained in local accounts. Certain taxes and secured claims might also be exceptions for similar reasons, although this article does not work through those two important categories of claims. Thus there is room in a universalist regime for a choice of law rule based on the existence of such expectations, permitting local assets to be distributed under local rules where appropriate.

Given its difficulties, why does localism survive? The primary overt justification seems to be a claim that it satisfies commercial expectations, although that claim is unproven and highly questionable. An underlying proposition that may be more important is that localism is unavoidable politically and is supported by a commitment to special local values. I will suggest that except for the three Great Priorities which are found nearly everywhere—wages, security, and taxes—it seems unlikely that either politics or widely shared national values strongly support most of the remaining grants of priority. Taking all in all, neither legislators nor judges are apt to be deeply committed to their vindication. If the Great Priorities could be managed, the rest would be of limited concern.

These policy arguments admittedly leave unaddressed the argument that all local priorities—and for that matter the very principle of pari passu distribution—are imposed by the terms of statutes and therefore must be enforced absent an international treaty. I divide possible solutions of the difficulty into two parts. First, a choice of law approach applies the law of the main proceeding as the law with the most significant connection to the distribution overall, but identifies some claims as so associated with particular assets as to justify application of local distribution rules. The second approach uses choice of forum as a method of centralizing choice of law, subject once again to exceptions for certain kinds of claims. I offer the United States and the United Kingdom as examples of the use of this approach.

5. I ignore a fourth priority that may be even more universal, the priority for administrative expenses of the proceeding. In the United States, for example, that would be found in section 507(a)(2) of the Bankruptcy Code. 11 U.S.C. § 507(a)(2) (2006), amended by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111-203, § 1101(b), 124 Stat. 1376, 2115 (2010). That priority must be granted in each jurisdiction where local official action is needed, along the lines suggested by the old adage that someone in the circus parade has to clean up after the elephants.

II. THE CASE FOR LOCALISM

Given all its flaws, why do observers still cling to localism, often reluctantly? Although others in this symposium present various arguments for favoring a local rule for local assets, I think it is fair to say that there are three grounds typically advanced in defense of localism. The first is that this rule is the traditional approach and current law in many jurisdictions. The second is that nationalism compels localism. The third is that local expectations and values should be vindicated. The first two arguments are importantly wrong. The last is valid, but only to a limited extent.

As to the fact that localism is the traditional rule, “[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” If the rule of localized distribution—a legacy of territorialism or “the grab rule”—has no justification except its existence, it should not detain us long except insofar as it may bind local judges despite their appreciation for its defects, a point addressed below.

The second argument for local distribution is one of realpolitik. It has two branches: refusal and resistance. The first branch is the claim that local judges will never be willing to permit local assets to slip away when local creditors would benefit from a local rule. We know that is wrong, because there are too many contrary examples. Whether parochialism might prevail more often than not remains to be
fully tested, but the tide is flowing toward cooperation and universalism, and every jurisdiction responding positively is an addition to the community of coordination, so there seems every reason to press on.\textsuperscript{10} Defenders of the localist position counter with the second branch of this argument, which is that insistence on global distribution will prevent cooperation while the embrace of nationalism will encourage it. In fact, the opposite is likely to be true.\textsuperscript{11}

Another argument for localism is based on a concern to protect localized expectations, an assertion that is unsupported and doubtful.\textsuperscript{12} An underlying proposition is that localism is politically unavoidable because it is supported by a commitment to special local values.\textsuperscript{13} I have suggested that after the three Great Priorities which are found nearly everywhere—wages, security, and taxes—it seems unlikely that either politics or widely shared national values strongly support most of the remaining grants of priority.

Having said that, the argument for local rules of priority does have some validity, as to certain sorts of rules under certain circumstances, a point addressed in section IV.

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\textsuperscript{10} Leonard Hoffmann, Baron, Keynote Address at the University of Texas School of Law International Insolvency Symposium: The Priority Dilemma (May 11, 2010) ("[H]istory shows that it may be necessary to cast one’s bread upon the waters, even though it is many days before one can find the reward in the form of enactments like the Model Law.").

\textsuperscript{11} See infra Part III.C.

\textsuperscript{12} See Adams & Fincke, supra note 7, at 57–58 (noting that protection of creditor expectations is one of the four main advantages that proponents of territorialism claim); LoPucki, Post-Universalist Approach, supra note 7, at 747 (arguing that a territorialist regime will better match unsophisticated creditors’ expectations); cf. LoPucki, Cooperative Territoriality, supra note 7, at 2223 ("[T]he workers in a Chrysler plant in Detroit do not expect to have to claim their wages and benefits in a German bankruptcy court . . . .").

\textsuperscript{13} See Adams & Fincke, supra note 7, at 71–72 (arguing that it is unrealistic to expect judges to resist domestic political pressure in bankruptcies, especially high-profile cases). Professor Tung described how various political pressures acting on local politicians work to defeat universalism:

In general, a state’s preference for its own bankruptcy law and reluctance to recognize foreign bankruptcy proceedings may arise from the desire of domestic political actors to defend the policies implicit in their domestic laws. This may include the preservation of any perquisites that redound to particular groups under those laws. The complexities of a state’s bankruptcy regime reflect myriad policy decisions and political trade-offs. These trade-offs might enhance the public interest or merely the interests of the victors in domestic rent seeking contests. Regardless of which, political actors will wish to preserve the balance struck in their domestic bankruptcy rules. They will generally resist recognition of foreign bankruptcy proceedings that would upset this careful balance.

III. THE TROUBLE WITH LOCALISM

The reason that localism is so subversive of the benefits of universalism is that distribution of value is a core function of bankruptcy proceedings. To adopt a territorial approach to distribution is to attempt to carve out the central idea of territorialism—the claim that creditors have vested interests in local assets based on local law—and then graft that idea upon universalism. The result is something like Professor LoPucki's cooperative territorialism, but not much like universalism, even in its pragmatic, modified version. Choosing priority law on a territorial basis makes this fundamental mistake and there remains only the struggle to ameliorate its inevitable anomalies and inefficiencies in a global economy.

Localism has five primary defects. The first is that its effects are arbitrary and unprincipled, normatively and economically, and therefore little related to its goals because it does not rest upon any relevant connection to particular local assets and cannot be used to benefit local creditors over others. The second is that there is little evidence for the assumption that locally claiming creditors legitimately expect to be paid from local assets. The third is that localism is harmful to the prospects for any international cooperation. The fourth is that it will encourage forum stashing, the transfer of assets for the purpose of exploiting local rules that favor a debtor's purposes rather than the rights of creditors and other stakeholders. The fifth, addressed in Section IV, is that it is far too broad a response to local expectations and local values. In those instances where the case for applying local rules to local assets is persuasive, that result can be achieved by a nuanced choice of law rule within a global regime.

A. The Lack of Connection Between Claimants and Assets

Localism does not protect local interests because there is no necessary connection between the assets captured by the local courts and the creditors who will be benefited by a local distribution. Thus, there is no principled connection between the claimants and the local assets on which to rest a preference. For example, applying local insolvency law may grant a priority to local civil contractors in the distribution of the proceeds of a company airplane that happened to be landing at the airport at the moment of filing or in the proceeds of sale of a local patent on a product unrelated to any local activity. The proceeds of inventory seized locally might be distributed to local employees although the inventory was produced and marketed by employees in another country and is destined for sale elsewhere.

The lottery flavor of localism is especially great in the case of intangibles. In the Lehman case we learned of the infamous $8 billion that was transferred through its cash management system from London to New York over the weekend before

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14. See generally LoPucki, Cooperative Territoriality, supra note 6 (advocating application of principles of sovereignty-territoriality in cross-border bankruptcy cases).

15. This difficulty is the one that Professor Janger attempts to meet with his choice of local law rules, an approach that I applaud, although we disagree about where to start and how to proceed. See Janger, Reciprocal Comity, supra note 4, at 449. For the difficulty of harmonizing choice of law rules, see Hannah L. Buxbaum, Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory, 36STAN. J. INT'L L. 23, 54-55 (2000).
Lehman filed insolvency proceedings in both jurisdictions. There has been no suggestion that employees, pensioners, or lenders on Wall Street or the Upper West Side had any greater relationship to this wandering treasure than their counterparts in the City or the East End. Similar cash management systems in thousands of large corporations loft huge sums from continent to continent every night. As to bank accounts generally, the answer to the question “where is a bank account located for legal purposes?” is “it depends.”

The lack of a connection between claimants and assets is found at both ends of localism, because it does not actually serve local creditors. Built into many discussions of localism is the implicit notion that it favors locals. I believe that this unstated assumption causes many judges and lawyers to assert that it is unthinkable that local judges would transfer assets without first satisfying local priorities, because the implication is that local creditors (and voters) would be favored. Yet nowadays, in virtually all jurisdictions with substantial economies, there is no statutory discrimination against foreign creditors. If Colossal Transnational Construction Company is owed millions of dollars by the debtor, it will claim in a local bankruptcy right alongside the local contractors and the electric utility and will share proportionately in any distribution of the value of the seized assets.


18. This mental block is found even among the outstanding expert participants in this symposium. José M. Garrido, No Two Snowflakes the Same: The Distributional Question in International Bankruptcies, 46 TEX. INT’L. L. J. 459, 479 (2011) (quoting an inartful reference in the Guide to the Model Law concerning “local” creditors); id. at 485 (protecting local creditors over foreigners); John A.E. Pottow, A New Role for Secondary Proceedings in International Bankruptcies, 46 TEX. INT’L. L. J. 579, 580 (2011) (“[t]he purpose of a secondary proceeding is to allow local creditors of a foreign debtor the opportunity to open a bankruptcy case in their native country, chiefly to enjoy the benefit of local bankruptcy law”) (emphasis added); Gropper, supra note 6, at 563 (arguing that it is unfair to “impose[e] a foreign distribution scheme and deprive[e] a worker of the substantial priority claim he would have in his home jurisdiction,” and that “it cannot be realistically expected that the authorities in a jurisdiction where assets are located will surrender those assets to a foreign court when the interests of local creditors will be adversely affected”) (emphasis added). Even Professor Fletcher is ambiguous in this regard. Ian Fletcher, “L’enfer, c’est les atttres”: Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency, 46 TEX. INT’L. L. J. 489, 491 (2011) (“[This public policy choice concerning priority rules] becomes a factor that is likely to color the approach by the courts of that country when reviewing any request to authorize the transmission of assets from their own jurisdiction to that of a different state under whose insolvency law the said assets will be subject to a different order of distribution.”).


20. Concerning their right to share in local priorities that come ahead of general unsecured creditors, see infra Part V.A.
localist approach, the local contractor will share in the proceeds of a locally registered patent sold as part of a worldwide auction of intellectual property (if lack of cooperation does not prevent the sale), while the international construction colossus will share in the proceeds of sale of the local accounts receivable. Each will benefit preferentially from the sale of assets with which it has no meaningful connection or right to preferred treatment and the benefit will often be adventitious and unpredictable.  

The situation is only somewhat less clear in the case of priority claims. If the local court would treat foreign creditors without discrimination in a pari passu distribution to general unsecured creditors, would it also permit foreign creditors to share in a priority distribution if a domestic creditor would enjoy priority in the same circumstances? The situation in the United States may be illustrative. Consider the position of foreign claimants in a regular corporate bankruptcy case, typically a Chapter 11. How will the United States priority rules apply to foreign claimants? I have discussed this problem at some length in earlier work, so I offer only a summary here.

Take as an example the bankruptcy of a Miami condominium project. A Minnesotan has put down a substantial deposit to buy apartment 6005 and a Mexican has deposited a similar amount against purchase of apartment 6006. There is nothing in section 507 or 726 of our Bankruptcy Code to limit the “deposit” priority of section 507(a)(7) to citizens or residents of the United States. On the face of our priorities, they apply to any creditor whose claim fits the stated requirements. Beyond the language of the statute, to grant the Minnesotan person a priority under section 507(a)(7) of the Bankruptcy Code while denying it to the Mexican would not only defy ordinary notions of fairness but would violate our treaty obligations with Mexico. In addition to the WTO treaty, the United States is party to hundreds of commercial treaties that require that each party give “national treatment” to the citizens of the other state party, which means that the foreign citizen must be treated in the same way legally as a United States citizen. These are commercial treaties and therefore have special cogency in commercial matters like bankruptcy. Given that there is nothing in the language of the Bankruptcy Code to suggest that the priority system should discriminate against foreigners and the case law is not an obstacle, it seems inconceivable that the United States would deny equal, national treatment to the Mexican claimant. This analysis has several important implications, but the

21. Professor Janger focuses not on the asset or the claim but the “transaction.” Janger, Reciprocal Comity, supra note 4, at 449 (“I envision a narrow role for lex forum concursus, and a much broader role for lex situs. My focus is not limited to assets . . .”). It seems to me to locate a transaction that typically involves several countries is even harder than applying a territorial approach to an asset or a claim.


25. See Universal Participation, supra note 19, at 427 (stating that nothing in the U.S. Bankruptcy
first one is that localism cannot target its benefits to local citizens and residents of the United States. Much the same analysis would apply in a number of other countries that would likely apply national treatment for priority claimants as well as for general unsecured creditors.

**B. Creditor Expectations**

It is often assumed that creditors have expectations based upon one or another sort of local contact. In particular, the argument for localism turns in large part on the idea that local creditors have relied on the presence of local assets in extending credit. Yet there are no reported data, hard or soft, to support that assertion. Experience suggests that creditor reliance is a very complicated question and may vary greatly from case to case, especially when the debtor is a multinational corporation. Does the local supplier rely on the presence of local assets or instead rely on a brand name associated with a multinational corporation of which the local operation is a part? In a certain supplier’s jurisdiction, do the credit reports break out the local assets in rating Wal-Mart? Do creditors in a particular credit culture have available reliable credit reports and what is their focus and effect, especially in terms of reporting assets, asset locations, and group identities? Is credit in that culture instead based on cash flow or prior payment record? Did the investor who

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Code discriminates against foreign creditors; see also PRINCIPLES, supra note 2, at 29–31, 95 (stating the general principle of national treatment among the NAFTA countries, but noting that there is little or no positive law on this subject); A.L.I., INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW 77 (2003) (describing national treatment of foreign claims under U.S. Bankruptcy law). There may be an exception as to taxes and other public-law claims. See Jonathon M. Weiss, Tax Claims in Transnational Insolvencies: A “Revenue Rule” Approach, 30 VA. TAX REV. 261, 299–304, 315–16 (2010) (describing how foreign tax claims have traditionally been unenforceable in foreign countries); PRINCIPLES, supra note 2, at 95–96; Universal Participation, supra note 19, at 427–28; Universal Priorities, supra note 19, at 36. But this exception is based on the traditional rule (the “revenue rule”) against recognizing foreign public-law judgments, a quite different problem.

26. See infra Part V.A.

27. See Case C-341/04, In re Eurofood IFSC Ltd, 2006 E.C.R. 1-3813, para. 37 (“[W]here a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.”). It seems especially unlikely that many creditors other than a lender would rely on the rules of the state of incorporation, without reference to assets or operations, yet the Eurofood court transformed a convenient procedural presumption into a set of presumed expectations to be overcome only by empirical evidence to the contrary. See Jay Lawrence Westbrook, Locating the Eye of the Financial Storm, 32 BROOK. J. INT’L L. 1019, 1028 (2007). Most lenders, I am reliably informed by lawyers in the trade, now put the COMI location right into the loan documents, making any change subject to notice and perhaps making the change an event of default. Of course, the fact that the court’s analysis in Eurofood is rather weak does not mean its conclusion about reliance in that case was wrong. It is difficult to judge the merits in that regard based on the reports of the case, but it involved a limited purpose financing entity, so perhaps the only relevant perspective was that of the lenders and they expected the law of incorporation to control.

28. See Tung, supra note 7, at 572–73; LoPucki, Cooperation in International Bankruptcy, supra note 7, at 701–02; LoPucki, Case for Cooperative Territoriality, supra note 7, at 2218–19; see also Janger, Reciprocal Comity, supra note 4, at 449 (arguing that the location of assets and the location of claims are both important under universal proceduralism).

29. United States credit reports suggest that prior payment records are by far the most important
bought $10,000 worth of Wal-Mart bonds from a New York underwriting house rely on the presence of a local Wal-Mart in the investor’s country? The answers to these questions are largely unknown or at least unstudied. The creditors’ expectations argument is neither supported by evidence nor compelled by ordinary experience. It may represent an effort to make twenty-first century global rules based on nineteenth century mental pictures of commerce in small towns.

Many of these points are illustrated by the facts in the HIH case in the United Kingdom, discussed in other articles in this symposium. The assets “in” England were reinsurance agreements. HIH might as readily have entered into such contracts with the same reinsurers in any money-center jurisdiction in the world where those reinsurers had a place of business. English creditors could hardly have relied on English priority rules for these assets, while policyholders in many countries may have relied on Australian law to protect them against failure of this Australian insurance company and to prefer them if it failed nonetheless. The absence of any reasonable expectation that English law would be applied to these assets is closely related to the lack of a meaningful relationship between these creditors and those assets.

Another dispute in the Lehman matter permits us to see the interaction of procedure and forum with the anomalies of localism. In the Perpetual cases, there have been inconsistent decisions in New York and London as to the legality of contractual priority clauses in a trust held by the Bank of New York that served as the vehicle for a complex derivative transaction between a Lehman entity and a group of investors. The effect of the clauses would be to “flip” priority positions in the trust assets—that is, to reverse them—in the event the Lehman party bankrupted. The United States and English courts both purported to apply rules designed to protect the debtor’s creditors from bankruptcy-termination clauses. The American court held that the United States rules against permitting a bankruptcy filing to serve as a default meant the flip in contractual priority was unenforceable. The English court held that a somewhat similar common law principle was not implicated and therefore the contractual flip should be given effect. The English
court specifically noted it was not deciding if United States bankruptcy law should apply, and the American court was careful not to enter judgment and thus left some room for a satisfactory accommodation of different views, if possible.35

To see how this analysis applies to distribution rules, we have to alter the facts a bit. Suppose that the difference in distribution of the trust assets arose from a difference in the priority rules in the two countries rather than from a contract.36 Assume, as is apparently true in Perpetual, that the creditors to be benefited or disadvantaged come from many countries and not primarily from the United States or England.37 If both the United States and England had localist choice of law rules for distributions, would the English court feel free to defer to the United States bankruptcy court? If not, how would the dispute between them be resolved, if both felt required to ensure that the assets would be distributed under their local rules? Would the location of the assets matter, the outcome turning on whether the assets were securities issued by Japanese corporations or real estate in Tanzania?38 Would both courts order the Bank of New York to surrender the assets to their respective liquidators under threat of sanctions if it did not comply with the conflicting orders? Would the “winning” court have somehow served its national interest by following its priority rules in distributing the value of the assets to persons who were probably resident elsewhere for the most part and who had not relied in any meaningful way on the chance of benefiting from application of the winning court’s rules?

A single rule of distribution will not solve all such problems. But a global distribution rule based on the priority rules of the main proceeding would seem to reduce the chances of such confrontations and to avoid the anomalies that arise from the lack of connection between claimants and the assets that are captured locally.

C. The Effect on Cooperation

One major consequence of localism is that courts otherwise willing to cooperate may feel bound to the letter of their local statutory priorities, which they may read as

35. Subsequently, however, the district court ordered that judgment be entered, so as to permit an appeal. See Decision and Order Granting BNY Corporate Tr. Servs. Ltd.’s Motion for Leave to Appeal, Lehman Brothers Holdings Inc., No. 08-13555, Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. Ltd., No. 09-11242 (S.D.N.Y. Sept. 21, 2010) (stating McMahon’s opinion that the decision warranted immediate review because of its “potentially game-changing effect on the structured finance business.”). See also Grant McKool, Judge Allows “Game-Changing” Lehman Case Appeal, REUTERS, Sep. 21, 2010, available at http://www.reuters.com/article/idUSTRE68K5CH20100921.

36. Similar conflicts in legal priorities arise fairly often. For example, the United States has a rule subordinating victims of fraudulent sales of stock to general creditors, while many other countries treat their fraud claimants as general unsecured creditors. 11 U.S.C. §510(b) (2006). See Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V., 310 F.3d 118 (3d Cir. 2002) (describing United States subordination of defrauded shareholders versus Belgian rule of nonsubordination). I understand that in the United Kingdom such a rule applies to some equity holders but not others, creating a potential conflict between jurisdictions. See Soden v. British and Commonwealth Holdings PLC, [1998] A.C. 298 (H.L.) (Lord Browne-Wilkinson) (appeal taken from Eng.) (establishing that shareholder claims of misrepresentation resulting in purchase of shares are not subject to subordination to creditor claims based on the “character of a member”).

37. See supra note 32.

38. In their decisions on the flip provision, neither court seemed to care where the trust and its assets were “located.”

39. We steadfastly ignore what the Japanese or Tanzanian courts might have done.
requiring that the value of the assets they can seize be distributed according to the local scheme. Such a result may in turn reduce or eliminate cooperation across the board. For example, if the local court requires that locally seized value be distributed under the local rules, then it may refuse to cooperate in the sale of a multijurisdictional division of the debtor company because of the difficulty in agreeing on the allocation of the proceeds of the sale to each local component of the division. Instead, it may insist that each component be sold separately even if that reduces realization overall. That is, the requirement of local distribution may impede multinational realization. That result is even more likely if the local component can be sold quickly and cheaply (perhaps to a competitor who is quite happy to liquidate the operation) and will produce more for favored local creditors while leaving the other jurisdictions with components worth far less.

Note that the pressure here arises not necessarily from a beggar-thy-neighbor impulse in the local court, but from the assumption that localism means that the court must favor distribution to those entitled under local law by maximizing the realization of local assets regardless of the effect elsewhere. That is, the court may believe that the territorial approach means not merely that local realization must be distributed under local rules, but also that the maximum local realization must be the goal of the proceeding. Localism may or may not compel that further step, but is highly likely to produce it. As a result, the common claim that universalism threatens cooperation may be more than counterbalanced by the potential for noncooperation arising from a broad view of localism.

D. Forum Stashing

Finally, localism encourages forum stashing, which seems to me a much greater risk than the much-discussed forum shopping, because moving assets is generally much easier than relocating the seat of the enterprise. Debtors, for their own purposes or to propitiate an aggressive creditor, will be tempted to find jurisdictions where the local rules will give advantages to those whom the debtors wish to prefer. Inevitably, this will give rise to a competition among jurisdictions to provide such rules, a consequence inexplicably applauded in some academic circles. A single distribution rule would nullify the effects of stashing in those jurisdictions that adopt

40. Nortel has attempted a solution to this problem by selling assets worldwide and then dividing the proceeds, but called in a mediator to resolve disagreements. Nortel Turns To Mediator To Help Divide $3.2B Sale Proceeds, GLOBAL INSOLVENCY (October 8, 2010), http://global.abi.org/headlines/nortel-turns-•mediator-help-divide-32b-sale-proceeds. It remains to be seen if this approach works or merely reminds local courts of the difficulty of after-the-fact division of proceeds in a territorial distribution, so they will be less willing to cooperate in a multinational realization scheme.

41. See, e.g., Janger, Reciprocal Comity, supra note 4, at 443 (“Westbrook’s view that priority should be determined by the rules of the main jurisdiction is likely to make such coordinated governance more, rather than less, difficult.”); Pottow, supra note 18, at 581 (“Universalism challenges states that are sensitive about the rotating subjugation of sovereignty a universalist system inherently requires.”); id. at591 (“[S]tates will not accept the wholesale subjugation of their domestic priority rules when there are in the ancillary position that full-fledged universalism dictates.”).

42. In one exemplary case, the debtor transferred more than $20 million from the United States to the Cayman Islands shortly before filing bankruptcy in that sun-kissed jurisdiction. Hoffmann v. Bulimore (In re Nat’l Warranty Ins. Risk Retention Grp.), 306 B.R. 614, 618 (B.A.P. 8th Cir.), aff’d 384 F.3d 959 (8th Cir. 2004). I should confess I was an advocate for a claimant in that case who objected to the transfer.
it, because most realizations would be distributed globally. While a single distribution rule would not prevent stashing in those jurisdictions that do not adhere to it, such a rule would at least avoid legitimatizing it and might provide a judicial tool for refusing cooperation to jurisdictions that permit it as well as injunctions requiring a return of assets.43

IV. HOW TO ACHIEVE A UNIVERSALIST BALANCE

A. The Choice of Law Solution

The general rule for distribution of value in a multinational insolvency case should be a single law applied worldwide. Such a rule permits the maximization of value through the application of a single distribution plan and avoidance of the barriers to cooperation discussed earlier. That single rule should be taken from the "main" or home-country jurisdiction, the center of main interests of the debtor, which is also the chosen forum under the Model Law.44 Of all the plausible jurisdictions, it is the most predictable for creditors who in some meaningful way rely on insolvency rules to protect them and might actually price their credits to some extent in light of those rules. Lenders may write the current home-country designation into their contracts and make any change a default. A single, generally accepted set of rules will make such a designation more useful, yet also make it harder for lenders to manipulate the rules to the disadvantage of other creditors. Beyond actual reliance, a home-country rule may also reflect a general creditor's expectation that the financial distress of a company based in England or Germany, for example, will probably be governed by a reasonable set of rules for protecting and ranking creditors.

As we discussed earlier, some courts may be concerned that the local statute requires by implication that local assets be distributed in accordance with local priorities. I know of no statute that actually says that. If the jurisdiction has traditionally applied the grab rule by judicial interpretation, that traditional rule may be considered overturned by a more recent adoption of a statute that provides for cooperation with and some deference to a main proceeding, whether under the provisions of the Model Law or otherwise.45 In that case, the requirement of cooperation and deference necessarily modifies the local insolvency priority rules in cases where the local proceeding is not the main one, because a slavish and detailed insistence on local priority rules would make the mandated cooperation impossible. As Professor Ziegel has said, referring to the Canadian priority system for secured parties,

43. See X v. Schenkius (Receiver For Y), Court of Appeal of 'S-Hertogenbosch, 6 July 1993 KG 1993, 406; NIPR 1993 No. 469; NJ 1994, 250 reported in 42 Neth. Int'l L. Rev. 121 (1995) (providing an example of Netherland's departure from territorialism toward a rule that allows claims to overseas property).
44. Model Law, supra note 19, art. 2(b).
45. Judge Gropper points out that the Maxwell case is powerful United States authority for the nonapplicability of provisions of the Bankruptcy Code in appropriate cases, using a choice of law approach. See Gropper, supra note 6, at 574-75 (citing Maxwell Commc'n Corp. v. Soc'y Gen. (In re Maxwell Commc'n Corp.), 93 F.3d 1036, 1052 (2d Cir. 1996)).
If we require the law of the home jurisdiction to mirror the Canadian characterization and ranking rules faithfully then it is unlikely a Canadian court will ever agree to release assets subject to a security interest or where the claimants have preferred status under Canadian law. If we agree, on the other hand, on the need for elasticity in applying our concept of fairness in the international context then we must also accept the consequence that Canadian creditors may not fare as well abroad as they would at home if the assets were retained and administered in Canada.\footnote{46}

Thus a legislature’s mandate of cooperation and deference lacks any substance unless the legislature intended also to permit some flexibility in regard to local priorities. On the required assumption that the legislature was rational, the necessary flexibility is best found in appropriately employing choice of law rules to choose the law properly applicable to fixing the priority of a particular claim. On that basis, the analysis would start with the general choice of law rule: priority should be governed by the priority rules of the main proceeding, as argued above.

But there are likely to be some important exceptions to application of the home-country rule in the form of choices of local law to govern the distribution of local assets for the benefit of certain classes of claims. The three Great Priorities, found in most countries, are likely to be among these exceptions. The Great Priorities are for wages, taxes, and secured claims.\footnote{47} My only example among these three in this article will be wages, but the analysis might be extended, with modifications, to taxes and secured claims as well.\footnote{48}


47. E.g., Council Regulation1346/2000, arts. 5, 10, 2000 O.J. (L160) 1(EC) (establishing regulations for security rights and employment). The Council Regulation has a system somewhat like the one I propose, with a central rule and stated exceptions, but the central rule has far less bite because of the latitude to open secondary proceedings. That latitude seems to give the trump to local priorities for local assets, although the choice of law results are not clear. See Donald T. Trautman, Jay Lawrence Westbrook & Emmanuel Gaillard, Four Models for International Bankruptcy, 41 AM. J. COMP. L. 573, 586, 589-91, 595 (1994) [hereinafter Four Models] (discussing the structure of earlier draft conventions leading up to the Council Regulation). The exceptions seem to be based on some political compromises rather than any consistent principle. See Fletcher, supra note 18, at 498 (describing compromises in conventions dating back to the 1960s as well as the Council Regulation); see also Four Models, supra, at 580-81, 595-97, 603-04 (noting compromises in the draft conventions predating the Council Regulation). One reason for the thinness of the Council Regulation’s provisions is the fact that it dates back to a draft convention from the 1980’s when all of us knew a lot less about cross-border insolvency. See Fletcher, supra, note 18, at 500; see also Council Regulation 1346/2000, supra, art. 44 § 1(k) (explicitly superseding the prior convention). See generally Bob Wessels, Unilateral Regimes Concerning International Insolvency in Modern Europe, 6 INT’L CORP. RESCUE 90 (2009) (noting the failed attempts to establish regulations for cross-border insolvency law). For an overall view of priorities, see Janis Sarra, Employee and Pension Claims During Company Insolvency: A Comparative Study of 62 Jurisdictions (2008).

48. Judge Gropper makes some salient points about the effects of corporate groups on priority decisions. See Gropper, supra note 6, at 562. That problem is very complex, not least because of overlapping assets and liabilities within a corporate group among affiliates incorporated in several countries, and because of the consolidation practice in the United States. See generally UNCITRAL, Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency (pre-release July 21, 2010), http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf (providing guidance on the treatment of domestic and cross-border insolvency proceedings of enterprise groups).}
The challenge is to identify the instances where a local law should be chosen. The answer begins with looking back to the earlier discussion about the fundamental defect of localism, which is the failure to connect particular types of claims with particular assets. The correct inquiry for applying local law appropriately is to determine if a claimant can assert a legitimate expectation of payment from local assets because of some connection between those assets and the claim. The most common instance where that connection might be successfully asserted is a claim for wages as against the local assets that constitute the workplace. Office equipment, the office building, local receivables arising from local activity, a local-office bank account—all of these might be found to be closely connected with the wage claim, giving rise to a worker's legitimate expectation that these, at least, would be available to pay the claim. At the other extreme, a court might be more skeptical of a supposed connection with a deposit at a local bank that was made by the multinational's global cash management system because of a spike in local interest rates and was caught there by the accident of the timing of the insolvency proceeding. The receivables might be distributed locally, but the deposit account might not.49

Choice of local law may not be limited to one of the Great Priorities. For example, suppose a local branch that sells insurance or brokerage services is required to maintain certain funds locally to which customers would have preferential access in case of default. In that common situation, the claim and the local funds have a strong connection and the claimant's expectation of priority in those funds is amply justified, so choosing local law is the obviously correct result in most such cases.

The facts in Perpetual and HIH, discussed earlier in this article, illustrate the opposite circumstance, where it is clear the general rule ought to be applied. The earlier discussion of Perpetual considered the hypothetical situation where the priority rule was a matter of law rather than provided in a contract. It seems obvious that there would be no apparent connection between the assets at issue and any particular local law and no discernable reason for a legitimate expectation that any insolvency law would apply other than the bankruptcy law of the United States, Lehman's home country. In HIH, Lord Hoffmann noted that the assets in question—reinsurance contracts—had no substantial connection with England that would have given rise to legitimate expectations that English priority law would apply, a position not seriously challenged by any of the other judges in that case. Absent such a connection, the applicable priority rule should be that of the main proceeding.

B. The Choice of Forum Solution

Notwithstanding the appeal of the choice of law solution just described, some courts may feel that the filing of a local insolvency proceeding commits them to applying local priority rules to local assets, even though nothing in the local statute commands that result. In courts like those in the United States and the United Kingdom, the availability of ancillary proceedings, which do not invoke the priority

49. This example might be an instance where Professor's Janger's "local transaction" rule would overlap with my approach, but I am not sure what that rule means and whether it would lead to the same result as I suggest.
provisions of their insolvency codes, may permit them to avoid this problem. However, in any jurisdiction, creditors or a debtor may open a “full” local insolvency proceeding of the same sort that would be opened for a purely domestic enterprise. That sort of proceeding in a nonmain jurisdiction may be called a parallel proceeding or, in a jurisdiction that takes international cooperation seriously, a secondary proceeding. Thus, the courts in any country may confront priority provisions that are believed to be controlling because a full proceeding has been opened, even in the face of the choice of law analysis presented above.

1. Choice of Forum Generally

It should be possible to adopt a single-distribution rule by judicial interpretation in many jurisdictions by applying a choice of law rule through a choice of forum procedure, as explained below.

When a court elects to transfer assets for distribution to the main proceeding, it may be effectively making a choice of law ruling, at least as to the general rule to be applied. That is, the court is deciding to adopt the distribution result that will be applied in the main jurisdiction’s courts. Traditionally, the main jurisdiction will apply its own rules to all claimants, producing a single global scheme of distribution. The ideal will be when the main jurisdiction is also willing to adopt certain exceptions along the lines suggested by this article and mirrored to some extent by Professor Janger. This de facto choice of a single law with exceptions is much less difficult than application of home-country law in the local courts. First, it avoids the usual problem where court A attempts to understand and apply in contentious cases the law of court B, especially when B’s laws are in another language and derive from a different legal culture. Second, it responds in forum-choosing terms to the unity of bankruptcy law, a very traditional notion, without having to engage the details of choice of law analysis. Given the vagueness of some choice of law rules, this result will be welcomed by all. Third, and closely related, it permits a number of jurisdictions effectively to choose the same law and produce coherent, consistent results.

Interestingly, the choice of forum approach was followed by the universalist judges in HIH,51 but was rejected by at least one of the judges who relied on the special relationship between England and Australia under section 426 of the Insolvency Act.52 Lord Neuberger thought that the effect of section 426 was to choose Australian law, which then generated the authority to transfer the assets to the Australian court.53 With respect, this analysis seems to put the engine on top of the rocket. If choice of law was the point, the English courts should simply apply Australian law, which they evidently understood very well. It is not obvious how turnover could be logically compelled by choice of law.

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51. Professor Janger suggests that the choice of forum choice was not a choice of law. Janger, Reciprocal Comity, supra note 4, at 452–53. However, it was such a choice in the functional sense for which I am arguing: the judges knew the Australian court would apply its own distribution rules.
53. Id.
54. On the other hand, the choice of law decision might be a factor in the decision whether to
The choice of forum approach to choice of law would also permit consideration of the local exceptions discussed above. For example, assume that the assets of General Universal, Inc. in Country A were the stock of a brokerage office and some passive real estate investments. Its main insolvency proceeding is pending in Country B. Employees and customers assert claims in Country A relating to the regulated brokerage business. Others file claims unrelated to the local operation. The local court might order turnover of the real estate assets to the main proceeding and send the claimants with unrelated claims to the main proceeding for validation and distribution. The local claims and assets might be retained locally. Note that some of the claimants asserting local brokerage related claims might be citizens and residents of other jurisdictions, but would be given nondiscriminatory access to the local realization.

It will often be true that the local claimants will not be paid in full from the local assets. In the pending example, are they to lose access to the worldwide assets realized in the main proceeding, including the proceeds of sale of the local real estate? That problem is one already addressed in the Model Law and many domestic bankruptcy laws. The underpaid local claimants have every right to apply to the main proceeding for additional payment, but that right is constrained by a rule of fairness called in common law countries the “hotchpot” rule and codified in the Model Law in article 32. It provides that these claims can be validated in the main proceeding (“proved,” as a common lawyer would say), but they will not be paid until the other claimants of the same class in the main proceeding have received payment for the same proportion of their claims as the proportion that the local claimants had already received. The result is that the local claimants will get no less (and no more) than other creditors whom the rules of distribution of the main proceeding put into the same class of creditors.

It is in the referral of claimants and the turnover of assets to the main proceeding that the single distribution rule may change results. This is because the priority classes in the main proceeding will almost certainly differ from those found in each local jurisdiction and because the worldwide debt/asset ratio will be different from that in each local jurisdiction. The effects of the referral will vary depending
upon the global claims, distribution rules, and procedures adopted in the main proceeding.

2. The United States Example

I offer a more detailed application of the choice of forum approach from my own jurisdiction. We can build on our earlier example, the bankruptcy of a United States condominium developer in Miami as to an American and a Mexican claimant who each could claim a priority for their apartment deposits under our local statute. What should happen if we change our example to make the debtor developer a Spanish company that had constructed and marketed the Miami condominium project, so that the United States is the local jurisdiction? There are two possibilities: a Chapter 15 proceeding is filed and no other United States proceeding or both a Chapter 15 and a Chapter 11 are filed.59

If only a Chapter 15 is filed, American law does not prescribe a distribution system60 and therefore the court need not be concerned with the direct applicability of the United States priority regime. For the most part, that will also be true of relief granted under section 1520 (automatic relief for a foreign main proceeding)61 and section 1521 (discretionary relief).62 However, as Judge Gropper points out, section 1521(b) limits one form of relief, the turnover of assets to the foreign representative, by requiring that the court be satisfied that “the interests of creditors in the United States are `sufficiently protected.’”63 Given the lack of distribution rules in Chapter 15, who is protected by this provision? It seems clear that the reference to “creditors in the United States” cannot mean only United States citizens and residents, because no such rule would be applied even in the bankruptcy of a United States debtor for the reasons given above.64 There is also nothing in the Bankruptcy Code that would tie our priority system to local assets.65

59. To avoid complicating the discussion even more, I put to one side the situation in which only a Chapter 11 is filed for a debtor whose home country is outside the United States. I have addressed that problem in a preliminary analysis. See generally Jay Lawrence Westbrook, Multinational Insolvency: A First Analysis of Unilateral Jurisdiction, in 2009 NORTON ANNUAL REVIEW OF INTERNATIONAL INSOLVENCY LAW 2 (2009). See also Alan L. Gropper, Current Developments in International Insolvency Law: A United States Perspective, in BANKRUPTCY & REORGANIZATIONS: CURRENT DEVELOPMENTS 2010, at 923-30 (discussing recent cases involving foreign debtors filing solitary plenary proceedings in the United States).


63. Gropper, supra note 6, at 563.


65. On the contrary, in a full bankruptcy in the United States, we are like a number of other countries in claiming jurisdiction over all assets of the debtor anywhere in the world.
The "interests of creditors in the United States" might refer to creditors who have filed claims in the United States, whatever their nationality, but absent a full United States bankruptcy under an operational chapter of the United States Bankruptcy Code, no claims are filed. As we have seen, Chapter 15 has no system of priorities like that applied in a full American bankruptcy. Does the protection cover every creditor who might file in a theoretical United States proceeding? If so, then the section 1521 protection is owed to every creditor of the debtor wherever located in the world. Even an avuncular Congress would not have gone so far. Thus it is unlikely that the quoted phrase is meant to require that our priority system apply in the foreign proceeding as a condition to turnover.

Looking at the Model Law and its Guide, along with the text of Chapter 15, the conclusion is inescapable that the protection is meant to ensure that creditors having some connection with the United States would not be treated unfairly in the main proceeding. That is essentially the meaning that was given to much more specific and strict language in section 304, so it seems highly unlikely a more restrictive meaning would be found in section 1521(b). The Chapter 15 distinction between main and nonmain proceedings, the ancillary nature of Chapter 15, and the mandate for cooperation all combine to make a restrictive reading unsupportable. That is, as indicated by the earlier analysis, the determination by Congress that we should cooperate necessarily means we should not impose our priority system on the rest of the world, especially given the absence of any statutory language that says we should.

It would obviously be inconsistent with the purpose of Chapter 15 to prevent a cooperative worldwide realization and distribution of the debtor’s assets in order to give a few creditors filing in the United States somewhat more, especially when one remembers that many of these local-filing creditors are not Americans and that there is likely to be little evidence that any of them relied on section 507(a)(7) of the Bankruptcy Code in making deposits on their condos.

What if a Chapter 11 has also been filed? Suppose there is pending in Spain, the developer’s home country, a proceeding in which a plan has been proposed that will pay all creditors, pari passu, fifteen percent of their claims, but is conditioned

66. Model Law, supra note 19, arts. 13-14; UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, Part 2. V §§ 103-11 (1997), available at http://www.uncitrall.org/pdf/english/texts/insolven/insolvency-e.pdf.; UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, Part I (emphasizing that "local" creditors are a only a subset of the creditors whose interests are protected under art. 22 of the Model Law).
67. In re Compañía de Alimentos Fargo, S.A., 376 B.R. 427, 437 (Bankr. S.D.N.Y. 2007). There Judge Bernstein captured the section 304 jurisprudence: "A foreign bankruptcy system need not, however, `mirror' United States law for comity to be granted, so long as foreign law is substantially similar and not repugnant to United States law [but are acceptable if not] at odds with our own fundamental notions of fairness ...." Id. Note the court looks for a fundamental difference although former section 304(c)(4) required "... distribution of proceeds of such estate substantially in accordance with the order prescribed by [the United States Bankruptcy Code]." 11 U.S.C. §304(c)(4)(2004). Contrast that requirement with the current Chapter 15 requirement for turnover if creditors are "sufficiently protected." 11 U.S.C. §1521(b) (2011). Note also that the Fargo standard is similar to that suggested by Professor Ziegel for Canada. See Ziegel, supra note 46 at 432-34. That approach began with the first case decided under section 304(c)(4) and continued throughout the life of that provision. See In re Culmer, 25 B.R. 621, 633 (Bankr. S.D.N.Y. 1982).
68. 11 U.S.C. §1521(b) (2006). But see Gropper, supra note 6, at 565; Fletcher, supra note 18, at 503.
upon a common pool of value worldwide, with no preferences under any local law. Suppose that the sale of the Miami property will bring enough over the mortgage to pay all condo-deposit claims at twenty-five percent, but leave nothing for other creditors filing in the United States. Other jurisdictions have indicated a willingness to waive local priorities in favor of the global plan, but the depositors in the Miami condo are adamant. Must the United States court deep six the world wide plan? The answer, thankfully, is no. As Judge Bernstein recognized in Fargo, the United States court has broad discretion under section 305(a)(2) to dismiss the Chapter 11 case where the broader purposes of Chapter 15 are served. With the United States Chapter 11 dismissed, only the Chapter 15 case remains and the court can turn over assets unless there is reason to believe that some creditors will be badly treated.

V. ENCOURAGING DEFERRAL TO THE MAIN PROCEEDING: CROSS-FILING AND NATIONAL TREATMENT

So important is the adoption of fair and efficient procedures by the main jurisdiction that their adoption may well be an important factor in deference decisions by nonmain jurisdictions. The most helpful next steps that could be easily taken in most jurisdictions would be the adoption of national treatment for priorities and “cross-filing.” These procedures have been discussed at length in earlier work by me and by the Danish scholar, Ulrik Bang-Pederson. I will just summarize them here.

A. National Treatment for Priorities

National treatment for priorities, which I called in earlier work “cross priority,” means nondiscriminatory treatment with regard to priority claims. As discussed above, such treatment is required by our treaty obligations and simple fairness. Thus the Mexican who has made the deposit on the Miami condominium would get the same priority in any United States bankruptcy proceeding as the American who contracted to purchase the apartment next door. The statutes in most countries do not discriminate against foreigners in their priority systems, although it is also hard to find provisions explicitly confirming that noncitizen creditors get the enjoyment of priority treatment if they belong to a locally defined priority class. Thus it seems that national treatment for priorities is probably the law in most countries, except for taxes, but it is difficult to document.


71. It is also not a good answer to say that these small creditors will always be paid off, so the problem can be ignored. Priorities can involve large amounts of money (e.g., back pay for thousands of employees) and a number of doctrines such as equitable subordination or subordination of shareholder fraud claims are effectively priority rules that can involve millions of dollars. Indeed, a short step from the current example would be a really large housing development where buyer deposits could reach that level.

72. Universal Participation, supra note 19, at 419; Universal Priorities, supra note 19, at 27; Bang-Pedersen, supra note 57.


74. See supra note 25 and accompanying text.
Obviously, national treatment for priorities is highly important to cross-border cooperation. It is one thing to accept that a certain class of local creditors might not enjoy the same privileged position in a main proceeding; it is quite different to say that they will suffer by comparison with others in the same class. In our Spain-to-Miami example, it should be acceptable, given the value of cooperation, if the Spanish proceeding grants no priority to condominium deposit claimants, but it would be unacceptable to have Spaniards get that priority and not Americans who are in exactly the same position. Some years ago the remarkable Canadian scholar Jacob Ziegel suggested a similar point in the realm of secured credit. He is quoted earlier in this article to the effect that no international cooperation will be possible without some flexibility with regard to distribution rules. At the same time, none of us would imagine that a local court would release assets to a foreign court whose policy would be simply to ignore a party’s secured interest. As a possible distinction in marginal cases, Professor Ziegel suggested “for example a rule requiring the home jurisdiction to accord the same status to the Canadian creditor’s claim as under Canadian law but not necessarily the same ranking vis-à-vis other creditors of the same class.” He imagines that it might be enough for a local court that the foreign insolvency court would grant secured status to a local secured creditor even though the foreign court’s rules might place the local creditor at a different point on the priority ladder vis-à-vis other secured creditors. It would be just a short step further to imagine a home-country rule that would also allow different treatment versus creditors of different classes, as long as all secured creditors were treated the same. The resolution of this and other issues as to secured creditors is beyond the scope of this article, but Professor Ziegel’s suggestion illustrates the sort of middle ground that might be sought. Judge Clark’s article in this symposium provides a masterful development of a balances approach to the secured credit priority.

Putting aside further development of these ideas on this occasion (with some regret), even this limited discussion permits us to see that national treatment for priorities is both possible and highly desirable, especially for countries that seek deference for their main proceedings.

75. See supra note 46 and accompanying text.
76. Cf. In re Treco, 240 F.3d 148 (2d Cir. 2001) (reversing orders of the Bankruptcy Court and the District Court ordering assets turned over to the Bahamas, where secured interests are subordinated to administrative expenses).
77. Ziegel, supra note 46, at 430–31 (emphasis removed).
78. The case he was discussing involved competing maritime liens and the possibility that different priority rules among lien holders might apply in relevant jurisdictions. Id.
79. For example, the foreign court might impose a “carve out” for the administrator of the foreign proceeding, as in Germany, or in favor of unsecured creditors, as in England. Jay Lawrence Westbrook, Charles Booth, Christoph Paulus & Harry Rajak, A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS 43 & n.68 (2010).
B. Cross-filing

The second highly desirable development to encourage deference and cooperation is “cross-filing.” I have used this term to mean permitting an administrator to file claims in each of the debtor’s pending insolvency proceedings on behalf of all the claimants in the insolvency proceeding in which that administrator was appointed. In our Spain-Miami example, the Spanish administrator could file in the United States proceeding in Florida as representative of each of the claimants in the Spanish main proceeding and a United States trustee in bankruptcy could do the same in Spain on behalf of all United States claimants. Because of the expense and difficulty of filing and validating claims in a distant jurisdiction, only cross-filing can ensure that all claimants, including smaller and more local claimants, can receive dividends from the main proceeding. It is therefore important as a matter of efficiency and fairness that a main jurisdiction permit such representative filings. The availability of this procedure will provide significant support for advocates of a global rule of distribution.

Closely related is the establishment of local claims processing procedures in cases where there are a substantial number of local claims to be asserted in the main proceeding. Combined with cross-filing, it has the potential to reduce greatly the pressures in favor of territorialism, because it permits claims, especially smaller ones, to be resolved through familiar local procedures in the local language and provides a realistic mechanism for adjudicating disputed claims in a way that is fair to local creditors. For those reasons, the Transnational Insolvency Project recommended it.

In the United States, such a rule could be developed and applied through judicial order, but a full-blown system should probably be the subject of rule-making or legislation.

VI. CONCLUSION

The judgment of Lord Hoffmann in the HIH case should serve as a signal to other courts guiding them toward a single distribution rule for multinational insolvencies. Courts must operate within the constraints of local statutes, but there is considerable room for judicial creativity in arriving at results that make multinational insolvency procedures more predictable and more fair in ways not inconsistent with local laws.

There are costs to the globalization of our economic system, including some reduction in local autonomy in the management of commercial matters. If we are determined to have a global economy nonetheless, then we should move aggressively to make it work as it should.

81. The small local creditor would file its claim in the local proceeding and disputes would be resolved there, while the cross-filing in the central main proceeding will ensure that creditor’s share of the distribution from that main proceeding.

82. “Universal” cross-filing describes a situation in which all proceedings, main or nonmain, will accept cross-filings from all other administrators. That is the situation within the European Union. Universal Priorities, supra note 19, at 30–31. Such a system has the potential to create results closer to universalism even in a territorialist system, although the territorialist version is a second-best alternative.

83. PRINCIPLES, supra note 2, at 74–76.