

Texas International Law Journal
Special 2003

**Symposium: Judicialization And Globalization Of The Judiciary
Symposium Articles**

*567 INTERNATIONAL JUDICIAL NEGOTIATION

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In the interests of comity, one [court] or other must give way. I wish that we could sit together to discuss it.
[\[FN1\]](#)Lord Denning, MR

I. Introduction

This article explores a type of judicial activity that has existed for some time and is growing in importance every day, but has received little academic attention: negotiation between courts in two sovereign nations. To the extent the cases reflecting this activity have been discussed, it has been in the context of traditional, unilateral perspectives on doctrines like reciprocity and comity. That is, each court has been treated as making a decision about a matter wholly independent of the future actions of the other court. The prior actions of the other court may be scrutinized for propriety of jurisdiction and fairness of process, for example, but the assumption has been that the court now acting does so entirely on the basis of that historical record and without reference to the future activity of the other court in the *568 pending matter. [FN2] That assumption, and the accompanying perspective and doctrines, are no longer universally true.

Contemporary courts are increasingly engaged in what must be described as international negotiation with other courts. [FN3] This paper distinguishes the types of judicial interaction that are not negotiation--like traditional reciprocity requirements--and those that are--like a stay of litigation conditioned on a certain action by a foreign court within a certain period of time. [FN4] It argues that the latter necessarily involve negotiation, that the negotiation aspect of those interactions is becoming more explicit and multilateral, and that these developments should be encouraged and extended. It explores bankruptcy and forum non conveniens as the two leading examples of this trend. It then discusses the emerging tools that courts are using in this activity, including direct communication between courts.

This trend is only part of a larger development, which is the attempt by courts in multinational cases to determine the optimal forum for each case. That is, the courts in various countries are increasingly dissatisfied with traditional rules such as the first-to-judgment rule, which permits parallel litigation involving the same parties and issues to proceed in two countries, with the result governed by the first court past the post. [FN5] The principal alternative today is the anti-suit injunction, forbidding the parties from pursuing a foreign version of the local case. The anti-suit injunction is highly intrusive and offensive to the other court. [FN6] Thus we find the courts groping for alternatives to these two approaches. International judicial negotiation has arisen as one solution to this problem. This paper discusses that solution, but leaves the larger questions for another occasion.

II. The Phenomenon

The phenomenon to be described arises when lawsuits involving many of the same parties and many of the same claims are pending in the courts of two or more sovereign nations. We will call this phenomenon "parallel litigation." The difficulty and novelty of this phenomenon is illustrated by the fact that it has produced so many doctrinal categories: parallel litigation, anti-suit injunctions, forum non conveniens (which necessarily includes potential lawsuits in other countries), international abstention, comity dismissal, and ancillary actions. We must therefore start with definitions and terminology. Although unification of these doctrines must await another paper, we can say that various judicial reactions to parallel litigation are efforts to find the "optimal forum." "International judicial negotiation" means interaction between courts. "Courts" for this purpose includes arbitral tribunals and administrative agencies with dispute-resolution functions. "Interaction" means a local court's deference to a foreign court or cooperation with a foreign court conditioned upon some further decision of the foreign court. [FN7] It is thus distinguished from traditional *569 reciprocity because it involves the same currently pending matter, rather than a tit-for-tat cooperation based on actions in prior cases. It is distinguished from other instances of deference or comity because it is conditional.

The word "negotiation" is justified where the local action is conditional. It is difficult to say that a party or institution is not negotiating when it says, in effect, "If you do A, we will do B," or some variation on such a "proposal." If a court says it will stay its hand if another court appoints a different official to a certain position,

[FN8] that is surely an offer or proposal. Of course, that definition implies that parties also negotiate with courts, a fact that cannot be denied. For example, when a party seeks a dismissal on the ground of forum non conveniens by promising that it will waive any objections to jurisdiction in the preferred forum and will provide discovery under U.S. rules, [FN9] it is surely making an offer to the local court "in exchange for" a dismissal or stay of the local suit. That negotiation is involved is emphasized by the fact that the dismissal or stay is often conditional, [FN10] so the court can be sure that the promise is performed. While the focus in this paper is on the negotiations between institutions, there is no doubt that the disputants play a crucial role in the process and are, in reality, negotiating with the courts as well as each other.

Judges are not always comfortable with the idea that a court "negotiates" with another court (much less that it negotiates with the parties). Many of the cases in which such negotiation is happening contain no explicit acknowledgement of the negotiation process, but negotiation is in fact an inescapable necessity in modern, cross-border commercial litigation, the category of cases to which this paper is limited. [FN11]

This paper will begin with a discussion of the emergence of international judicial negotiation in the field of insolvency litigation, the area in which it is most advanced. It will then discuss similar developments in forum non conveniens cases and their nascent emergence in other cases of parallel litigation and anti-suit injunctions. Although these developments seem strange in traditional terms, they are healthy and necessary in a world of transnational litigation in which there is no ultimate controlling or coordinating authority like the U.S. Supreme Court or the European Court of Justice. Their use should be extended to a variety of other issues in transnational litigation. The paper concludes with a discussion of some of the techniques being developed in the most advanced area, insolvency, and suggests how they might be used elsewhere.

*570 A. Insolvency [FN12]

Insolvency cases have provided the vehicle for issues of international judicial cooperation and coordination for a long time. Not everyone remembers that *Hilton v. Guyot*, [FN13] the classic U.S. case for the enforcement of judgments through "comity," was an insolvency case. So too was *Canada Southern Railway Co. v. Gebhard*, [FN14] in which a Canadian plan of reorganization for a Canadian railroad was held binding on U.S. bondholders even though the bonds were payable in New York. It was through insolvency cases that the Second Circuit in the 1970s substantially advanced the modern doctrine of comity through deference to foreign courts. [FN15] The most compelling sort of case requiring real-time cooperation among courts, and therefore potential negotiation, is the reorganization of a multinational corporation, which is surgery on a living patient. But liquidation cases also demand judicial interaction when the arena overlaps national borders, because much value may be lost by fragmented judicial action.

To understand the developments in the field, it is necessary to begin by understanding the difference between two types of parallel litigation in the insolvency context. We may call one "parallel proceedings" [FN16] and the other "parallel claims cases." When courts in two nations each have before them a full-blown insolvency proceeding relating to the same debtor, [FN17] we have truly parallel proceedings. Typically, each of them will claim jurisdiction over all the debtor's property everywhere in the world, although each will be able to exert actual control only over property somehow within its territorial sovereignty or in the control of a person or company within that sovereignty. [FN18] In the past, these courts traditionally followed the "grab rule," selling the dir assets within their control and distributing them under *571 local law without reference to the other court involved. Increasingly, courts have realized that this parochial approach may cause serious loss to the claimants in insolvency proceedings. Much of the cooperation and negotiation that is emerging in this field arises from that realization. [FN19]

The second category, parallel claims cases, were traditionally simple "comity dismissal" cases, in which a local court would dismiss or stay a claim against an insolvent debtor in favor of the foreign insolvency court that was charged with resolving all such claims. [\[FN20\]](#) As we will see, however, the judges are coming to believe those cases require more sophisticated, interactive responses. In particular, the judges are choosing conditional decisions as an alternative to a stark choice between dismissal and the continuance of parallel litigation.

1. Full Proceedings in Parallel

A liquidation example of the first category, parallel proceedings, is *In re Inverworld*. [\[FN21\]](#) The debtor in that case defrauded hundreds of Latin American investors of hundreds of millions of dollars. The investors were carried on the company's books as owning stock and other investments worth over U.S.\$400 million, but PriceWaterhouseCoopers, the liquidator, was able to find only about U.S.\$100 million in valuable property. [\[FN22\]](#) The debtor had its main offices in Texas and many assets in New York, but put its transactions with investors through its Cayman Islands and English subsidiaries. Insolvency cases were filed for the parent company and certain subsidiaries in Texas, the Cayman Islands, and England. The contracts with investors (and other contracts among the affiliates) had various and conflicting choice of law and choice of forum clauses. The result was a remarkable tangle of choice of law and forum questions. The case was rife with possibilities for extremely expensive litigation in three national courts [\[FN23\]](#) and for conflicting decisions, leaving the residue for the victims much reduced. [\[FN24\]](#)

To avoid that result, the representatives of various parties created "protocols" that were accepted by each of the courts involved. In summary, these agreements led to dismissal of the English insolvency proceeding, upon certain conditions about the treatment of claimants therein, and the allocation of functions among the two remaining courts. The U.S. court was to resolve the outstanding legal and factual issues relating to entitlements as among various classes of investors, while the Cayman Islands court was to oversee the administration of the distribution of proceeds to claimants. Each court was to take the other court's actions as binding and thus to prevent parallel litigation. Ultimately, the operation of the protocol led to a worldwide settlement at a cost far less than would have attended a three-court struggle.

*572 Similar protocols have been used in Chapter 11 bankruptcy cases, the most famous of which is *In re Maxwell Communication Corp.* [\[FN25\]](#) The Maxwell proceedings involved a major portion of the collapsed media and publishing empire of Robert Maxwell. A Chapter 11 case was filed in New York and an "administration" case (a form of reorganization proceeding) in London. In a multinational reorganization case there are often two agreements, as there were in Maxwell: an operating protocol at the start and a distribution agreement at the end. The U.S. court recognized that the parallel litigation would cause stupendous cost and conflict. It appointed a "special examiner," who negotiated an operating protocol with the administrators appointed in London. This protocol allocated functions and provided for a cooperative administration. The protocol was approved by the English and U.S. courts and thereby acquired the force of law for that case. Inter alia, it granted power to the English administrators to administer all assets and operations of the debtor group's business, incur expenses, and so on, all subject to agreement by the U.S. examiner as to specified types of questions. Certain items were to require U.S. court concurrence, after a hearing, while many others did not. The second agreement was a plan of reorganization/scheme of arrangement. It was approved by the two courts. [\[FN26\]](#) The debtor's assets were distributed worldwide pursuant to that agreement. The dual approvals amounted to a second protocol, governing the future of the business. The combined plan/scheme is believed to have been the first successful distribution plan adopted on a worldwide basis. [\[FN27\]](#)

Although Maxwell was a liquidation case that used the form of reorganization, [\[FN28\]](#) an emerging group of such cases are more like traditional reorganizations, but on an international scale. The Loewen Group proceedings in Canada and the United States are a good example. [\[FN29\]](#) Again a court-approved protocol governed the administration of the case and a plan of reorganization governed the company's post-bankruptcy operations. [\[FN30\]](#)

Characteristic of each of these cases, and a number of others in recent years, is that the courts in two or more countries were faced with the financial collapse of a single multinational business [\[FN31\]](#) under circumstances in which the value available for claimants was apt to be dramatically reduced by litigation and inefficient administration unless cross-border cooperation could be achieved. [\[FN32\]](#) That is, the courts could not do their jobs properly absent cooperation with other national courts. The problem is not simply one of a common res to which title is disputed. These cases require active management of the disposition of assets and the resolution of claims in real time. That is true even in liquidation cases, where jurisdictional disputes can create value-destroying doubt about title. Furthermore, assets may bring much more value if sold as a cross-border package (for example, as a complete multinational division of a company). Real-time cross-border management is even more necessary in reorganization, where claims settlement is intimately related to configuration of a financial restructuring and to obtaining new financing going forward. [\[FN33\]](#)

It might be objected that this international cooperation is really among parties, rather than being fairly called "negotiation" among courts. It is quite true that most of the initiatives and the communications involved in these cases came through the parties. [\[FN34\]](#) As noted above, the parties in cross-border cases negotiate with courts all the time. [\[FN35\]](#) But each of the cases discussed above involved specific issues as to which courts effectively agreed to be bound on the condition that the other courts involved made similar agreements. The existence of conditions makes these decisions quite different from instances in which courts have simply deferred to one another, even as to a common debtor or a single dispute, without conditions. [\[FN36\]](#) Some courts, like the courts in *Inverworld*, have gone further to accept limitations on the issues that they would hear and to commit themselves to enforce the decisions of the other courts involved. Such conditional decisions must be regarded as both the mechanism and the result of judicial negotiation, even if it is done through the medium of the parties.

2. Parallel Claims Cases

The second category of negotiation cases, parallel claims cases, comprises cases that arise when only one insolvency proceeding is pending and the issue is whether a claim brought in a legal action in a second court should be dismissed in favor of the insolvency court's jurisdiction to resolve all claims against the debtor. Many such cases in the United States have involved such deference. [\[FN37\]](#) Typical is *Victrix Steamship Co. v. Salen Dry Cargo A.B.*, [\[FN38\]](#) in which the Second Circuit approved dismissal of a claim against a debtor in a Swedish insolvency proceeding in deference to that proceeding. *Cunard Steamship Co. v. Salen Reefer Services A.B.*, [\[FN39\]](#) involved a similar dismissal of an arbitration in favor of an insolvency proceeding. These cases represent what amounts to a special parallel proceeding rule where a defendant is the debtor in a pending insolvency proceeding: other things being equal, the court will defer to the claims resolution function of the insolvency proceeding. That deference is the cross-border version of the result in most countries in domestic insolvencies, where the ordinary courts often are required to refer claims against a debtor to the insolvency court once an insolvency has been opened. [\[FN40\]](#)

Even in parallel claims cases, however, deference is not always granted. Although various doctrines have been advanced by the courts for their refusals to defer, the decisions seem to have as a common core a concern about the fairness of the treatment of the litigant in the foreign court. Thus, for example, in the *Koreag* case, [\[FN41\]](#) also

in the Second Circuit, the court insisted that the "constructive trust" rights of a domestic litigant must be determined in the U.S. court rather than in the Swiss insolvency of the Swiss defendant. [FN42] In the Valores case, [FN43] the U.S. court found procedural defects in the resolution of the claimant's claim in the Mexican reorganization proceeding and refused to defer.

These sorts of cases present the "claim" court (that is, the non-insolvency court) with an unattractive choice. It can dismiss the claim and hope that the foreign insolvency court will act properly and fairly, or it can proceed with the claim despite the strong policy in favor of comity, giving a distinct "back of the hand" to the foreign court. One response to this dilemma is the conditional dismissal or stay.

This approach began to find favor with the Remington case. [FN44] The original case arose from the sale by Remington to a Dutch firm, BSI, of a typewriter business, including both tangible goods and intellectual property. Remington sued in the United States alleging breach of contract, but BSI went into bankruptcy in the Netherlands. The U.S. case went forward nonetheless, with Remington seeking a worldwide constructive trust on the property as to which BSI had allegedly breached. Several years later, the U.S. courts entered a large monetary judgment against BSI, but refused to impose a worldwide trust on its property, telling Remington to take its money judgment to the Dutch court for recognition in the bankruptcy proceeding. [FN45]

In deference to Remington's concerns, however, the U.S. court conditioned its denial of broader relief on recognition of the U.S. judgment by the Dutch court. In short, whether the United States would seize the U.S. assets for the sole benefit of Remington would depend on the Dutch court giving recognition to the U.S. judgment in the distribution of BSI's worldwide assets. The court intimated that non-recognition might lead to affirmance of a worldwide constructive trust, putting into doubt the title to all of BSI's assets. On the other hand, the U.S. court made it clear that, if the Dutch insolvency court gave effect to the U.S. judgment in favor of Remington, the U.S. court would even consider turnover of the U.S. assets for distribution in the Dutch proceeding. In arriving at this decision, the court expressly recognized the serious problem of title to assets that the U.S. constructive trust decision might impose on the assets in the Netherlands and the possibility that its decision *575 might destroy any chance for rehabilitation of the debtor. [FN46] Although the cases are not identical, to some extent the Remington court was faced with the same sort of uncertainty about foreign court intentions as in *Koreaga*, but chose a conditional decision rather than a flat denial of comity.

A second Remington opinion, six years later, revealed that Remington went to the Dutch trustee with its judgment, felt rebuffed, and again applied to the U.S. courts for a worldwide trust. [FN47] The U.S. appellate court again refused that request. It determined that Remington had not given the Dutch courts a sufficient opportunity to recognize the U.S. judgment and sent it back to try again. The second decision seems implicitly to emphasize that the U.S. court was negotiating not with the trustee, but with the Dutch court itself.

Another case has gone a full step farther in its conditionality, arguably intruding fairly sharply on the rights of a foreign court, but doing so in the context of an attempt at comity. In the Blanco litigation, [FN48] a Venezuelan company filed a New York lawsuit against a Venezuelan development bank in connection with a development in Venezuela. The case involved substantial non-Venezuelan elements, including a consortium of Middle Eastern banks. One of the key financing agreements had a permissive forum clause, permitting suit in New York, London, or Caracas. English law was to govern, but payment was to be made in New York in U.S. dollars. After the suit was brought in New York, the plaintiff company went into bankruptcy in Venezuela and trustees were appointed, ousting the shareholders from control. The bankruptcy trustees sought dismissal of the New York suit. The shareholders then intervened in the New York action, claiming that they could not get justice in the Venezuelan courts.

The Second Circuit disagreed, granting a motion to dismiss on the grounds of forum non conveniens over a vigorous dissent. [FN49] However, the dismissal was not unconditional. The court majority imposed a condition: that the Venezuelan bankruptcy court would appoint a new co-trustee reasonably acceptable to the shareholders. If it did not, the suit could be reopened in the United States. The condition was imposed in response to vigorous claims by the shareholders that the trustees appointed by the Venezuelan court were hostile and unfair to them.

This case represents a rather substantial interference in another nation's adjudicatory process. It is interesting to consider this case in light of the Second Circuit's experience in a case involving a Dubai liquidation. In that liquidation, the district court deferred to the Dubai proceeding, only to conclude years later that that proceeding had been very unfair to the U.S. litigant. [FN50] Perhaps the court imposed conditions in Blanco because of that unhappy prior experience. In any case, it is hard to imagine a more clear instance of negotiation between courts: Appoint a more impartial official, or we will proceed with parallel litigation. [FN51] This approach risked offensive intrusion into the foreign court proceedings, but it also permitted the court to avoid the difficult dichotomous decision to dismiss or proceed.

*576 *Felixstowe Dock and Railway Co. v. U.S. Lines Inc.* [FN52] represents one of the early cases in which judicial negotiation was attempted. The case was a parallel-claims case to the Chapter 11 reorganization of an American shipping line. The U.S. debtor sought judicial cooperation from the English courts by way of the lifting of injunctions that had tied up the debtor's assets in England. [FN53] In the end, the English court refused.

An attempt at negotiation arose early in the case when the English court expressed concern about possible contempt actions against the creditors with claims in England. The concern was that lawsuits by the English claimants would be asserted to be violations of the U.S. stay. If the English injunctions were lifted and those creditors continued with their lawsuits, would the U.S. court try to hold them in contempt? To calm those fears, the U.S. court, at the urging of the debtor's counsel, issued an order giving assurance that prosecution of the English claims in the English courts would not give rise to actions for contempt in the U.S. court. However, the order was expressly conditioned upon vacation of the English injunctions, which would free the English assets to be used by the U.S. debtor. [FN54]

The English court declined the deal. Although its concern about contempt had been satisfied, it remained convinced that a North American reorganization would produce an agreement that severely disfavored the English claimants. [FN55] That is, the larger deal that the court anticipated would be unsatisfactory, so the proffer as to one element was insufficient. No agreement had been reached in the U.S. Chapter 11 case, which was in its early stages. The English court was projecting what it believed to be the likely contents of the reorganization plan. If the U.S. debtor had been able to promise the English claimants *577 favorable treatment in the reorganization plan, then the transatlantic deal might have been done and the English injunctions lifted. In today's Chapter 11 practice, the debtor might well have been able to do just that. It is clear, however, from the court's language with respect to the first deal--the agreement not to prosecute a stay violation--that the English court would have insisted that any such assurance about the reorganization plan have the blessing of the U.S. court. It seems equally clear that U.S. approval might have been forthcoming, but would have been conditional. So here the courts were on the cusp of an international judicial deal, but the legal technology of the time could not quite bring it to closing.

B. Forum Non Conveniens

Although multinational insolvencies have proven a natural medium for the growth of international judicial

negotiation, it is emerging in other sorts of parallel litigation as well. After insolvency proceedings, the most common place to find it is in cases in which a party seeks forum non conveniens dismissal. Such a case is always a parallel litigation problem. Often there is suit already pending in another jurisdiction, but always there must be the potential of such a competing lawsuit. In the rule announced in the leading contemporary case, *Piper Aircraft*, [FN56] a forum non conveniens dismissal requires the finding of an acceptable alternative forum. [FN57] Thus another lawsuit is necessarily contemplated, even if it has not yet been brought. [FN58] Whether or not to defer to that other lawsuit is the issue presented in such cases. Where there are key questions about how the foreign suit might proceed, a court is likely to be anxious about deciding to dismiss or stay the local case lest the reference to the other forum turn out to be disastrous for the plaintiff. A solution is the conditional stay or dismissal, which is, as we have seen, simply the initiation of a judicial negotiation.

A good example is *Borden, Inc. v. Meiji Milk Products Co.* [FN59] There, the plaintiff had licensed its intellectual property to a Japanese company, Meiji. After the agreement expired, Meiji allegedly violated Borden's intellectual property rights by its ongoing marketing arrangements. The dispute was subject to an arbitration clause and Borden had demanded arbitration, but in the meantime, the Japanese side continued its marketing practices to the alleged injury of Borden. Borden sought a preliminary injunction in the United States to block those practices pending arbitration. Meiji moved to dismiss on grounds of forum non conveniens. The issue was whether the Japanese courts provided an adequate alternative for the granting of the provisional relief sought by Borden pending the arbitration. The trial court found that those courts were an adequate alternative and dismissed. However, the trial court's dismissal was contingent. It took seriously Borden's concern that the Japanese courts were incapable of acting quickly to protect Borden's rights and allowed Borden to restore the action if preliminary injunctions were unavailable in Japan. The Court of Appeals affirmed, but conditioned its dismissal on action by the Japanese courts within sixty days of an application for interim relief filed by Borden. Relief was not conditioned upon Borden's success in Japan, but only upon prompt action by its courts.

*578 It seems impossible to understand this result except as the proposing of an international agreement between courts. If the Japanese court acts promptly, the U.S. court will forebear. If the Japanese court does not react within sixty days, however, the U.S. court will consider granting relief. Meiji would surely advise the Japanese court that it must accept the deal by acting swiftly or the Americans would act for them. Even if relief was denied to Borden, as long as the denial was timely, Borden would know that the U.S. court would regard the deal as done and would not entertain a claim for relief in the United States: *quid pro quo*.

A case like *Borden* illustrates the difference between negotiation between courts and negotiation between parties and courts. As noted earlier, it is commonplace for parties to make offers to courts and vice versa. Sometimes the parties make promises (offers) and the courts make dismissal expressly conditional on those offers. In forum non conveniens cases, for example, defendants often agree that the preferred forum will have personal jurisdiction over them and often waive the statute of limitations in exchange for, and as a condition of, the forum non conveniens dismissal. [FN60] They may also agree to provide witnesses and to satisfy any resulting judgment. [FN61] But these conditions are within the power of the offering party to perform. By contrast, in *Borden*, the Japanese party, Meiji, could transmit to the Japanese court the offer of the United States court, but did not have the power to seal the deal. Ultimately, the deal was between the courts.

The factor that makes the courts the real negotiators in forum non conveniens cases is the "available forum" requirement of *Piper*. In another exemplary case, an insurer sought dismissal on the ground that the U.S. case should be joined with a number of cases being tried in England. For various reasons, including the applicability by contract of English law, the U.S. court was inclined to agree. However, it was not enough to make a deal that the insurer apply for the addition of these U.S. parties to the English suit. The English court would have to agree, and its concurrence was not certain. Thus the dismissal was made conditional on joinder of these parties to the

English suit and that "deal" was affirmed on appeal. [\[FN62\]](#)

It must be noted that judicial negotiation may sometimes be with the political branches of the foreign government. In the Sussman case, [\[FN63\]](#) for example, the forum non conveniens dismissal in favor of the Israeli courts was conditioned upon the agreement of "the appropriate Israeli authorities" [\[FN64\]](#) that the plaintiff Sussman would not be arrested if he traveled to Israel in connection with the case. We can find other examples outside the private-law field. For example, the party with whom the local court is negotiating may function at the intersection of judicial and executive authority. That may be true, for example, in cases where extradition to the United States in a capital case is requested and the foreign jurisdiction makes agreement to eschew the death penalty a condition of the extradition. [\[FN65\]](#) The official in the foreign Ministry of Justice may be acting for the prosecutor *579 and in a civil law system such an officer serves both executive and judicial functions as we would understand those functions in the United States. [\[FN66\]](#)

These sorts of conditional dismissals, requiring action by the parties or by foreign courts, are becoming so routine that they may not be so often reported in recent years. It seems apparent, however, that their use is increasing year by year.

III. Communication and Negotiation

We strongly recommend . . . an actual dialog . . . between the courts of the different jurisdictions . . . [\[FN67\]](#)

Even in traditional terms, a court that wished to cooperate with or defer to another court often wanted to know something about the governing law in the other court and therefore the likely result of cooperation or deferral. That is, it needed information. Increasingly, a court also wants to know what the other court is prepared to do in the concrete circumstances of the pending case, which leads to negotiation.

As to information, the court considering deferral or cooperation can rely, as many courts have done, upon the parties to present evidence of foreign law and the likely intentions of the foreign court, but that process is expensive and frequently inconclusive, to say the least. [\[FN68\]](#) Too often, the parties' foreign-law experts swear to markedly different versions of the foreign law, leaving the U.S. court in a quandary. An explanation from the foreign court offers a most attractive alternative. [\[FN69\]](#)

A recent case from the Third Circuit, *Stonington Partners*, takes an enormous step forward in the recognition of this approach. [\[FN70\]](#) The case strongly resembled *Maxwell*, [\[FN71\]](#) except that no protocol had been achieved. A Belgian company had filed parallel proceedings--a Chapter 11 in the United States and a Concordat in Belgium. The Concordat has roughly the same goals as a U.S. reorganization. However, *Stonington* had a securities-fraud claim that would, like the preference claim in *Maxwell*, be treated in very different ways in the two courts. Unlike *Maxwell*, the different treatments might well render a single, worldwide resolution impossible. [\[FN72\]](#) If U.S. law were applied in *Stonington*, the securities-fraud claim would effectively be denied any share. The Bankruptcy Court in the U.S. case so held. The Belgian court, however, held that under Belgian law the claim could *580 be allowed and, if proven, would rank *pari passu* with all other unsecured claims. Applying the Belgian law would benefit *Stonington* greatly but would substantially reduce the value of all other unsecured claims, because of the size of the *Stonington* claim. Because full, plenary bankruptcy cases were pending in both countries, the effect might be to make any compromise between the two results practically impossible. [\[FN73\]](#)

The Bankruptcy Court reacted to these difficulties by issuing an anti-suit injunction against *Stonington vis-à-vis*

the Belgian proceeding. [\[FN74\]](#) The Third Circuit reversed and remanded, holding that no sufficient showing had been made to justify an anti-suit injunction. [\[FN75\]](#)

The key point for present purposes was that the circuit court then added a separate section to its opinion virtually directing the parties and the courts below to communicate directly with the Belgian court and to negotiate a solution to the problem posed by the differing laws. Even prior to its decision, the panel had asked for a separate briefing describing what negotiations of this sort had been done already in the case, only to be told that little had been attempted. It was clearly disappointed. Despairing of the parties, it addressed itself to the courts below:

We strongly recommend, in a situation such as this, that an actual dialog 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. Maxwell provides a good example. [\[FN76\]](#)

Judge Rendell specifically noted that this communication would be helpful even if no agreement was reached because "it would be valuable to communicate regarding the policies animating a certain law so as to be better able to perform a choice-of-law analysis." [\[FN77\]](#) The concurring judge agreed:

I also agree with the majority's recommendation that the Delaware and Belgian bankruptcy courts should engage in a dialogue in an effort to develop a protocol for the cooperation of the two courts in overseeing and harmonizing the dual proceedings so as to effectuate the orderly administration of justice. [\[FN78\]](#)

Stonington is the first case in which an appellate court has embraced direct communication for the purpose of negotiation. [\[FN79\]](#) Judge Rendell's opinion is both highly knowledgeable and gratifyingly direct.

Of course, even after a general adoption of this view, many difficulties will remain. The method of communication followed in earlier cases was the writing of an opinion by one or the other court, in effect explaining local law and likely local results to the other *581 court. In Remington, the parallel claims court detailed U.S. law for the benefit of the Dutch insolvency court, along with a statement of how the U.S. court would react to a Dutch decision to recognize or fail to recognize the U.S. judgment. [\[FN80\]](#) In Felixstowe, the U.S. Bankruptcy Court issued an order that was a mini-treatise on U.S. bankruptcy law in an attempt to convince the English court that it could be comfortable in cooperating. [\[FN81\]](#) More recently, the rise of the protocol--an agreement among parties and courts that will govern a particular proceeding--has been achieved by a combination of communication through the parties with statements of law and intention in court orders. [\[FN82\]](#)

To achieve the maximum efficiencies, the process must advance to direct communication between courts. [\[FN83\]](#) Again, the leading efforts are found in the insolvency field. The UNCITRAL Model Law on Cross-Border Insolvency, which has been adopted by several leading commercial nations and is likely to be adopted soon by the United States, [\[FN84\]](#) provides explicitly for direct communication between courts. [\[FN85\]](#) The American Law Institute (ALI) has gone further, encouraging direct communications in such cases. [\[FN86\]](#) Its Principles of Cooperation in Transnational Insolvency Cases adopts guidelines for such communications. The International Insolvency Institute has a new project developing the ALI guidelines for use in various regions of the world. [\[FN87\]](#)

Direct communications between courts have the potential to increase cooperation and eliminate costly inefficiencies. For example, a recent Canadian-U.S. case involved a Canadian insolvency. The United States had issued a cooperative stay halting U.S. lawsuits involving the Canadian debtor. The U.S. stay paralleled in its scope the one that had been issued in Canada. The Canadian court subsequently modified its stay to permit certain third-party suits to go forward. When a plaintiff in a U.S. lawsuit sought a similar modification, the

debtor argued that the situation was different in the United States and that the Canadian proceeding would be harmed by permitting the U.S. suit to go forward. The resulting confusion about the purpose and effect of the Canadian modification led to delay and expensive litigation in the U.S. court. [\[FN88\]](#) If the U.S. court had felt free to call the Canadian court on the telephone, with appropriate procedural safeguards, it would likely have saved everyone concerned considerable time and money.

The next step beyond communication for information is communication for negotiation. If negotiation is a necessary element of growing cooperation among courts in real time in multinational cases, they must communicate with each other. The opinion in *Remington*, for example, not only communicated information as such, but also advised as to the deal being offered by the U.S. court to the Dutch court: the U.S. court would withhold *582 the constructive trust remedy if the Dutch court recognized the U.S. judgment. [\[FN89\]](#) There, the method was the written opinion, but direct communication is faster and permits a clarifying interaction. For example, after the order that was issued in the *Sussman* case, [\[FN90\]](#) it seems likely that questions might have arisen about the scope and efficacy of the required assurances of the Israeli "authorities" concerning *Sussman's* immunity from arrest while in Israel in connection with the suit. Whatever actually happened in that case, it would not be surprising if the process that followed the *Sussman* decision would have included months of back and forth, perhaps including a need for further resort to the U.S. court for clarification of its order in relation to a detailed proffer of immunity that had been made by the Israelis. The result might be further expense and delay, with misunderstanding and offense perhaps unavoidable in such a clumsy process.

It might have been more efficient in *Sussman*, and more consistent with a diplomatically acceptable result, to have the U.S. court in direct contact with the Israeli authorities. Questions could have been asked and answered and a writing approved. That might have been done entirely by mail or fax or email or might have been supplemented by a conference call. If done carefully, with respect for the parties' rights and with a full recognition of the court's right to halt or suspend the process at any time, the result in such a case might be far superior. [\[FN91\]](#) Some courts have already gone farther. There have been joint video and telephonic hearings in U.S.-Canadian insolvency cases, with the courts hearing arguments and making decisions in tandem in real time. [\[FN92\]](#)

Of course, there are many difficulties. The most obvious impediment to direct communication is language. Resolution of translation difficulties is a substantial task in itself, although the increasing institutional strength of the European Union demonstrates that it can be achieved. Direct communication between courts also raises a host of procedural questions. For example, must counsel be informed? Must counsel have an opportunity to participate or, at least, to hear the conversation? [\[FN93\]](#) There is some risk that the two legal systems involved will have different answers to those and related questions. For example, in the ALI Project, it transpired that in Mexico *ex parte* communications with the judge are *583 considered normal and necessary, but are deplored in Canada and the United States. [\[FN94\]](#) Even within the United States, judges and lawyers at the ALI had quite different views about the propriety of contacts between judges without the knowledge or participation of the attorneys for the parties. Some of the judges, for example, did not accept that there was any difficulty with private contacts among them, while some of the lawyers were appalled at the idea. The ALI Guidelines create a framework for resolving these problems and a baseline of workable rules, but details must be resolved in each case as it arises.

Despite difficulties, the effort is required, because of the large potential payoffs. In the end, the key point is not the use of technology per se or the details of procedure, but the acceptance of the principle of direct communication between courts. It will not be far in the future of multinational litigation that the study of old cases and abstract code provisions concerning comity and reciprocity will rest only in memory, like quill pens and cracked leather bindings. Like so much else in the modern world, communication and negotiation between

courts challenges thought and risks abuse, but they are essential to remaining astride an on-rushing modernity.

IV. Information as a Solution in Parallel Cases

Direct communication of information between courts could produce more efficient and fairer adjudication in a variety of contexts. The *Euromepa* case offers a good example. [FN95] There the issue was the request of a party to a French litigation for discovery under [28 U.S.C. 1782](#), a U.S. statute that permits parties to use U.S. discovery methods to gather evidence for use in foreign tribunals. The argument was raised that the use of [section 1782](#) would represent an evasion of French limitations on out-of-court discovery and would be offensive to the French court. Although the U.S. court allowed the requested discovery, it would have benefited from learning directly from the French court if the opposing argument had any substance. [FN96] Indeed, if the French court would say that approach A (say, an oral deposition) would be evasive and offensive, while approach B (say, written interrogatories) would not, then the U.S. court could have fashioned just the right order. The U.S. court's communication could have taken the form of written questions to the French court (a reverse letter of request [FN97]) or an oral communication. In either case, the French court might refuse to respond. If it did refuse, however, any subsequent French umbrage at the action of the U.S. court would be hard to justify.

V. Uses of Communication and Negotiation in Other Areas

Communication or negotiation might be extended from the cases discussed above to assist in other cases of parallel litigation, including the use of anti-suit injunctions. Although this paper is limited to the use of negotiation and does not address the resolution *584 of parallel litigation issues generally, a couple of hypothetical examples will illustrate how communication and negotiation might resolve or ameliorate the results where anti-suit injunctions have been employed, depending on the ultimate balance to be struck in such cases.

The traditional rule in cases of parallel litigation was that the result in the first court to issue judgment would be *res judicata* in the other court, so that the first judgment would prevail. Many have believed this rule to be arbitrary and subject to abuse. The typical claim of abuse arises especially when a party that is sued in country A subsequently files a declaratory action in country B for a declaration that it is not liable in the case--especially if the second action is filed after extensive time and expense has been incurred in the original lawsuit. [FN98] One result is that courts are sometimes willing to issue anti-suit injunctions effectively enjoining continuation of the suit in country B. Although it is the country B plaintiff that is enjoined, not the other court, it is generally understood that the effect is the same. [FN99]

U.S. courts are sharply divided about the standard to be applied in considering a request for an anti-suit injunction. [FN100] The federal courts of appeals are split between those that impose a strict rule, which almost never permits such an injunction, and those that permit an injunction whenever the other litigation presents serious problems of duplication and expense. [FN101] Cases in the United States and elsewhere [FN102] have emphasized that such injunctions are potentially offensive to foreign courts and are to be issued with caution, although with varying rules about how great the caution must be. Communication and negotiation offer some possibility of reducing the potential conflict--or at least of softening it.

One hypothetical can be constructed from the facts in the *China Trade* case. [FN103] In that case, *Ssangyong*, a Korean shipping company, carried a shipment of soybeans under a contract with the *China Trade* company, a buyer of soybeans. The soybeans were allegedly ruined en route. *China Trade* arrested a vessel belonging to *Ssangyong* to initiate its claim for damages. *Ssangyong* posted a bond in the usual way to release the ship and a

lawsuit went forward in the United States. After that suit had gone through considerable discovery and other activity, Ssangyong filed a declaratory action in Korea seeking a declaration of non-liability to China Trade, which in turn sought an anti-suit injunction in the U.S. court. The district court granted the injunction, but the Second Circuit reversed, aligning itself with the strict rule, largely because of concern about the intrusive and offensive nature of an anti-suit injunction. [\[FN104\]](#)

Using these facts as an example, one can construct a different approach, using communication and negotiation. The New York court might have issued an injunction restraining Ssangyong from further proceeding in the Korean action until it had applied to the Korean court for a stay of that action. It would be required to include in its application a properly translated copy of certain findings by the New York court. These findings would include recitation of the extensive judicial activity to date in the U.S. court together with a *585 finding by that court that (a) the Korean party had willingly submitted to the jurisdiction of the U.S. courts and had spent years of litigation here before filing in Korea shortly before trial; (b) that China Trade and the U.S. court would be deprived of a substantial investment of time and money if the case were to be resolved in Korea; and (c) that if the stay was refused, the U.S. court would be assisted by knowing the reasons for refusal of the stay by the Korean court before deciding what, if any, further action to take in the United States. The temporary injunction against Ssangyong would remain in effect until the Korean court ruled. This procedure would give the Korean court an opportunity to acquiesce by staying its action or to assert specific reasons why it would not do so. There is a reasonable chance that this procedure would be less offensive and would end without the need for a permanent injunction, because the Korean court would stay or the U.S. court would decide, after understanding the views of the Korean court, to permit the parallel proceedings to continue.

The strict courts might feel this approach is itself too intrusive and the more aggressive courts that it is not aggressive enough, which suggests that it might be just right.

A second example could be given based on *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, [\[FN105\]](#) which presented a situation similar to *China Trade*: a French party litigates in the United States until shortly before trial and then turns to the French courts. It differed from *China Trade* in that the center of gravity of the case (a warehouse fire) was in France, the French case had actually started first, and the U.S. case was the one seeking a sort of declaratory relief. The court, per Judge Posner, issued an anti-suit injunction nonetheless. It relied on delay in prosecution of the French action and a heavy investment in the U.S. litigation on both sides, as in *China Trade*, but it employed as a second ground a bluntly expressed disbelief in the capacity of the French Commercial Court to resolve business issues of any real complexity. With a court in such a disdainful mood, the solution proposed above might not be thinkable, but the adoption of that approach--giving the foreign court the benefit of the United States' reasons for proceeding in the United States and giving a respectful hearing to the reactions of the foreign court--would itself tend to deflect U.S. courts from relying on the second sort of ground. The method's focus on engagement and communication might reduce the likelihood that a U.S. court would adopt a patronizing view toward a foreign court, especially in the very order that would be sent to that foreign court. The consequence would surely be better relations with other courts and more likelihood of cooperation in future cases. By contrast, in *Allendale* one could assume that the likelihood of recognition of the U.S. judgment in France was greatly reduced by the injunction and by the court's barely disguised contempt for French judicial institutions.

Better still than a reasoned anti-suit injunction would be direct communication between courts. An interactive communication--written or oral-- could more quickly and surely achieve the results suggested above. In a future case along the lines of *Allendale*, it might even enable Judge Posner to acquire a greater appreciation for a commercial litigation tradition that has been successful in one of the great commercial countries of the world and has been followed in other countries around the globe.

The relationship among information, communication, and negotiation leads to one final point about adjudicatory technique. In modern litigation, it is nearly always possible that there is an international aspect to a case, whether it appears on the face of the complaint or not. Often, there may be a related proceeding in another country about which the court should know from the start. For that reason, in the insolvency arena the ALI's Principles recommend that the court require every foreign administrator who seeks recognition in the United States to advise the court upon filing about any related actions or proceedings *586 pending in other countries and to update the court promptly upon new filings or material developments in previously filed cases. [\[FN106\]](#) It would seem similar rules would be increasingly valuable in all civil litigation.

VI. Conclusion

This article addresses one aspect of the problem of managing multinational dispute resolution, where courts in two or more jurisdictions are seized with responsibility for resolving the same dispute. The traditional approaches-- reciprocity, the first-to-judgment rule, and the anti-suit injunction--have come under increasing criticism as inadequate in a modern, globalizing world. One important response is the emergence of communication and negotiation among courts in cross-border cases. This solution has progressed the most in insolvency cases because of the universal jurisdiction characteristic of bankruptcy, but it is being used in forum non conveniens cases and elsewhere. Methods of direct communication among courts, coupled with conditionality, are now being forged and will be used more and more as global litigation multiplies.

Although there have been some startling moves in the direction of truly supranational courts in recent years, [\[FN107\]](#) that "vertical" approach to managing multinational litigation will not apply to most litigation in the near future, if ever. As a result, courts all over the world must address the difficult task of learning to talk to each other and arrive at working agreements to reduce the time and expense of litigation and serve the cause of justice.

[\[FNd1\]](#). Copyright © 2003. Benno C. Schmidt Chair of Business Law at The University of Texas School of Law. Some of the ideas and case analysis for this paper originated in a paper I gave to the International Bar Association meeting in New Orleans several years ago. I greatly appreciate the able research assistance for this paper from Tonya Shotwell, J.D. candidate 2004, The University of Texas School of Law.

[\[FN1\]](#). *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 735 (C.A. 1982).

[\[FN2\]](#). Reciprocity always involves some element of concern that the courts of the other jurisdiction will defer and cooperate in future cases, but that is necessarily a hope or a prediction, not a condition of the present action of the court now acting.

[\[FN3\]](#). A very recent article discusses some of the same judicial negotiations covered in this article. See generally Anne-Marie Slaughter, [A Global Community of Courts](#), 44 *Harv. Int'l L.J.* 191 (2003).

[\[FN4\]](#). See *infra* notes 7-8 and accompanying text.

[FN5]. See James P. George, [International Parallel Litigation--A Survey of Current Conventions and Model Laws](#), 37 Tex. Int'l L.J. 499, 502 (2002); Louise Ellen Teitz, [Parallel Proceedings and the Guiding Hand of Comity](#), 34 Int'l Law. 545, 545 (2000). The doctrinal method is that the first judgment obtained is res judicata in the other court(s), if they recognize that judgment.

[FN6]. See George A. Bermann, The Use of [Anti-Suit Injunctions in International Litigation](#), 28 Colum. J. Transnat'l L. 589, 590-91, 627-28 (1990).

[FN7]. Either the phrase "local court" or "now-acting court" is used in lieu of traditional phrases like "recognizing court" or "adjudicating court," except where the discussion is of traditional doctrines like res judicata in judgment enforcement. The reason is that the traditional phrases come burdened with a retrospective focus often appropriate to their traditional uses, but misleading as applied in the context of an international judicial negotiation.

[FN8]. See infra note 48 and accompanying text.

[FN9]. See, e.g., Gary B. Born, International Civil Litigation in United States Courts 343, 356 (3d ed. 1996); Russell J. Weintraub, International Litigation and Arbitration 191 (3d ed. 2001) (excerpting [Harrison v. Wyeth Labs. Div. of Am. Home Prods. Corp.](#), 510 F. Supp. 1 (E.D. Pa. 1980)).

[FN10]. See, e.g., Born, supra note 9, at 343.

[FN11]. Many other sorts of cases--notably custody and other domestic- relation cases--raise many of the same issues and deserve the same study given here to commercial cases. The same is true in international public-law cases as well. See Anne-Marie Slaughter, [Judicial Globalization](#), 40 Va. J. Int'l L. 1103, 1112-15 (2000) [hereinafter Slaughter, Judicial Globalization]. For a discussion of global adjudication generally, see Laurence Boisson de Chazournes & Sarah Heathcote, The [Role of the New International Adjudicator](#), 95 ASIL Proc. 129 (2001). See also Francis Jacobs, The [European Court of Justice](#), 38 Tex. Int'l L.J. 547 (2003); José Alvarez, The [New Dispute Settlers: \(Half\) Truths and Consequences](#), 38 Tex. Int'l L.J. 405 (2003).

[FN12]. Cases devoted to resolution of companies in financial difficulties are called "insolvency" cases in this article. To quote the ALI Principles of Transnational Insolvency:
"Bankruptcy" or "insolvency" law governs collective proceedings for the adjustment or collection of debts on behalf of all creditors and other interested parties.... In worldwide English-language usage, "insolvency" is perhaps the more common term for such proceedings where a business debtor is involved, but in North America "bankruptcy" is at least as often used for business proceedings as well as those involving consumers. Transnational Insolvency Project, Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement 1 n.2 (ALI Tentative Draft Apr. 14, 2000) [hereinafter ALI Principles].

[\[FN13\]. 159 U.S. 113 \(1895\).](#)

[\[FN14\]. 109 U.S. 527 \(1883\).](#)

[\[FN15\].](#) Jay Lawrence Westbrook, *Transnational Bankruptcy*, in *The Development of Bankruptcy & Reorganization Law in the Courts of the Second Circuit of the United States* 239, 243-47 (U.S. Courts for the Second Circuit Comm. on History and Commemorative Events ed., 1995).

[\[FN16\].](#) See Report of the United Nations Commission on International Trade Law on the Work of Its Thirtieth Session, U.N. GAOR, 52d Sess., Supp. No. 17, Annex 1, U.N. Doc. A/52/17 (1997), reprinted in [1997] 28 U.N. Comm'n on Int'l Trade L. Y.B. 305, U.N. Doc. A/CN.9/SER.A/1997 [hereinafter Model Law]; ALI Principles, supra note 12, sec. II.A, at 10-16; see also Transnational Insolvency Project, *International Statement of United States Bankruptcy Law* 144 n.277 (ALI Tentative Draft Apr. 15, 1997) (discussing U.S. cases in which a second court has deferred to the insolvency court for resolution of a parallel dispute).

[\[FN17\].](#) This issue can arise when the debtors are two different, but closely related, companies (for example, parent and subsidiary), but we will save that discussion for another day.

[\[FN18\].](#) This fact leads to serious conflicts of jurisdiction over those subject to personal jurisdiction in the two countries, as with banks in Canada and the United States. ALI Principles, supra note 12, sec. IV.B.2, at 50-54. If a bank has branches in two countries, each of them may claim control over an account of the debtor located in either branch or, indeed, in a branch in a third country. Because both courts have the power to impose sanctions on the bank, it may find itself "the meat in the sandwich." Canadian banks have been especially upset because United States courts use their power over the Canadian branches in the United States to impose the United States bankruptcy stay with regard to Canadian-situated property. The ALI Principles state rules meant to ameliorate this conflict. ALI Principles, supra note 12, sec. V.2, at 129-30.

[\[FN19\].](#) See ALI Principles, supra note 12, sec. II.B., at 17-21; but see André J. Berends, [The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview](#), 6 *Tul. J. Int'l & Comp. L.* 309, 313 (1998) (stating the converse proposition).

[\[FN20\].](#) ALI Principles, supra note 12, Reporters' Note 68, at 143 (providing examples of North American cases).

[\[FN21\]. 267 B.R. 732, 740 n.10 \(Bankr. W.D. Tex. 2001\).](#)

[\[FN22\].](#) The present author was appointed as Special Counsel ("Examiner") by the United States Bankruptcy Court and filed a report concerning the choice of law issues in the case.

[FN23]. This statement does not even speak of the pending suit by the United States Securities and Exchange Commission, in which a receiver had been appointed for the debtor.

[FN24]. The most central question was the relative entitlements of those with investments in general investment vehicles established by the debtors as opposed to those who were listed on the debtor's books as the owners of shares in specific companies.

[FN25]. [170 B.R. 800, 818 \(Bankr. S.D.N.Y. 1994\)](#), aff'd, [186 B.R. 807, 822 \(S.D.N.Y. 1995\)](#), aff'd, [93 F.3d 1036, 1051 \(2d Cir. 1996\)](#). Professor Slaughter has cited Maxwell as an example of "judicial globalization" in the private-law area. See Slaughter, supra note 11, at 1114 nn.43-44.

[FN26]. The "plan" was the U.S. version of the agreement, and the "scheme" was the U.K. version. They were, however, the same in substance.

[FN27]. There was notable transnational cooperation in the BCCI cases, but they were marred by serious instances of non-cooperation, especially through "ring-fencing" assets in the [United States](#). See generally [Sturge v. Smouha \(In re Smouha\)](#), [136 B.R. 921 \(Bankr. S.D.N.Y. 1992\)](#); Duncan E. Alford, [Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI](#), [26 Geo. Wash. J. Int'l L. & Econ. 241 \(1992\)](#).

[FN28]. The United States and the United Kingdom are two of the countries that will permit a reorganization plan to be used for liquidation as well.

[FN29]. See [In re Loewen Group, Inc. Securities Litigation, No. 99-6740, 2001 WL 530544 \(E.D. Pa. May 16, 2001\)](#); see also [In re Cadillac Fairview, No. B28/95, 1995 WL 1727507 \(Ont. Gen. Div. Mar. 7, 1995\)](#) (Can.).

[FN30]. Protocols are now used routinely in Canadian-U.S. bankruptcy cases. Telephone conversation with Justice James Farley, Ontario Superior Court (Mar. 24, 2003). Justice Farley sat on the Ontario commercial court for many years, handling a number of large multinational bankruptcies.

[FN31]. Often the single business was conducted through a host of subsidiaries incorporated in a host of jurisdictions. This fact complicates the problem of coordination immensely. ALI Principles, supra note 12, sec. IV.C.3, at 106-14. Some have thought that the use of separate national subsidiaries might actually simplify the issues, because then each national court could dispose of the assets of "its" subsidiary and the claims against it. Lynn M. LoPucki, [Cooperation in International Bankruptcy: A Post-Universalist Approach](#), [84 Cornell L. Rev. 696, 742-44 \(1999\)](#); see also Jay Lawrence Westbrook, [A Global Solution to Multinational Default](#), [98 Mich. L. Rev. 2276, 2308-09 \(2000\)](#). Unfortunately, the assets, liabilities, and operations of these subsidiaries rarely fall neatly within national borders. See [id. at 2312-13](#). In addition, they are often linked by a host of inter-group transactions and guarantees, so that no one national court can administer their insolvencies so as to maximize value and avoid litigation. ALI Principles, supra note 12, sec. IV.C.3, at 106-14.

[FN32]. See Claudia Tobler, [Managing Failure in the New Global Economy: The U.N.C.I.T.R.A.L. Model Law on Cross-Border Insolvency](#), 22 *B.C. Int'l & Comp. L. Rev.* 383, 421 (1999); David Costa Levenson, [Proposal for Reform of Choice of Avoidance Law in the Context of International Bankruptcies from a U.S. Perspective](#), 10 *Am. Bankr. Inst. L. Rev.* 291, 303 (2002); ALI Principles, supra note 12, sec. I, at 3-4, sec. III.I, at 31-35. Even those who would be cautious in "internationalizing" management of these cases recognize that cross-border cooperation among courts is crucial. LoPucki, supra note 31, at 750; see also Westbrook, supra note 31, at 2291.

[FN33]. Bruce Leonard, [Managing Default by a Multinational Venture: Cooperation in Cross-Border Insolvencies](#), 33 *Tex. Int'l L.J.* 543, 544 (1998); Costa Levenson, supra note 32, at 343; Sid Brooks, *Global Economy Demands Judicial Cooperation and Communication*, *Colo. Law.*, Mar. 1999, at 33.

[FN34]. In some cases, it is said that the courts had some direct communication.

[FN35]. See supra note 9 and accompanying text.

[FN36]. The English and U.S. courts in Maxwell deferred to each other at different stages in a huge, \$100 million preference avoidance dispute. *Barclays Bank Plc v. Homan*, [1992] B.C.C. 757 (Ch.), aff'd, [1992] B.C.C. 757 (C.A.) (Eng.), available at [1992 WL 893786](#); *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036, 1051 (2d Cir. 1996). The mutual deference was clearly meant to be reciprocal, both ex ante and ex post, but the decisions were unconditional.

[FN37]. Transnational Insolvency Project, *International Statement of United States Bankruptcy Law* 144 n.277 (ALI Tentative Draft Apr. 15, 1997).

[FN38]. [825 F.2d 709 \(2d Cir. 1987\)](#).

[FN39]. [773 F.2d 452, 458-61 \(2d Cir. 1985\)](#).

[FN40]. See, e.g., 2 *Collier's on Bankruptcy* ch. 362 (15th ed. 1993) (explaining the automatic stay provided by [11 U.S.C. § 362](#)).

[FN41]. *Koreag, Contrôle et Révision S.A. v. Refco F/X Assocs., Inc.* ôé([In re Koreag, Contrôle et Révision S.A.](#)), 961 F.2d 341 (2d Cir. 1992).

[FN42]. Contrast that holding with the treatment of a constructive trust claim in [Remington Rand Corp.-- Delaware v. Business Sys. Inc.](#), 830 F.2d 1260 (3d Cir. 1987).

[FN43]. [United States v. Valores Corporativos, S.A.](#), 159 B.R. 689 (S.D.N.Y. 1993).

[FN44]. [Remington Rand Corp.--Del. v. Bus. Sys. Inc.](#), 830 F.2d 1260 (3d Cir. 1987).

[FN45]. [Id.](#) at 1273.

[FN46]. [Id.](#) at 1272.

[FN47]. [Kilbarr Corp. v. Bus. Sys. Inc.](#), 990 F.2d 83 (3d Cir. 1993) (Kilbarr was originally Remington Rand.).

[FN48]. [Blanco v. Banco Industrial de Venezuela, S.A.](#), 997 F.2d 974 (2d Cir. 1993).

[FN49]. The court's characterization of the dismissal seems inaccurate. The decision applied the traditional insolvency litigation rule mentioned earlier, deference to a foreign insolvency proceeding concerning the defendant, rather than a weighing of the various forum non conveniens factors. For discussion of forum non conveniens, see *infra* note 56 and accompanying text (discussing [Piper Aircraft Co. v. Reyno](#), 454 U.S. 235 (1981)).

[FN50]. [Drexel Burnham Lambert Group, Inc. v. Galadari](#), 127 B.R. 87, 100 (S.D.N.Y. 1991).

[FN51]. In some ways, *In re Olympia & York Realty Corp.*, No. 92 B 42698- 42702 (Bankr. S.D.N.Y. 1993), is an even more innovative example of cooperation, although not judicial negotiation. There, a U.S. Bankruptcy Judge persuaded Cyrus Vance to take time off from Bosnia to bring some peace to Manhattan. The U.S. courts largely deferred to the Canadian and British courts in that matter, despite the presence of very significant U.S. real estate assets in the case. The deference was under [Section 304 of the Bankruptcy Code](#), permitting an "ancillary" proceeding for cooperation in bankruptcy without the need for a full-blown Chapter 7 or Chapter 11 proceeding. But the U.S. creditors had grown very unhappy with the Canadian administrator and were threatening a U.S. Chapter 11 for all the U.S. properties, even though all agreed it would be better to avoid that result because of expense and additional legal complexities. Mr. Vance succeeded in getting the parties to agree on a group of people to serve as an independent governing board for the U.S. properties, thus heading off the threatened parallel litigation.

[FN52]. [1989] Q.B. 360 (1987) (Eng.).

[FN53]. These were Mareva injunctions. See, e.g., *Credit Suisse Fides Trust S.A. v. Cuoghi*, [1997] 3 W.L.R. 871 (C.A.) (Eng.). See Andrew Lenon, *Mareva Injunctions in Support of Foreign Proceedings*, 147 New L.J. 1234, 1234- 36 (1997).

[FN54]. The U.S. court order read as follows:

IT IS ORDERED:

1. Subject to the conditions set forth in paragraph 2, the automatic stay provided by [section 362 of the Bankruptcy Code](#) and the Restraining Order issued by this Court in the above-captioned Chapter 11 cases dated November 24, 1986 are modified for the sole purpose of permitting (but not requiring) persons or companies domiciled in England to commence and continue lawsuits for damages against U.S. Lines in the courts of England in order to fix and liquidate the claims of such persons and companies for purposes of allowances in the Chapter 11 case of U.S. Lines. This modification shall be deemed to be effective as from November 24, 1986, so that any conduct that would otherwise constitute a violation of the automatic stay of the Restraining Order shall not be grounds for contempt sanctions or for claims for damages.

2. The relief granted in paragraph 1 is expressly conditioned upon the entry of a final order by the courts of England vacating [the FDR and FL Mareva injunctions] and upon the transfer by U.S. Lines of the property covered by said orders to the United States, subject to the jurisdiction of this Court. *Felixstowe*, [1989] Q.B. at 384.

[FN55]. *Id.* at 386-87. The *Felixstowe* court did not fear a facially discriminatory plan so much as a plan that would make sense for U.S. creditors given the company's future operations, but would not make sense for UK creditors.

[FN56]. [Piper Aircraft Co. v. Reyno](#), 454 U.S. 235 (1981).

[FN57]. *Id.* at 254 n.22.

[FN58]. Admittedly, in many tort cases the alternative suit may be an entirely theoretical one, highly unlikely to be brought. See David A. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 Law Q. Rev. 398, 418-20 (1987).

[FN59]. [919 F.2d 822 \(2d Cir. 1990\)](#).

[FN60]. See, e.g., [Flores v. S. Peru Copper Corp.](#), No. 00 CIV. 9812(CSH), 2002 WL 1587224, at *29 (S.D.N.Y. July 16, 2002); [Ilusorio v. Ilusorio-Bildner](#), 103 F. Supp. 2d 672, 682 (S.D.N.Y. 2000); [Dickson Marine, Inc. v. Air Sea Broker, Ltd.](#), 969 F. Supp. 389, 395 (E.D. La. 1997).

[FN61]. [Dickson](#), 969 F. Supp. at 395.

[FN62]. See [Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.](#), 796 F.2d 821, 830 (5th Cir. 1986).

[FN63]. [Sussman v. Bank of Israel, 990 F.2d 71 \(2d Cir. 1993\).](#)

[FN64]. [Id. at 71.](#)

[FN65]. See Maida Cassandra Odom, Einhorn "Looking Forward" to Testifying: Murder Defendant Jumped Bail, Then Fought Extradition, *Boston Globe*, Sept. 22, 2002, at A11; Jacqueline Soteropoulos, Ira Flops with the Jury, *Philadelphia Inquirer*, Oct. 18, 2002, at A1, <http://www.philly.com/mld/inquirer/news/local/4309890.htm> (last visited April 4, 2003).

[FN66]. See Kai I. Rebane, [Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights](#), 19 *Fordham Int'l L.J.* 1636, 1650-51 (1996); Bruce Zagaris, [Avoiding Criminal Liability in the Conduct of International Business](#), 21 *Wm. Mitchell L. Rev.* 749, 827 (1996).

[FN67]. [Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.](#), 310 F.3d 118, 133 (3d Cir. 2002).

[FN68]. See, e.g., [Spier v. Calzaturificio Tecnica, S.P.A.](#), 663 F. Supp. 871 (S.D.N.Y. 1987) (referencing a plethora of experts, at least one of whom seems to be inconsistent in his positions in court and in the law reviews).

[FN69]. See, e.g., [Stonington Partners, 310 F.3d at 132](#). In a Canada- U.S. case, Agribiotech, the Canadian court was asked to recognize a "foreign representative" from the United States bankruptcy court in Nevada. The issue under Canadian law was whether the representative was independent from the debtor. The need for action was pressing, so the Canadian judge, Justice James Farley, telephoned the Nevada judge, with the consent of all Canadian counsel. He read to the Nevada judge the Canadian criteria for independence and was able to confirm then and there that the foreign representative satisfied those criteria, so the Canadian court could proceed with needed actions in Canada. E-mail from Justice James Farley, Ontario Superior Court (Apr. 1, 2003) (on file with author).

[FN70]. [Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.](#), 310 F.3d 118 (3d Cir. 2002). The case was decided after the symposium in Austin.

[FN71]. See supra note 26-28 and accompanying text.

[FN72]. [Stonington Partners, 310 F.3d at 123.](#)

[FN73]. The reason is that priority provisions may be mandatory and inflexible. ALI Principles, supra note 12, sec. II.D.3, at 25-29; Jay L. Westbrook, [Universal Priorities](#), 33 *Tex. Int'l L.J.* 27, 30-31 (1998).

[FN74]. The scope of the court's order is not entirely clear. The court in *Stonington Partners* called it an "anti-argument" injunction, because it permitted Stonington to participate in the Belgian case, but not to further prosecute "the issue of the priority, treatment, and classification of the Dictaphone Merger Claims in Belgium under Belgian law." [Stonington Partners, 310 F.3d at 125](#).

[FN75]. [Stonington Partners, 310 F.3d at 128-29](#). The concurrence agreed on reversal, but thought remand unnecessary because an anti-suit injunction could not be justified on any basis in this case. [Id. at 133-34](#).

[FN76]. [Id. at 133](#).

[FN77]. [Id.](#)

[FN78]. [Id.](#)

[FN79]. It is fair to say the court's intention was a negotiation, because it hoped the lower court could "reach an agreement as to how to proceed...." [Id.](#)

[FN80]. [Remington Rand Corp.--Del. v. Bus. Sys. Inc., 830 F.2d 1260, 1273-74 \(3d Cir. 1987\)](#).

[FN81]. *Felixstowe Dock & Ry. Co. v. U.S. Lines Inc.*, [1989] Q.B. 360, 367 (1987).

[FN82]. ALI Principles, *supra* note 12, sec. IV.C.2, at 90-106.

[FN83]. Another factor of great importance is the increased opportunity for judges to meet their counterparts from other countries. See Report of the Working Group on Insolvency Law on the Work of Its Nineteenth Session, U.N. GAOR, 29th Sess., at 3-4, U.N. Doc. A/CN.9/422 (1996) (concerning the judges' symposium that laid groundwork for Model Law on Cross-Border Insolvency); Berends, *supra* note 19, at 379-80; United Nations Commission on International Trade Law, at <http://www.uncitral.org/en-index.htm> (last visited Mar. 26, 2003). See also Claire L'Heureux-Dubé, The [Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court](#), 34 *Tulsa L.J.* 15, 26 (1998); Slaughter, *supra* note 11, at 1120-23.

[FN84]. See articles cited *supra* note 32.

[FN85]. Model Law, *supra* note 16, arts. 25(2), 26(2), at 308.

[FN86]. ALI Principles, *supra* note 12, sec. IV.B.10, at 79.

[FN87]. Institute's Guidelines for Court-to-Court Communications Gain International Approval, ALI Rep., Fall 2002, at 18.

[FN88]. [In re YMB Magnex Int'l, Inc.](#), 249 B.R. 402 (Bankr. E.D. Pa. 2000).

[FN89]. Remington, 830 F.2d at 1273-74.

[FN90]. [Sussman v. Bank of Israel](#), 990 F.2d 71 (2d Cir. 1993).

[FN91]. In Canadian-U.S. bankruptcies it is now routine to have protocols of the sort discussed above and these protocols very often attach the ALI Guidelines for Communication as part of the agreement. Telephone conversation with Justice James Farley, Ontario Superior Court (March 24, 2003). See supra note 30 and accompanying text. A recent example is an unreported case, *Re Systech Retail Systems Corp.* Bruce Leonard, *The International Scene*, Am. Bankr. Inst. J. (June 2003) (forthcoming) (draft on file with author). The Leonard article mentions that the Guidelines have been translated into French, German, Italian, Korean, Portuguese, and Spanish. The International Insolvency Institute, based in Toronto, has mounted a project to adapt the Guidelines for use in various legal systems around the world.

[FN92]. There are many examples of joint hearings. In 1995, this new tool began to emerge in cases like *Everfresh*, in which a joint telephonic hearing was held between the Ontario Commercial Court and the bankruptcy court in the Southern District of New York. Justice James Farley and Bankruptcy Judge Burton Lifland used the joint hearing to develop a coordinated schedule for the case, which had been filed in both countries. A survey of creditors later found broad support for this technique. There was a similar joint hearing on March 27, 2000, in the bankruptcy of the Lowen group. In addition, there have been video joint hearings called to discuss a proposed sale of United States and Canadian assets. A recent example occurred in late September, 2001. Telephone conversation with Justice James Farley, Ontario Superior Court (March 24, 2003). The author is grateful to Justice James Farley for taking time out of a very busy schedule to provide these examples. Another recent example is *Re Systec*, discussed supra note 91, in which a joint telephonic hearing was conducted on April 28, 2003, by the Ontario court and the bankruptcy court in the Eastern District of North Carolina. Email from Bruce Leonard to author, May 7, 2003 (on file with author).

[FN93]. An exchange of judicial views by telephone was conducted very recently between the bankruptcy court in Manhattan and the High Court in London in the *Senago* case, with counsel allowed to listen to the judges' discussion of possible cooperation as to various matters. Interview with Gabriel Moss, Q.C. and Martin Pascoe, Q.C., May 8, 2003.

[FN94]. ALI Principles, supra note 12, sec. IV.B.10 comment, at 79-80.

[FN95]. [Euromepa S.A. v. R. Esmerian, Inc.](#), 51 F.3d 1095 (2d Cir. 1995).

[FN96]. The court held that no extensive inquiry into French law concerning discovery should be undertaken. The reason was precisely the difficulty of determining what that law might be. "[W]e believe that a district court's inquiry into the discoverability of requested materials should consider only authoritative proof...." [Id. at 1100](#). There could be no more authoritative proof than a statement by the French court concerning the very case at hand.

[FN97]. A letter of request or letter rogatory is used to request action, especially the gathering of evidence, from a foreign court. See [Société éNationale Industrielle Aérospatiale v. United States Dist. Court](#), 482 U.S. 522, 531 (1987); Charles Alan Wright et al., [Federal Practice and Procedure § 2005.1](#) (2d ed. 1994).

[FN98]. See, e.g., [China Trade & Dev. Corp. v. M.V. Choong Yong](#), 837 F.2d 33, 38-39 (2d Cir. 1987) (Bright, J., dissenting).

[FN99]. [Id. at 35-36](#).

[FN100]. See generally Margarita Treviño de Coale, [Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States](#), 17 B.U. Int'l L.J. 79 (1999).

[FN101]. See Born, *supra* note 9, at 476-77.

[FN102]. See, e.g., [Airbus Industrie GIE v. Patel](#), [1999] 1 A.C. 119, 129, 134 (H.L. 1998) (appeal taken from Eng.).

[FN103]. [China Trade & Dev. Corp. v. M.V. Choong Yong](#), 837 F.2d 33, 34- 35 (2d Cir. 1987).

[FN104]. Cf. [Turner v. Grovit](#), [2002] 1 W.L.R. 107, P 23 (H.L. 2001) (appeal taken from Eng.) (Lord Hobhouse criticizing the use of the term "anti- suit" injunction as too pejorative).

[FN105]. [10 F.3d 425 \(7th Cir. 1993\)](#).

[FN106]. ALI Principles, *supra* note 12, sec. IV.B.8, at 73-77. The Brussels Convention generally requires a court to stay or dismiss when the same case has been brought previously in another EU court. In a recent case, however, a party filed in a Spanish court without disclosing the existence of a prior "closely related" lawsuit in England. See [Turner v. Grovit](#), [2000] Q.B. 345 (C.A. 1999). The case presented the classic instance where a rule requiring disclosure of related litigation in other countries, with meaningful sanctions for disobedience, could be very useful.

[\[FN107\]](#). One example is the European Court of Justice. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 169, 298 U.N.T.S. 11, 75. See also [North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., chs. 11, 19, 20, 32 I.L.M. 605 \(1993\)](#) (providing dispute settlement procedures).

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