FOREIGN CREDITOR RIGHTS: RECOGNITION OF FOREIGN BANKRUPTCY ADJUDICATIONS IN THE UNITED STATES AND THE REPUBLIC OF SINGAPORE

MARK GROSS*

As United States businesses increase sales and investments in developing nations such as Singapore, creditor claims are sure to follow. Because of this expected rise in lender claims, it is increasingly important to comprehend the reliability of creditor claim enforcement. This paper is an attempt to respond to the increasing value of trade between Singapore and other nations by providing a review of creditor claim enforcement in Singapore. The following analysis is primarily limited to foreign creditor rights within the bankruptcy context. A discussion of the rights of foreign creditors in the United States is also presented to enhance the reader's understanding of foreign creditor rights in Singapore.

There should be little question that Singapore is worthy of this attention. As one of the "four tigers," Singapore is a major economic force in Asia. The Port of Singapore is one of the world's busiest, handling 102 million freight tons in 1982. Singapore's prosperity derives from its role as a gateway for Southeast Asia, its growing manufacturing and services industries, and its position as a major financial center. The economy's shift to manufacturing, spurred by a government industrialization program in 1961, has continued as rising labor costs in Japan, Korea, and Taiwan have forced those nations' industrialists to look elsewhere for manufacturing facilities. United States

2 The four tigers are the newly industrialized Asian countries: Hong Kong, Korea, Taiwan, and Singapore. The tiger appellation is a reference to these nations' dynamic technological growth, dedicated work force and export-oriented economies. See Fin. Times, Dec. 30, 1987, at 10, col. 1.
3 W. Woon, COMMERCIAL LAW OF SINGAPORE 3 (1986).
4 One hundred eighteen local and international banks operate from Singapore. Id.; see also Fin. Times, May 7, 1987, at 12, col. 1 (key battles in Singapore's fight to become the banking gateway to Asia).
6 Sony to Double Output at Singapore Plant, Fin. Times, Mar. 1, 1988, at 6, col. 1 (Sony plans $42 million expansion of compact disc player assembly on island); Why Aiwa Set Up, Fin. Times, Mar. 2, 1987, at 12, col. 1; Toshiba to Expand in Singapore

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computer and semiconductor companies have joined this trend and have established manufacturing capabilities in Singapore. While none of these manufacturers have chosen to establish a presence in Singapore because of its creditor rights laws, there remains a need for both industrialists and their creditors to understand the treatment of foreign creditors in Singapore.

1. THE GOAL: CREDITOR EQUALITY

A civil action to secure a judgment is a familiar method of creditor claim enforcement in common law countries. As both the United States and Singapore share a common law tradition, both countries allow for this means of enforcement. The principle of international comity includes England and its former and present colonies and territories (including the United States). In contrast, civil law countries are typically continental European nations and their former colonies.


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9 See Wawro, supra note 1.

10 Comity is often defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895). United States courts have stated that such recognition should only be accorded a foreign court's decision if the foreign court is a court of competent jurisdiction and the foreign law applied is not violative of the United States' public policy or the rights of its residents. See Cornfeld v. Investors Overseas Services, 471 F. Supp. 1255, 1259, 1262 (S.D.N.Y. 1979) (United States court deference to Canadian liquidation proceeding due to the public policy embodied in the bankruptcy statute, the public interest in judicial efficiency and international cooperation, and the creditors' interests in the efficient and equitable distribution of the debtor's assets), aff'd, 614 F.2d 1286 (2d Cir. 1979). But see In re Toga Mfg., 28 Bankr. 165, 170 (Bankr. E.D. Mich. 1983) (comity required that claim of United States lien creditor against Canadian debtor be litigated in Michigan separate from concurrent Canadian bankruptcy proceeding because the creditor's secured status would not receive the same or substantially similar treatment under Canadian law as it would under United States law).

While 11 U.S.C. § 304(c) (1988) lists comity and not reciprocity as a guideline in determining whether to grant the relief sought by a foreign bankruptcy representative, some commentators nevertheless argue that inherent in comity is a contingent requirement of equivalent reciprocal privileges for one's subjects in the foreign country.
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generally has led common law countries to either pass statutes or enter into treaties that provide for the recognition of judgments rendered in other countries.\textsuperscript{11} Treaties, however, are fairly rare,\textsuperscript{12} and creditors usually must rely on a local court’s recognition of the comity principle for enforcement of a foreign judgment.

This reliance on another nation for enforcement of one’s judgment may jeopardize the viability of the foreign claim. Admittedly, equal treatment of creditors is the stated basis for insolvency proceedings in virtually every legal system.\textsuperscript{18} Yet, where a debtor has assets and creditors in multiple countries, “however high the profession of the adherence to the principle of equal treatment for all creditors,” local creditors often receive a disproportionate share of local assets.\textsuperscript{14} Even where procedures do not specifically allow local creditors to obtain more than their equal share,\textsuperscript{16} territorial limitations constrain a unitary disposition of the estate and create potential difficulties for the foreign creditor.

Nadelmann, The Bankruptcy Reform Act and Conflict of Laws: Trial and Error, 29 HARV. INT’L L.J. 27, 38-41 (1988) (comity requirement recognizes that participation in the distribution of local assets on an equal basis should be dependent upon the existence of reciprocal rights for United States creditors in any bankruptcy adjudication in the foreign representative’s jurisdiction). While it may be unclear whether United States federal courts require a reciprocity demonstration, a number of states have adopted the Uniform Enforcement of Foreign Judgments Act. The Act provides for the enforcement of foreign adjudications without any showing of reciprocity. E. WARREN & J. WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 70 (1986); cf. Grace, Law of Liquidations: The Recognition and Enforcement of Foreign Liquidation Orders in Canada and Australia - A Critical Comparison, 35 INT’L & COMP. L.Q. 664, 667 (1986). Canada has no reciprocity requirement. The country’s common law jurisdictions will not refuse recognition of a foreign liquidation merely because that jurisdiction does not afford reciprocal recognition to Canadian liquidation orders.

\textsuperscript{11} Leibowitz, Rights of U.S. Creditors to American-Based Assets in Foreign Proceedings, N.Y.L.J., Jan. 15, 1987, at 1, 2, col. 2.

\textsuperscript{12} While there is no treaty generally adhered to by many countries providing for the enforcement of foreign judgments, the United States has both bilateral and regional treaties with some of its largest trading partners. Wawro, supra note 1.

\textsuperscript{13} Bankr. Code, 11 U.S.C. § 1129(b)(1), (2) (1988) (confirmation of plan so long as it does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests); 11 U.S.C. § 726(b) (various classes of unsecured claimants to be paid pro rata in a bankruptcy liquidation); Allan & Drobnig, Secured Credit in Commercial Insolvencies: A Comparative Analysis, 44 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 615-17 (1980) (a significant caveat is that the existence of recognized differences in creditor priority restricts the scope of equality to creditors of equal rank); Huber, Creditor Equality in Transnational Bankruptcies: The United States Position, 19 VAND. J. TRANSNAT’L L. 741, 742 (1986) (the primary goal of liquidation bankruptcy is to distribute the debtor’s assets equally among the debtor’s creditors).

\textsuperscript{14} Nadelmann, Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Claims, 47 AM. BANKR. L.J. 147 (1973).

\textsuperscript{15} Id. at 149.
2. THE PROBLEM: UNIVERSALITY VS. TERRITORIALITY

Insolvency proceedings involving transnational bankruptcies are governed by one of two international choice of law rules: universality or territoriality. Universality is achieved when a single estate consisting of all the debtor's assets, wherever located, is administered by a single trustee appointed by the authorities in the adjudicating country. One bankruptcy court marshals all of the debtor's assets in its jurisdiction and settles all creditor claims against the assets. Such unitary disposition gives international effect to a local bankruptcy adjudication.

The unitary/universalist approach should result in an equitable distribution of the estate. The procedure equalizes creditors' rights by subjecting every claim to one body of law and satisfies those claims from one estate. There should also be greater efficiency with the avoidance of multiple bankruptcy proceedings in several jurisdictions. The disadvantage of this method is that some creditors will be inconvenience by having to assert their claims where the debtor is domiciled even though some creditors may have contracted with the debtor assuming that they have a priority that does not exist under the laws of the adjudicating nation.

Territorial limitations of jurisdiction prevent the unilateral application of the universality doctrine. Given such territorial limitations, some commentators argue that there should be concurrent bankruptcy adjudications in each jurisdiction where the debtor has assets and no extra-territorial recognition should be given to other bankruptcy proceedings. This approach is very convenient for local creditors. However, local creditors might also receive superior treatment in their own nation, thus diminishing creditor equality. With complete territoriality, assets located abroad are not included in the estate. If an adjudication is not given effect outside the domestic jurisdiction, then the country where the assets are located has complete discretion whether to grant any effect to the foreign bankruptcy adjudication.

10 Leibowitz, supra note 11, at 2, col. 4.
11 Huber, supra note 13, at 744.
12 Huber, supra note 11, at 2, col. 4.
14 Leibowitz, supra note 11, at 2, col. 5.
15 Id.
16 Huber, supra note 13, at 744.
17 See Leibowitz, supra note 11, at 2, col. 5.
18 Id.
19 Huber, supra note 13, at 745-46.
tion, creditors are forced to attach non-domestic assets and subject themselves to multiple and possibly conflicting judicial determinations. The result of concurrent bankruptcy proceedings, therefore, is duplicative litigation expenses that reduce the total amount of assets for creditor claim satisfaction while imposing barriers to some foreign creditors who lack the financial capacity to seek redress abroad.

In the context of conflict resolution and the opposing strains of universalism and territorialism, this paper will compare the solutions fashioned by Singapore and the United States. The primary vehicle for foreign creditor protection in a United States adjudication is section 304 of the Bankruptcy Code. This provision, added to the Code by the Bankruptcy Reform Act of 1978, substantially adopts the universalist approach, albeit with some territorial limitations. Singapore law has no statutory equivalent to section 304. Foreign creditor protection, however, does exist. One could describe the Singapore system as an alternative middle course between universalism and territorialism. While Singapore’s system lacks the breadth of foreign creditor protection possessed by its United States counterpart, its adopted common law displays a greater capacity for achieving total, as opposed to merely local, creditor equality than would be possible under a civil law jurisdiction.

3. A Possible Solution: Universalism in United States Bankruptcy Code Section 304

3.1. Prerequisites of Section 304(c)

United States bankruptcy jurisdiction sweeps broadly. It can reach all who have property within the United States while negating any do-

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26 Leibowitz, supra note 11, at 2, col. 5.
27 Huber, supra note 13, at 745.
29 The Bankruptcy Reform Act of 1978 replaced the Bankruptcy Act of 1898 as the governing bankruptcy legislation and enacted provisions addressing situations in which an insolvent debtor has assets in more than one jurisdiction [hereinafter the Code or the Bankruptcy Code, and cited in footnotes as 11 U.S.C.].
mestic effect of a foreign bankruptcy adjudication.\textsuperscript{31} Foreign commentators have consequently criticized the Code for being territorialistic.\textsuperscript{33} Support for such criticism comes from reading the Code's description of who may be a debtor together with its provisions establishing the extent of the debtor's estate.\textsuperscript{83} Debtor status is limited to those residing, domiciled, or having a place of business or property in the United States,\textsuperscript{34} while the debtor's estate comprises "property, wherever located."\textsuperscript{7985} Thus even a non-resident debtor with little property in the United States could seemingly be declared bankrupt and have rights to his entire estate adjudicated in a United States' proceeding as if he were principally located there.\textsuperscript{38}

The extent of such territorial reach is limited, however, by other provisions of the Code granting a foreign trustee the right to bring an involuntary bankruptcy proceeding in the United States,\textsuperscript{87} the right to commence proceedings here ancillary to those already commenced abroad,\textsuperscript{38} and the right to seek dismissal or suspension of any local adjudication if a foreign proceeding is pending.\textsuperscript{39} The discretion to grant such actions lies with the bankruptcy court. Thus, while territorial limitations exist, the Code's newer provisions have the ability to promote international cooperation in bankruptcy proceedings.\textsuperscript{40}

Sections 304\textsuperscript{41} and 306\textsuperscript{42} of the Bankruptcy Code extend to foreign creditors, to a limited degree, treatment equal to that given creditors in domestic cases.\textsuperscript{43} Section 304 grants a foreign trustee standing before any United States court,\textsuperscript{44} which enables a court to turn the debtor's assets or proceeds located in the United States over to the petitioning

\textsuperscript{31} 11 U.S.C. § 109(a); Nadelmann, \textit{supra} note 10, at 33.
\textsuperscript{33} Nadelmann, \textit{supra} note 10, at 33.
\textsuperscript{35} 11 U.S.C. § 109(a) (who may be a debtor); 11 U.S.C. § 541 (property of the debtor's estate).
\textsuperscript{84} 11 U.S.C. § 109(a).
\textsuperscript{85} \textit{Id.} § 541(a).
\textsuperscript{86} \textit{See} Nadelmann, \textit{supra} note 10, at 33.
\textsuperscript{87} 11 U.S.C. § 303(b)(4) (involuntary cases).
\textsuperscript{88} \textit{Id.} § 304(a) (cases ancillary to foreign proceedings).
\textsuperscript{89} \textit{Id.} § 305(a)(2)(A) (abstention).
\textsuperscript{41} 11 U.S.C. § 304.
\textsuperscript{42} \textit{Id.} § 306.
\textsuperscript{43} Huber, \textit{supra} note 13, at 746 (discussing § 304). Section 306 allows a foreign representative to make a limited appearance in bankruptcy court in connection with a petition or request under §§ 303-05. Such an appearance does not submit the foreign representative to the jurisdiction of any court of the United States for any other purpose. 11 U.S.C. § 306 (1988).
\textsuperscript{44} 11 U.S.C. § 304(a) (case ancillary to a foreign proceeding commenced by foreign representative filing petition with bankruptcy court).
foreign representative. Thus, the Code implicitly affirms universal-ity by its potential recognition of any asset located in the United States as part of a foreign estate.

The ancillary proceedings commenced by the foreign representa-tive protect the estate against dismemberment. The Code allows assets in the United States to become part of the foreign bankruptcy estate, with foreign courts determining creditors' rights in domestic collateral. Thus, the foreign creditor benefits not only from a united proceeding but from the possibility that such unitary proceedings may be within his home jurisdiction.

When deciding whether to grant the foreign representative's peti-tion under section 304, a court should render a decision that ensures the "economical and expeditious administration of such estate." Such a principle favors the unitary approach because the segregation of United States assets from a foreign proceeding would probably not be the most efficient or economical means of distributing an estate.

In addition to the goal of efficient asset distribution, courts are guided by the following six principles when determining whether to grant the relief sought by the foreign bankruptcy representative:

1. just treatment of all claim holders;
2. protection of claim holders in the United States against prejudice and inconvenience;
3. prevention of preferential or fraudulent dispositions of property of the estate;
4. distribution of proceeds of such estate substantially in accordance with the order prescribed by the Bankruptcy Code;
5. comity; and
6. the provision of an opportunity for a fresh start for the individual, if appropriate.

Courts use these guidelines when deciding whether to suspend or dis-miss United States proceedings ancillary to foreign litigation, or when deciding whether any other form of relief should be granted to a foreign

45 Id. § 304(b)(2); Leibowitz, supra note 11, at 2, col. 1.
47 Huber, supra note 13, at 746.
48 Id. at 747.
49 11 U.S.C. § 304(c) (preamble).
50 Huber, supra note 13, at 748.
representative. Relief can include an injunction against commencing or continuing proceedings against the debtor or his property, an order to surrender assets to the foreign trustee, or other appropriate relief.

The legislative history of section 304 indicates that the section’s ultimate purpose is to “prevent dismemberment by local creditors of assets located in this country that are involved in a foreign insolvency proceeding.” Arguing that the ultimate goal is the achievement of universality, many commentators have argued that Congress intended the above six requirements to serve as mere guideposts. Nevertheless, a number of courts have rigidly applied the above tests, granting relief only when the foreign representative has complied with all six requirements.

Rigid application of section 304(c) may present significant difficulties as the factors can appear diametrically opposed. For example, the first guideline, providing for the “just treatment of all claim holders” (and the deference to foreign proceedings that it suggests), appears inconsistent with a concurrent attempt to protect “American claim holders against prejudice and inconvenience.” Section 304(c)(1) states that all creditors, regardless of origin, should be treated equally. This goal is made impossible if the main proceeding discriminates against foreign claims. When applying such language, courts have thus declared that “the central examination... in order to comply with section 304(c) is whether the relief petitioners seek will afford equality of distribution of the available assets.”

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52 Trautman, supra note 40, at 50.
55 See Huber, supra note 13, at 748 n.41; Leibowitz, supra note 11, at 2, col. 2; see also Trautman, supra note 40, at 50 (stating that “[t]he guidelines are designed to provide a great deal of flexibility”). But cf. Nadelmann, supra note 10, at 35-36 (judicial discretion is more limited today than under previous versions of the Code due to the existence of these explicit guidelines).
56 See In re Toga Mfg., 28 Bankr. 165, 169 (Bankr. E.D. Mich. 1983) (requiring satisfaction of all six factors while also stating that the court should be permitted to make the appropriate order under all of the circumstances); Huber, supra note 13, at 748-49; see also In re Gee, 53 Bankr. 891, 900-04 (Bankr. S.D.N.Y. 1985).
57 See, Huber, supra note 13, at 749; Trautman, supra note 40, at 52.
58 Trautman, supra note 40, at 53.
59 Huber, supra note 13, at 749.
60 Id. (the purpose for granting relief under § 304 is “to achieve creditor equality internationally”).
61 Id.
62 In re Culmer, 25 Bankr. 621, 628 (Bankr. S.D.N.Y. 1982) (court ordered transfer of Bahamian bank’s assets located in New York to Bahamian liquidators upon ruling that the primary proceeding in the Bahamas would afford fair and regular
While the language of section 304(c)(2) exists for the protection of United States creditors, too rigid an approach will cut against section 304(c)(1)'s universalist goals. Concern regarding section 304(c)(2)'s territorial elements may be alleviated, however, given that disruption of a unitary proceeding should occur only after a judicial finding of prejudice in the rules governing the foreign proceeding. A court would thus be circumspect in using section 304(c)(2) to prevent the turnover of attached assets given the recognition of probable consequent preference for United States creditors.

Concern regarding the territorial nature of section 304(c)(2) should also be partially alleviated by judicial interpretations of prejudice and inconvenience. While section 304(c)(2) requires the protection of United States creditors against prejudice, prejudice will not be found merely because the rules of the foreign jurisdiction do not favor the claimant's creditor class to the same extent as United States law does. For example, finding that the distribution of the debtor's assets under Cayman Islands law would be substantially in accordance with the United States' Bankruptcy Code, the court in Gee stated that it was "not necessary that the [Cayman Islands] Companies Law be a carbon copy of the Bankruptcy Code; rather, it must be of a nature that is not repugnant to the American laws and policies."

Similarly, in McLean the Second Circuit Court of Appeals rejected an appeal of a bankruptcy court decision by merchant-seamen with medical claims against the debtor to compel bank creditors to subject funds obtained in related court proceedings in Singapore to United States jurisdiction. The seamen had sought adjudication in the United States, claiming that they would be both prejudiced and inconvenienced by having to litigate their claim in Singapore. The court instead dismissed their appeal in order to allow the High Court of Singapore the treatment for all creditors and that respect for such proceedings should be exercised unless extremely unjust consequences would flow from its implementation; cf. Cunard S.S. Co. v. Salen Reefer Services, AB, 773 F.2d 452, 458 (2d Cir. 1985); In re Gee, 53 Bankr. 891, 901 (Bankr. S.D.N.Y. 1985).

See id. (citing Klöcker, Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison, 20 Tex. Int'l L.J. 55, 87 (1985) (arguing that § 304(c)(2) should be read restrictively to achieve the goal of creditor equality in transnational bankruptcies)).

Id. note 13, at 751.

Id. (such a denial of relief under § 302(b) would be contrary to the purpose of that section); see also, Culmer, 25 Bankr. at 630.

Prejudice in this context means discrimination against the creditor due to his domicile.


In re McLean Indus., Inc., 857 F.2d 88 (2d Cir. 1988).
opportunity to rule whether the banks or the seamen had priority to funds realized from the sale of assets.\textsuperscript{70}

The court rejected the prejudice claim stating that, depending on how the High Court ruled, it was not clear that the seamen would be worse off under Singapore law.\textsuperscript{71} The issue was apparently not as straightforward as the sailors claimed because the Singapore court had escrowed the specific amount of their claims notwithstanding the general Singapore rule. \textit{McLean} also denied the seamens' inconvenience argument stating that such a position rested on "conjecture as to how the High Court of Singapore will rule."\textsuperscript{72} Reasoning that the Singapore court might well be receptive to alternative arrangements such as accepting deposition testimony,\textsuperscript{73} the United States court concluded that it was by no means certain that the Singapore court would require the seamen to incur the expense of presenting their testimony and the testimony of other witnesses in Singapore.\textsuperscript{74}

As with the sailors in \textit{McLean}, the United States creditors in \textit{Culmer} (Banco Ambrosiano) protested the grant of ancillary relief on a § 304 claim.\textsuperscript{75} The court, however, rejected the creditors' demands, stating that the foreign-based rights should be enforced so long as such enforcement did not approve a "transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."\textsuperscript{76} The court then examined the provisions of Bahamian law, the situs for the foreign proceedings, and found that it essentially conformed with United States bankruptcy law. It concluded that the relief requested would afford equality of distribution of available assets.\textsuperscript{77} Significantly, the court found that the Bahamian bankruptcy gave no preference to the claims of local Bahamian citizens.\textsuperscript{78} Moreover, United States creditors would be adequately protected against prejudice and inconvenience in processing their claims in the Bahamian liquidation proceeding since the debtor's estate distribution in the Bahamas would substantially ac-

\textsuperscript{70} \textit{Id.} at 89.
\textsuperscript{71} \textit{Id.} ("Singapore law generally gives a priority to a first preferred ship mortgagee over the maritime lien arising from a personal injury aboard a ship whereas United States law gives the priority to the 'preferred maritime liens' of the personal injury claimants, 46 U.S.C. App. § 953(b) (1982)").
\textsuperscript{72} \textit{Id.} at 90-91.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{In re Culmer}, 25 Bankr. 621 (Bankr. S.D.N.Y. 1982).
\textsuperscript{76} \textit{Id.} at 629 (citations omitted).
\textsuperscript{77} \textit{Id.} at 629-30. Among the factors that the court found important were the Bahamas Supreme Court supervision of the winding-up proceedings, the periodic reporting requirements of the liquidators, and provisions concerning voidable preferences. \textit{Id.}
\textsuperscript{78} Leibowitz, \textit{supra} note 11, at 2, col. 3. \textit{But see} Trautman, \textit{supra} note 40, at 54 (stating that the ruling was made without considering the foreign rules in detail).
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cord with priorities provided under the United States Bankruptcy Code. Consequently, ancillary relief was appropriate.

It should be noted that the court in In re Lineas Areas de Nicaragua denied the relief sought by the foreign trustee, stating that the participation of a United States creditor in a foreign proceeding was an “alternative to be avoided if possible under section 304(c)(2).” This interpretation, however, has been abandoned as courts and commentators have reasoned that such application would render the code provision ineffective any time a foreign debtor has United States creditors. United States’ courts consistently recognize the interest of foreign courts in liquidating or winding-up the affairs of their own domestic business entities. Some commentators, in fact, argue that so long as the foreign adjudication is held at the debtor’s primary place of business, considerations of fairness should be limited to matters such as the discriminatory treatment of foreign creditors rather than to different priority rules or inconvenience.

A potential solution to the conflict between the dual goals of equality for all creditors and protection for United States creditors from prejudice and inconvenience abroad might be found in a judicial order that makes any asset turnover conditional upon procedures devised for United States creditor protection. In cases where there are numerous

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79 Leibowitz, supra note 11, at 2, col. 4. But cf. In re Toga Mfg., 28 Bankr. 165, 168-69 (Bankr. E.D. Mich. 1983) (territoriality preeminent where court denied injunction request by Canadian trustee on grounds that United States creditor would have a secured claim against the assets under United States law but only a general claim under Canadian law; court found no inconvenience or possible unfairness, but based decision that distribution of proceeds would be substantially in accordance with the order prescribed by the Bankruptcy Code on § 304(c)(4)). For an affirmation of the universalist approach and a rebuttal of In re Toga, see In re Axona Int’l Credit & Commerce, Ltd., 88 Bankr. 597, 611 (Bankr. S.D.N.Y. 1988)(estate’s assets turned over to Hong Kong liquidators for distribution in primary Hong Kong winding-up proceeding. “[T]he limited focus in Toga on the minor substantive differences between Canadian and United States law prevented the Toga court from considering the full scope of Canadian law.”), aff’d, 115 Bankr. 442 (S.D.N.Y. 1990).


81 Id. at 780.

82 Huber, supra note 13, at 751; see also In re Gee, 53 Bankr. 891, 903 (S.D.N.Y. 1985).


84 Trautman, supra note 40, at 56; see also Grace, supra note 10, at 686 (arguing that in the case of multiple liquidation orders, effect should be given to the order of the jurisdiction having the most real and substantial connection with the foreign company).

85 See, e.g., In re Lineas Areas de Nicaragua, S.A., 13 Bankr. 790, 791 (Bankr. S.D. Fla. 1981) (trustee from Nicaragua obtained turnover order from a Florida court on the condition that United States assets be primarily applied to debts owing to United States creditors).
small, possibly noncommercial creditors upon whom participation abroad would be burdensome, or where there are substantial assets in the United States, a court could appoint a local trustee to administer the domestic assets in cooperation with the representative of the principal proceeding in the foreign country. Some commentators suggest that, in balancing these two goals, greater deference to a foreign proceeding should be accorded without undue burden on United States creditors when dual proceedings would result in higher administrative costs; when the foreign law is similar to that of the United States; when the foreign jurisdiction is relatively convenient for United States creditors; or when the majority of creditors and the greater part of the debtor's assets are located abroad. Thus, in balancing the dual goals of creditor equality and protection of the United States creditors, choice-of-law considerations guided by which jurisdiction has the greater interests in the proceeding should perhaps be the prevailing, if unwritten, factor in determining the United States courts' decisions.

3.2. Relief Available Under Section 304(b)

Any attempt to reconcile the promotion of transnational creditor equality with the protection of United States creditors must comport with section 304(b) of the Code. This subsection establishes the powers available to the bankruptcy court in assisting the foreign representative. The scope of relief available under section 304(b), however, is quite broad, as illustrated by the following material.

3.2.1. The Stay

Section 304(b) provides the bankruptcy judge with injunctive powers having the practical effect of an automatic stay. Like the automatic stay, a section 304(b) injunction prevents creditors from further collecting upon their claims outside of the judicial proceedings. Such an injunction prevents unsupervised estate dismemberment and allows for the preserving of assets for economical distribution in accordance

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86 Trautman, supra note 40, at 56-57.
87 Trautman, supra note 40, at 53; see also Honsberger, Conflict of Laws and the Bankruptcy Reform Act of 1978, 30 CASE W. RES. 631, 656 (1980).
88 Trautman, supra note 40, at 54-55.
90 Id.; Huber, supra note 13, at 763.
91 11 U.S.C. § 362. Under United States law, the filing of a bankruptcy petition triggers an automatic stay prohibiting further creditor attempts to collect from the debtor. A § 304(b) injunction has the same effect.
92 Huber, supra note 13, at 763-64.
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with the bankruptcy law.98 Once the ancillary proceeding is complete, the court may confirm the stay should it decide to grant the foreign bankruptcy trustee’s requested relief.94 A confirmed stay will effectively avoid existing attachments, especially if accompanied by an order to turnover assets.95

3.2.2. Turnover of Assets and Other Appropriate Relief

United States bankruptcy law requires an entity in possession of property that the trustee “may use, sell or lease,” to deliver that property to the trustee.96 Such asset turnover makes estate unification possible in the transnational bankruptcy context. Since estate unification allows the primary (foreign) proceeding to control asset distribution,97 turnover “is the ultimate objective of any foreign representative.”98 For that same reason, it is also vigorously opposed by local creditors, particularly lienholders who must surrender asset control and pursue their rights abroad.99 While the question of which party should prevail in such a conflict depends upon the court’s analysis of the factors included in § 304(c),100 the general goal of expeditious and economical estate administration generally favors the unitary estate and thus the foreign representative.101

Section 304(b) provides for the judicial grant of other forms of appropriate relief.102 Such relief may range from allowing a foreign trustee standing to use discovery in uncovering a debtor’s assets in the United States,103 to novel asset disposition schemes.104 Court orders under such a flexible structure may well result in relief not requested by the foreign representative.105 Although not requested by the foreign

94 Huber, supra note 13, at 764.
95 Id. Singapore law provides for an automatic stay upon commencement of insolvency proceedings by unsecured creditors. The stay does not, however, apply to secured creditors who may foreclose, repossess, or seize the debtor’s assets depending upon their contractual and legal rights. See Hicks, Reforming Insolvency Law - Company Rescues, 7 SINGAPORE L. REV. 128 (1986).
97 Huber, supra note 13, at 764.
98 Id.
99 Id.
100 See supra notes 49-88 and accompanying text.
101 Such a conclusion assumes that the unitary estate is more efficient. Supra notes 19, 20 and accompanying text.
103 Angulo v. Kedzep Ltd., 29 Bankr. 417, 419 (Bankr. S.D. Tex. 1983) (the scope of § 304 is “broad and flexible enough to allow for an ancillary suit to be filed for the purpose of discovery”).
104 See supra notes 92, 93 and accompanying text.
105 Id.
representative, such orders should be viewed positively as an attempt to achieve universality while balancing local creditor rights.

3.2.3. Abstention From or Suspension of a Domestic Case

If the foreign proceeding satisfies the goals enumerated in section 304(c), the court can dismiss the domestic action following the foreign representative's filing for ancillary relief. Although some cases will demand concurrent proceedings, a competing domestic suit should be dismissed if the ancillary proceeding can justly and effectively dispose of assets located in the United States and claims of United States creditors. Dismissal of the domestic proceeding is especially warranted where the debtor is a foreign entity, but is not equally justified in the case of a domestic corporation adjudged bankrupt abroad.

3.3. Foreign Trustee Access to United States Courts

To obtain the benefits of section 304, the foreign representative must have access to United States courts. The foreign representative is entitled to such access if the foreign proceeding "fulfill[s] a purpose similar to that of a case under the United States Bankruptcy Code, namely liquidation, reorganization or debt adjustment . . . [and] ha[s] a judicial or administrative nature. . . ." Jurisdiction over the foreign proceeding must also be valid. Thus, while the United States grants itself jurisdiction over anyone with assets in the United States, a United States court will only recognize foreign jurisdiction over the debtor if the debtor's principal place of business or principal assets are situated in that foreign country.

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108 Id. at 905 (competing Chapter 11 petition of defunct Cayman Islands reinsurance company dismissed; court recognized that case filed ancillary to foreign liquidation proceeding as a means to effectively deal with assets and creditors located in the United States was wholly incompatible with Chapter 11).
109 Cunard S.S. Co. v. Salemn Reefer-Serv., AB, 773 F.2d 452, 458-59 (2d Cir. 1985) (creditors of an insolvent corporation may be required to assert their claims against a foreign bankrupt debtor before a duly convened foreign bankruptcy tribunal, recognizing the interests of foreign courts in liquidating or winding up the affairs of their own domestic business entities).
110 Huber, supra note 13, at 767.
111 Id.
112 Id.
113 Id. at 768. While similarly granting itself jurisdiction over the debtor, Singapore will recognize foreign jurisdiction in an even more limited context depending upon asset classification. See infra notes 150-52 and accompanying text.
3.4. Section 304 Summary

The subsequent material concerns Singapore's insolvency laws. While reading the next section, a number of aspects of the United States Code should be kept in mind. First, although containing some territorial limitations for the protection of local creditors, section 304 generally takes a universalist approach to creditor equality. This universalist approach is evidenced by the provisions for foreign trustee assistance without a concomitant reciprocity requirement. Second, as any jurisdictional limitation on the recognition of the foreign trustee undermines creditor equality, United States courts have shown an increasing willingness to accommodate the foreign trustee. Third, the range of relief afforded by section 304 provides a flexible tool for affecting the Code's universalist approach to creditor equality. While the United States' orientation regarding these factors - theoretical framework, jurisdictional limitations on the recognition of foreign adjudications, and the ultimate degree of assistance available to the foreign trustee - differs from its Singapore counterpart, Singapore's approach is not without its own devices for the special protection of the foreign creditor.

4. Foreign Creditor Protection in Singapore: An Alternative Middle Course Between Universality and Territoriality

The Bankruptcy Act for individuals and partnerships and the Companies Act for corporations are the bases for Singapore insolvency adjudications. These two laws establish separate statutory founda-
tions depending upon the debtor's corporate status. Both statutory systems are supplemented by English and other Commonwealth nations' commercial laws.\footnote{119}

Neither Singapore's Bankruptcy Act nor its Companies Act embody the statutory equivalent of section 304 of the United States Bankruptcy Code. See KOH KHENG LIAN, supra note 5, at 8.

The complexity of the country's legal system is illustrated by the following nonexhaustive list of sources of Singapore law.

**English Sources:**
3. Where the issue relates to mercantile law, the Civil Law Act, 1970, ch. 30, § 5(1) (Singapore) provides for the application of English law as it stood at the time the action arose. \textit{Id.}

**Non-English Sources:**
2. Between September 16, 1963 and August 9, 1965, legislation passed by the Malaysian Parliament which was extended to Singapore and legislation passed by the State Legislative Assembly in Singapore. \textit{Id.} (Singapore was politically merged with Malaysia from September 16, 1963 to August 9, 1965).
3. After August 9, 1965, legislation passed by Singapore's Parliament. \textit{Id.}
4. \textit{Stare Decisis.} (Singapore courts adhere to the doctrine of common law precedent. Deciding which prior decisions apply is complicated, however, by constitutional and political changes.) \textit{Id.} at 13.

Singapore continues to receive English commercial law under § 5(1) of the Civil Law Act, which states in pertinent part:

\begin{quote}
With respect to the law of partnerships, corporations, banks, principals and agents, . . . and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England, unless . . . other provision is or shall be made by statute.
\end{quote}

\textit{Id.} at 16 (emphasis added).

Hence, a Singapore court will only apply English statutory law if it can classify the statute as mercantile law. It is not clear, however, what criteria the court will utilize in determining whether or not a statute is "mercantile." \textit{Id.}

Although complicated in practice, a Singapore court in the commercial context will declare itself bound by English case law decided prior to the cut-off date and may call in representatives from England to testify as to the state of the law. A Singapore court will also look for guidance from post cut-off date English, Australian, Malaysian and Indian cases, particularly where Singapore law is similar to the other countries' jurisprudence. See W. WOON, \textit{supra} note 3, at 7; Singam, \textit{Company Insolvency in Singapore, Thailand and Indonesia 1985 INT'L BUS. LAW.} 451; see also Keng, \textit{Legal Crossroads: Towards a Singaporean Jurisprudence}, 8 SINGAPORE L. REV. 1 (1987).
rruptcy Code. In the absence of such a broad codified acceptance of universalism, Singaporean legal protection of the foreign creditor is less than that provided in the United States. Singapore, nevertheless, does provide an alternative course between universalism and territorialism. Singapore's conflict of law provisions, rooted in English common law, provide an opportunity for equal creditor treatment; Singaporean courts temper jurisdictional control over assets located within Singapore by recognizing the interests of foreign creditors and bankruptcy representatives while concurrently seeking cooperation with foreign courts.

4.1. Special Creditor Protection Prior to Insolvency

Prior to bankruptcy adjudication, a foreign creditor in Singapore may find protection in the grant of a *Mareva* injunction against the domestic debtor. The injunction, designed to prevent asset dissipation prior to judgment, was originally designed to protect the domestic creditor against such behavior by a foreign defendant. In recognition, however, of the fluidity of modern banking fund transfers and hence the ability of any domestic defendant to dissipate assets abroad as easily

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120 Note that United States prejudgment remedies include attachment and garnishment. These remedies are controlled by state law. The general attachment proceeding involves a sheriff seizing or levying upon the debtor's property to satisfy the creditor's potential judgment. State law may restrict the attachment proceeding on various grounds, although some states will permit attachment as long as the plaintiff establishes a reasonable probability of success on the merits. See D. Epstein & J. Landers, *Debtors and Creditors* 3-8 (1982). A typical state statute will provide the debtor with an opportunity to be heard, although not necessarily prior to attachment. For the evolving federal due process requirements in the context of prejudgment creditor remedies, see Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (prejudgment garnishment of wages, absent notice and prior hearing violates procedural due process); Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972) (state's prejudgment replevin violative of the Fourteenth Amendment; procedural due process requires notice and hearing before deprivation of property); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607-08 (1975) (prejudgment garnishment on affidavit of plaintiff (without the participation of a judicial officer) containing no provision for notice and an early hearing at which the creditor is required to demonstrate at least probable cause for garnishment, does not satisfy due process). But cf. Mitchell v. W.T. Grant Co., 416 U.S. 600, 616-20 (1974) (issuance of sequestration writ without notice and hearing did not violate procedural due process; ultimate judicial determination adequate where other procedural safeguards exist for debtor).

121 The Singapore High Court has confirmed the validity of the established English *Mareva* injunction. See Wei, *The Mareva Injunction: Some Recent Developments*, 25 Malaya L. Rev. 12, 12 (1983); see also *Mareva Compania Naviera, S.A.* v. Int'l Bulk Carrier, S.A. [1975] 2 Lloyd's Rep. 509 (English case from which the *Mareva* injunction derives its name); English Supreme Court of Judicature (Consolidation) Act, 1925, § 45 (English basis for the *Mareva* injunction); Schedule to the Singapore Courts of Judicature Act, 1964, ¶ 6 (basis in Singapore law for such authority).

122 Guest, *Recent Developments in English Commercial Law*, 7 J. Malaysian & Comp. L. 159, 163 (1980); Wei, supra note 121, at 14.
as his foreign counterpart, courts have extended the injunction to protect the foreign creditor as well.\textsuperscript{123}

The \textit{Mareva} injunction is of practical assistance only to the foreign lender who seeks judicial enforcement of its claim prior to an insolvency declaration. While such an injunction will not improve the plaintiff's priority over other creditors,\textsuperscript{124} it will restrain the defendant from removing any assets from the jurisdiction in which they are located.\textsuperscript{125} The injunction is not, however, a means by which the plaintiff seeking to enforce its claim may bring itself within the jurisdiction of the Singapore court when there is no substantive cause of action within that jurisdiction.\textsuperscript{126} Hence, in contrast to a pre-trial attachment in the United States, a \textit{Mareva} injunction cannot be used to seize assets and then claim jurisdiction.\textsuperscript{127}

\subsection*{4.2. Creditor Rights in Insolvency}

Winding-up is the consequence of insolvency under Singapore corporate law.\textsuperscript{128} Although Singapore's Companies Act provides for jurisdiction over the debtor's property wherever located,\textsuperscript{129} this has never been construed to give its courts or trustees the authority to take control of the debtor's assets located in another country.\textsuperscript{130} Consequently, while jurisdiction may be assumed on the basis of the mere presence of assets,\textsuperscript{131} its practical application is usually limited to Singapore.

The winding-up procedure may be initiated by the court, by the company in a voluntary proceeding initiated by resolution at its general meeting, or by the creditors under court supervision.\textsuperscript{132} A court-initiated proceeding is commenced by the filing of a petition by an inter-

\begin{footnotesize}
\begin{enumerate}
\item[123] Guest, \textit{supra} note 122.
\item[124] \textit{Id.} at 164. For conditions precedent and procedure, see \textit{id.} at 160-61.
\item[125] Wei, \textit{supra} note 121.
\item[126] This conclusion is based upon the English requirements. See Guest, \textit{supra} note 122, at 163.
\item[127] \textit{Id.}
\item[128] Singam, \textit{supra} note 119, at 451. Winding-up is the English term for commercial dissolution. See \textit{id.}
\item[129] Companies Act (Singapore) § 269 ("[T]he liquidator . . . shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.") (emphasis added); see also § 272 (powers of liquidator).
\item[130] Schecter, \textit{supra} note 116, at 5.
\item[131] This is also true regarding English Companies law. See Nadelmann, \textit{supra} note 10, at 47.
\end{enumerate}
\end{footnotesize}
FOREIGN CREDITOR RIGHTS

ested party. The court controls the winding-up under this system, appoints an Official Receiver as provisional liquidator, and possibly appoints a committee of inspection. In contrast, a company-initiated winding-up is controlled by members who appoint the liquidator. There is no meeting of creditors or committee of inspection. Nevertheless, creditor rights in a voluntary winding-up are largely similar to those of creditors in a compulsory winding-up, and bankruptcy rules governing proof and priority of debts apply equally to both situations.

Any creditor, including a contingent or prospective creditor of the company, may initiate the winding-up procedure. The creditors, in petitioning the court, have thirteen grounds upon which to base such a petition. These grounds are extremely broad, ranging from the customary (inability to pay corporate debts) to the expansive (activities prejudicial to the good of Singapore). The wide sweep upon which a creditor may seek a corporate debtor’s dissolution is supplemented by provisions allowing for significant resistance by creditors to rehabilitation proposals and for the facilitation of claim enforcement to the full extent of the collateral.

Regardless of the lending context, secured creditors want to know

183 See Singam, supra note 119, at 451-52. Whether the Official Receiver remains as liquidator depends on the creditors and whether sufficient assets exist to justify the actions of an outside liquidator. Goode, The Secured Creditor and Insolvency Under English Law, 44 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 674, 699 (1980).

184 See Singam, supra note 119, at 452.

185 Goode, supra note 133, at 696.

186 Singam, supra note 119, at 451.

187 Unlike Singapore, United States law no longer contains specific acts of bankruptcy. The United States Bankruptcy Code does not require insolvency as a condition to bankruptcy as evidenced by corporations such as Johns Manville, Inc., and Texaco, Inc., seeking bankruptcy protection although technically solvent. Id.

188 Under § 254 of the Companies Act (Singapore), a company may be wound-up in any of the following circumstances: (1) The company is unable to pay its debts; (2) the directors have conducted the affairs of the company in their own interests rather than in the interest of the shareholders as a whole; (3) the company has held a license under any written law relating to banking, and that license has been revoked or the company has carried on banking business in contravention of the provisions of any written law; (4) the company has carried on multi-level marketing or pyramid selling; (5) default is made in lodging the statutory report or in holding the statutory meeting; (6) the company suspends its business for a whole year; (7) the company is being used for unlawful purposes prejudicial to the peace, welfare or good of Singapore or against national security or the public interest.

189 A secured creditor in Singapore is better able than its United States counterpart to force liquidation in opposition to an attempted corporate reorganization. For the United Kingdom’s approach and, by extension, the likely Singapore view, see Goode, supra note 133, at 704-05; cf. Allan & Hiscock, The Position of Secured Creditors in Commercial Insolvencies - Australia, 44 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 713, 722-25 (1980).
their priority position before funds are advanced. Priority rules in Singapore, however, are often inconsistent in substance or are unsatisfactory. For example, in McLean, the United States court stated that the claimant-seamen probably did not have the priority under Singapore law that they would have had under United States law. The Singapore High Court had, however, set aside funds in escrow for the seamen as if they did have such priority. The priority issue was far from clear. Thus, while confused priority rules pose difficulties for any creditor, they are all the more troublesome for the foreign creditor who lacks an extended appreciation of Singapore procedure.

Creditor protection is also hampered by unenforceable fraudulent preference rules. Singapore law requires liquidators to determine whether any creditor received a fraudulent preference. The difficulty with bringing such an action is that Singapore law requires a showing of a dominant intent to prefer rather than merely the fact that a preference has resulted. The rule is thus difficult to use and is consequently infrequently invoked.

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140 Cf. Goode, supra note 133, at 708-09 (stating English priority rules are confused, lack consistency and fail to recognize a need for continuing priority in the cycle of assets).
141 In re McLean Indus., Inc., 857 F.2d 88 (2d Cir. 1988).
142 Although uncommon, Singapore courts have sought Queen's Counsel (England) testimony to explain English and, by extension, Singapore, priority rules.
143 The problems for foreign as well as domestic creditors do not end with confused priorities rules and unenforceable fraudulent preference rules. Singapore's security laws have long been geared to the needs of consumer transactions rather than industrial finance. Koh Kheng Lian, supra note 5, at 4. Singapore's security laws are consequently often "unrealistic, cumbersome, and inadequate to meet the needs of development financing". Id.; Singam, supra note 119, at 452 (describing the insolvency system as unclear, unfair and in some cases unworkable); Goode, supra note 133, at 705-08 (the rules governing perfection and classification of security interests within the insolvency context are unstructured and capricious).
144 Under Singapore law, a creditor has received a fraudulent preference if the payment to the creditor (1) puts the creditor in a better position than others in the same priority position; (2) is made with the intent to prefer that creditor over others; and (3) is made at a time when the company was insolvent. Bankruptcy Act (Singapore) § 53; Companies Act (Singapore) § 329; see also Stockwell & Fidler, The Effects of the U.K. Insolvency Act, 5 INT'L FIN. L. REV. 9, 12 (Mar. 1986).
145 Singam, supra note 119, at 452; cf. Goode, supra note 133, at 709. English law has long recognized the difficulties in proving intent. Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (1601) (enunciation of various "badges of fraud," the existence of which leads to a presumption of intent to defraud); Section 101, a new provision in the 1986 English Insolvency Act, removes the required showing of dominant intent to prefer. Stockwell & Fidler, supra note 144. It is unknown whether Singapore will similarly amend its laws.
146 Under United States bankruptcy law, a trustee (or debtor-in-possession) may avoid a preference without having to prove an intent by the parties to prefer the creditor. 11 U.S.C. § 547(b) (1988). Instead, the trustee may void any transfer of an interest in the debtor's property to a creditor for an antecedent debt made either while the debtor was insolvent or within 90 days before the filing of the petition (within one year...
4.3. Problems Particular to the Foreign Creditor

4.3.1. Recognition and the Enforcement of Foreign Judgments

In some jurisdictions, local creditors may obtain a disproportionate share of local assets through the more brazen straight priority rule for domestic claims as well as by the less obvious rules denying the effectiveness of foreign bankruptcy adjudications. While the United States does have treaties with some of its largest trading partners, no such treaty exists with Singapore. A United States creditor seeking enforcement of his claim in Singapore must instead rely on the High Court’s recognition of the comity principle for enforcement of a United States judgment. Fortunately for the foreign creditor in Singapore, English-based conflicts systems generally give effect to foreign bankruptcy adjudications, and Singapore itself recognizes this principle in a statute.

Singapore provides for the local enforcement of judgments ren-

if the payment was for the benefit of an insider) (with exceptions including, but not limited to: (1) contemporaneous exchanges; (2) debts incurred in the ordinary course of business in accord with ordinary business terms; and (3) purchase money security interests perfected within ten days of the debtor’s receipt of possession). 11 U.S.C. § 547(b), (c). Similarly, an intent to defraud is presumed under Code provisions addressing constructive fraudulent transfers. 11 U.S.C. § 548(a)(2). Furthermore, under United States state law regulating commercial activity, intent to defraud need not be demonstrated in order to set aside the transaction. UNIF. FRAUDULENT CONVEYANCE ACT § 4, 7A U.L.A. 427, 474 (1985) (the UFCA has been enacted in twenty-six states and territories). Section 4 of the UCFA explicitly provides that “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration” (emphasis added). Id.

146 Nadelmann, supra note 14, at 149; see also Nadelmann, The Lure in “International Bankruptcies” Of Assets Located Abroad, 33 INT’L & COMP L.Q. 431, 431 (1984) (“No international co-operation can develop where the foreign trustee in bankruptcy is denied local assets and no local procedure exists for their equal distribution.”).

147 See supra note 10. 11 U.S.C. § 304(c)(5) includes comity as a consideration for the United States court assessing a foreign representative’s petition. See supra notes 41-53 and accompanying text.

148 Nadelmann, supra note 10, at 46. The opposite is true of civil law jurisdictions, such as Quebec, which do not give effect to foreign bankruptcy adjudications. Id. at 39 n.69.

dered in a foreign country which affords reciprocal treatment to Singapore judgments.\textsuperscript{150} Enforcement under the Act is achieved by court registration upon an application by a judgment creditor.\textsuperscript{151} While the Act does not require strict reciprocity, it does demand substantially equal recognition of Singapore judgments if foreign court judgments are to be recognized in Singapore.\textsuperscript{152}

Singapore courts will recognize the authority of a liquidator appointed under the law of the place of incorporation to act on behalf of the corporation.\textsuperscript{153} The rationale for this rule is that the existence and dissolution of an entity that has been validly created under the law of a foreign country should be governed by that law.\textsuperscript{154} The question that remains, however, is to what degree a court will recognize an adjudication of the bankrupt's estate from a jurisdiction other than that of the company's incorporation.\textsuperscript{155} The reason for granting such recognition is that a foreign company's business activities may be widely dispersed or more substantial elsewhere, or its place of incorporation may be merely fortuitous or an attempt to take advantage of tax legislation or investment incentives.\textsuperscript{156} In these circumstances, the non-domiciliary foreign court has a significant interest in the estate's equitable distribution. Singapore recognizes such an interest, as its own insolvency jurisdiction is not limited to companies incorporated in Singapore.\textsuperscript{157}

\textsuperscript{150} Foreign Judgments Act, \textsuperscript{\textsuperscript{supra}} note 149, § 3.

\textsuperscript{151} Id. § 4.

\textsuperscript{152} Id. § 12; cf. Marasinghe, \textit{The Recognition and Enforcement of Foreign Judgments}, 12 J. MALAYSIAN & COMP. L. 197, 202 (1985) (Malaysia Reciprocal Enforcement of Foreign Judgments Act will recognize judgments of a foreign court only if that nation's courts afford reciprocal treatment towards Malaysian judgments). Singapore's Enforcement of Foreign Judgments Act is virtually identical to its Malayan counterpart. Foreign Judgments Act, \textsuperscript{\textsuperscript{supra}} note 149. This standard is less demanding than the general civil law requirement of reciprocity evidenced by statute rather than by practice. \textit{See} E. \textit{Warren} \& J. \textit{Westbrook}, \textsuperscript{\textsuperscript{supra}} note 10, at 70 (while United States courts are generous in enforcing foreign judgments, "foreign civil law jurisdictions are often reluctant to accept case law decisions that are unsupported by statute").

\textsuperscript{153} \textit{See} Woloniecki, \textit{Co-operation Between National Courts in International Insolvencies: Recent United Kingdom Legislation}, 35 INT'L \& COMP. L.Q. 644, 647 (1986) (citing pre cut-off date cases); Grace, \textsuperscript{\textsuperscript{supra}} note 10, at 666, 683 (stating the law in Canadian common law jurisdictions and in Australia, respectively).

\textsuperscript{154} Woloniecki, \textsuperscript{\textsuperscript{supra}} note 153, at 647.

\textsuperscript{155} Cf. Grace, \textsuperscript{\textsuperscript{supra}} note 10, at 666-67 (reasoning that, since Canadian bankruptcy and winding-up jurisdiction is not solely limited to Canadian domiciled companies, Canadian law recognizes the interest of jurisdictions other than the country of incorporation); Woloniecki, \textsuperscript{\textsuperscript{supra}} note 153, at 656 ("It is not clear whether the English court will recognize the jurisdiction of a foreign court to wind-up a company in any case where the company is not incorporated under the law of that court.").

\textsuperscript{156} Grace, \textsuperscript{\textsuperscript{supra}} note 10, at 666, 683.

\textsuperscript{157} While Singapore may recognize this interest in the context of a jurisdictional grant for Singapore courts to adjudicate the estate of a company incorporated abroad, the following material demonstrates that its recognition of foreign judgments premised
Despite the above reasoning, the Reciprocal Enforcement of Foreign Judgments Act, as well as general common law jurisdictional rules, pose a number of obstacles to recognition of such foreign proceedings.158 In a proceeding *in personam*, such jurisdiction may only be conferred under one of the following five conditions: When the defendant (1) is a subject of the foreign country in which the judgment has been obtained;159 *(2) was a resident of the foreign country when the action commenced, or had its principal place of business there; (3) has selected the forum in which he is afterwards sued or counterclaimed against in the original court; (4) voluntarily appeared otherwise than for the purpose of protecting property seized or threatened with seizure; or (5) contracted to submit itself to the forum in which the judgment was obtained.160 In a proceeding *in rem* where the judgment concerns immovables, exclusive jurisdiction lies with the court of *situs*.161 Thus, if the immovable property was located in Singapore, no recognition would be accorded to a foreign judgment concerning such property, as only the court of *situs* could adjudicate rights in the immovable goods. In the case of movable property, jurisdiction may be based on either (1) the good's *situs*, where a judgment has the effect of vesting property in persons who claim the property right against the whole world, or (2) the domicile of the party whose status the court is called upon to determine, where the judgment orders the movables to be sold as part of the administration of the estate.162 Thus, in a case involving movable property located in Singapore (and the parties are a foreign creditor and a local debtor), the Singapore court would not be bound by common law jurisdictional rules to recognize the foreign court's adjudication.

_Foreign Judgments Act, supra note 149. For a discussion of the general concepts underlying this statute, see Marasinghe, supra note 152, at 198 (jurisdiction in this context is jurisdiction under international law); cf. Grace, supra note 10, at 667 (Canadian common law province court likely to recognize a foreign liquidation order of a jurisdiction (1) "to which the foreign company submitted," (2) "in which the foreign company carried on business," or (3) "with which the foreign company had a real and substantial connection") (footnotes omitted).

159 This would include the situation where the defendant had a place of business in the foreign jurisdiction and the proceedings in the foreign court pertained to a transaction engaged in, by, or through the foreign office. Foreign Judgments Act, supra note 149, § 5(2)(a)(v).

160 Id., § 5(2)(a)(i)-(v). For the English law, see Emanuel v. Symon, [1908] 1 K.B. 302 (C.A.). In any event, an action *in personam*, for our purposes, could only be utilized by judgment creditors since bankruptcy or winding up proceedings are not included under such an action. Foreign Judgments Act, supra note 149, § 2(2)(c), (d).

161 Foreign Judgments Act, supra note 149, § 5(3)(a); see also Marasinghe, supra note 152, at 199; Woloniecki, supra note 153, at 657.

162 Foreign Judgments Act, supra note 149, § 5; see also Marasinghe, supra note 152, at 200.
In addition to the jurisdictional limitation, the foreign judgment must be final and conclusive, and enforceable for a definite sum of money. Even if the foreign creditor has met the above obstacles, the debtor could still raise defenses such as fraud, or public policy to defeat enforcement of the foreign judgment.

4.3.2. The Unitary Estate

Given the above discussion, it would be hazardous for a foreign creditor to depend upon Singapore's Foreign Judgments Act or common law right of enforcement of foreign judgments. Of benefit to foreign creditors in Singapore, however, is the fact that they are not impaired by rules encouraging local creditors to go after assets located abroad. Because Singapore law classifies all assets, wherever located, as part of the bankrupt's estate, there is an assumed obligation to turn over assets attached abroad. The same result should occur in the United States, since its Bankruptcy Code provides that property wherever located belongs to the bankruptcy estate and that any property of the debtor must be turned over to the trustee in bankruptcy.

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164 Foreign Judgments Act, supra note 149, § 3(2)(b) (defining an enforceable judgment as a judgment rendered for the payment of a sum of money). Where the sum payable under the judgment is expressed in a currency other than Singapore's, the judgment shall be registered under Singapore currency at the exchange rate prevailing on the day of the original judgment. Id. § 4(3).

165 Id. § 5(1)(iv), (v). In comparison, a United States court will not enforce a foreign judgment if it believes the foreign procedure failed to treat the defendant with fundamental fairness as to jurisdictional basis or failed to provide a fair opportunity to defend. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440-41 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972).

166 Nadelmann, supra note 146, at 431 (citing English cases decided prior to Singapore cut-off date which are thus part of Singapore common law). An example of such a rule would be one that allowed local creditors to keep what they get, without having to account for it, if they file a claim for the residue in the domestic bankruptcy. Id.

167 Id.; cf. Grace, supra note 10, at 681-82 (Canada requires Canadian-resident creditors receiving payment abroad, after commencement of the concurrent liquidation proceeding, to refund the property so obtained to the Canadian liquidator).


169 11 U.S.C. § 542; see also Nadelmann, supra note 146, at 435. The significant benefit conferred by the unitary estate to the foreign creditor is discussed supra text accompanying notes 48-50.
4.3.3. Assistance to the Foreign Representative

A common method of undermining foreign creditor rights is to refuse to recognize the transfer of the estate from the debtor to the foreign trustee. Singapore law provides for unity of the estate and consequently assists foreign representatives in some, but not all, situations.

Both of Singapore’s insolvency statutes (corporate and individual) vest all of the debtor’s property with the equivalent of a trustee in bankruptcy. Singapore’s Bankruptcy Act clearly states that it is to have effect over both movable and immovable property, whether situated in Singapore or elsewhere. The Act also provides for reciprocal assistance between the courts of Malaysia and Singapore. In practice, Singapore’s reciprocal assistance for both corporate and individual bankruptcy estates extends beyond Malaysia to include England, Australia, New Zealand, and Hong Kong.

An English court may assist a foreign trustee in collecting the bankrupt debtor’s local assets by appointing the trustee as the receiver of the debtor’s property with the power to alienate the property and distribute the proceeds to the creditors. As English law has not limited this assistance to British courts, a Singapore court might not limit such aid to a Malaysian trustee. Thus, if a foreign trustee is able to convince Singapore’s High Court to appoint it receiver with

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170 There is very little recognition abroad of the right of a United States trustee to claim or seize control of the debtor’s property located in another country. Consequently, it is difficult for the United States trustee to collect foreign located assets. See Schechter, United States - Canadian Bankruptcy Litigation: Is the Treaty the Way to Go?, 4 Canadian-Am. L.J. 1, 6 (1988).

171 Companies Act (Singapore) § 269 (custody and vesting of company’s property with the Official Receiver or other liquidator); Bankruptcy Act (Singapore) § 8 (effect of receiving order), §§ 55-61 (realization of property by official assignee).

172 Bankruptcy Act (Singapore) § 2 (definition of “property”); cf. Woloniecki, supra note 153, at 645 (similar language in the English statute).

173 “The High Court . . . shall in all matters of bankruptcy and insolvency act in aid of and be auxiliary to the courts of Malaysia . . . .” Bankruptcy Act (Singapore) § 103; see also id. § 104 (concerning reciprocal recognition of official assignees); cf. Woloniecki, supra note 153, at 645 (English statute providing for reciprocal assistance between England, Scotland, Wales, Ireland and every British court elsewhere).

174 Reciprocity among Commonwealth countries is illustrated in Woloniecki, supra note 153, at 646 (discussing statutory mandate in New Zealand and Australia for cooperation with the bankruptcy courts of the United Kingdom, Canada or any other Commonwealth country).

175 Id.


177 Because In re Kooperman extends recognition of foreign adjudications beyond those enumerated by statute, and because that case was decided prior to the Singapore cut-off date, the decision is part of Singapore’s common law tradition. With no other statutory amendments to the contrary, Singapore would extend recognition of foreign adjudications beyond those enumerated by statute.
power of alienation over those assets, that foreign trustee could possibly gather in all of the bankrupt debtor's assets located in Singapore.

The foreign trustee's position is weakened, however, by rules concerning prior judgment creditors. As previously mentioned, Singapore's anti-fraudulent preference rules are hampered by an intent requirement. Under Singapore law, one must show that the dominant intent behind the transfer was the desire to prefer one creditor over another. This weakness in enforceability created by the intent requirement is complicated by the fact that property sought by a foreign trustee is often subject to judicial process. In such a situation, the foreign trustee's interest is subject to any judicial process in existence prior to the effective date of trusteeship, even if that process is not concluded. A Singapore court will presumably apply this rule regardless of whether the foreign jurisdiction grants the foreign trustee priority over a judgment creditor and regardless of whether the judgment creditor's interest would have been subordinate to the trustee's in a local proceeding. Consequently, this rule may deny the foreign trustee the ability to reach any prior transaction, including a fraudulent one.

Thus, under English and, by extension, Singapore law, a foreign liquidator may seek to assert title to the foreign company's assets directly, by virtue of an order from the foreign court, or, indirectly, by seeking appointment as receiver of the company's assets. A foreign trustee may also bring insolvency proceedings directly in Singapore. A Singapore court has jurisdiction to wind-up any company registered under the Companies Act with a place of business in Singapore, and any unregistered corporation with assets in Singapore if there are persons in Singapore who would benefit from a winding-up order.

178 See supra, text accompanying notes 143-45.
179 This process may be execution, attachment, or garnishment. See Grace, supra note 10, at 672.
181 Since Galbraith, [1910] 79 L.J.K.B 1011, was decided prior to the Singapore cut-off date, the decision is part of Singapore's common law tradition. Cf. Grace, supra note 10, at 672 (discussing the application of the rule in a Canadian adjudication).
182 Grace, supra note 10, at 673.
183 Supra notes 175-77 and accompanying text; see also, Woloniecki, supra note 153, at 648 n.30 (question of fact whether the effect of the foreign court's order is to vest the company's assets in the liquidator) (citing Macaulay v. Guarantee Trust Co. of N.Y., [1927] 55 T.L.R. 99).
185 Companies Act (Singapore) § 253.
4.3.4. Concurrent Insolvency Proceedings

Insolvency proceedings in Singapore are not automatically stayed by the commencement of proceedings elsewhere. A Singapore court will permit a concurrent winding-up proceeding so long as the foreign company has assets in Singapore. Such adjudications are useful, and possibly necessary, where foreign legislation has no extraterritorial effect, or when one desires to attack certain transactions or avoid an unfavorable priority scheme.

4.3.5. Abstention

In addition to the possibility of concurrent proceedings, the court may at any time "adjourn any proceedings before it upon such terms as it thinks fit to impose." Such adjournment could be thwarted, however, by a creditor with superior priority under Singapore law relative to its priority under the laws of the foreign jurisdiction. This exception to the Singapore rule can also be achieved under the United States Bankruptcy Code. A United States court, after notice and a hearing, can dismiss a case at any point if the interests of the debtor and creditor would be better served by such dismissal or suspension. Such dismissal may be thwarted, as under Singapore law, if the rules of the foreign jurisdiction fail to distribute the estate's proceeds substantially in accor-
dance with the order prescribed by the Bankruptcy Code.\textsuperscript{194} The difference between the two systems is that no Singapore court will dismiss or suspend proceedings before it upon a demonstration that a creditor would have superior priority under Singapore law relative to its priority under the laws of the foreign jurisdiction, whereas such a showing is but one of six factors that a United States court weighs in making its decision.\textsuperscript{195}

5. Conclusion

This paper began with a description of opposing conflict of law choices — territoriality versus universality. By combining territorial rules with discretionary provisions, the United States has adopted elements of both approaches. Singapore's statutory framework is philosophically more territorial than the United States' system. English case law, however, has generally supported the principle of cooperation in matters of international insolvency.\textsuperscript{196} As a result, there exists an alternative course between strict territoriality and universality where courts of each country exercise insolvency jurisdiction over assets located within that country but recognize the interests of foreign bankruptcy trustees and seek to cooperate with foreign courts. The possibility of such cooperation exists under Singapore's system, although it is not mandated by Singapore’s statutory scheme.\textsuperscript{197} Thus, a foreign creditor in Singapore might be afforded a significant degree of equality, although not to the same extent as under United States law.

\textsuperscript{194} 11 U.S.C. § 304(c)(4).
\textsuperscript{195} Id.
\textsuperscript{196} Although less territorial than continental systems, Nadelmann, supra note 14, at 149; Schecter, supra note 170, at 6-7, the English system, from which Singapore law is derived, does confer significant autonomy and territorial prerogative in the various jurisdictions of the United Kingdom: England, Scotland, Wales, and North Ireland; see also Woloniecki, supra note 153, at 661 (in concurrent insolvency proceedings, an English court must first satisfy the claims of creditors having priority under English law; only if there are undistributed assets left in England will there be any scope for assisting a foreign liquidator or trustee).
\textsuperscript{197} Such statutory requirement is rare, although Australian and New Zealand provisions confer upon their courts the general discretion to assist bankruptcy courts of any country. Allan & Drobnig, supra note 13, at 646. In contrast, England's stride towards increased universality, as evidenced by § 426 of Insolvency Act 1986, extends total cooperation only to the other jurisdictions of the United Kingdom. Overall, the vast majority of countries lag behind the advances encompassed in § 304 of the United States Bankruptcy Reform Act. Allan & Drobnig, supra note 13, at 637.