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# Reciprocal Comity

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EDWARD J. JANGER\*

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## INTRODUCTION

Let me begin by saying what an honor it is to be here. I am a relative newcomer to the field of cross-border bankruptcy. The thought that I might have something useful to say to this group comes to me as a bit of a surprise. Lord Hoffmann and Professor Westbrook have been thinking about international bankruptcy since before I became a bankruptcy lawyer.<sup>1</sup> Even John Pottow, who is a few minutes younger than I am, has been thinking deep thoughts about international bankruptcy law longer than me.<sup>2</sup> Hopefully, I can offer a fresh perspective without appearing naïve.

First, a bit of context: for several years now, I have been trying to flesh out a mode of thinking about cross-border insolvency that I call “universal proceduralism.”<sup>3</sup> Universal proceduralism has, at its core, a choice-of-law principle that I call “virtual territoriality.”<sup>4</sup> I will explain these terms in greater detail shortly, but the goal is to facilitate a bankruptcy case administered at the debtor’s center of main interest that is procedurally global, but substantively territorial. To my mind, the principal focus of any cross-border bankruptcy architecture is to capture the benefits of coordinated decision-making. I am less concerned than some with equality of distribution across borders, and am therefore prepared to allow nations to determine their own approach to priority. I seek an administratively centralized cross-border regime that maximizes the extent to which decisionmaking can be coordinated, but which minimizes the extent to which local entitlements are disturbed.

Professor Westbrook disagrees with me about the importance of respecting local priorities.<sup>5</sup> He seeks to approximate a regime of “one case under one law,” while I advocate a regime of “one case under many laws.”<sup>6</sup> In Jay’s view, the principle of universalism, articulated by Lord Hoffmann in *McGrath v. Riddell* (“*HIH*”), crystallizes our disagreement.<sup>7</sup> In a recent colloquy about the extent to which local priority schemes should control distributions in cross-border bankruptcy cases, Jay closes with the following lines:

[I]n the realm of distribution rules *HIH* posed squarely the question that divides Professor Janger and me: Should local law control assets? . . .

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1. Lord Hoffmann handled the first major cross border bankruptcy case, *In re Maxwell Comm’n Corp. plc.* [1992] B.C.C. 372. In 1991, Jay Westbrook was practicing as a cross-border bankruptcy attorney and had served as an expert in the United States. I became a practicing attorney in 1990.

2. See John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT’L L. 935 (2005) (contending that international bankruptcy reform mechanisms succeed due to a combination of attributes such as modesty of scope and procedural focus).

3. See Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT’L L. 401 (2010) [hereinafter Janger, *Virtual Territoriality*] (developing a set of choice-of-law principles that would facilitate both the administration of global bankruptcy cases and the acceptance of rescue-based insolvency regimes); Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT’L L. 819 (2007) [hereinafter Janger, *Universal Proceduralism*] (advocating the adoption of a “universal proceduralism” regime). But see Jay Lawrence Westbrook, *A Comment on Universal Proceduralism*, 48 COLUM. J. TRANSNAT’L L. 503 (2010) [hereinafter Westbrook, *A Comment*] (criticizing the universal proceduralism proposal).

4. Janger, *Virtual Territoriality*, *supra* note 3, at 108.

5. Westbrook, *A Comment*, *supra* note 3, at 517.

6. *Id.* at 516–17.

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

[F]or all the reasons discussed above I think that Lord Hoffmann's opinion expresses the correct and future answer to that question. I look forward to a continuing dialogue over the best method to take proper account of localized interest and concerns in the resolution of a global insolvency proceeding.<sup>8</sup>

So here I am, and the dialogue continues. I am not just honored to be here; I am also intimidated. It is one thing to be the loyal opposition. It is another to take on Jay Westbrook and Lord Hoffmann—two of my heroes—at the same time. If I can, I will try to lay out my areas of agreement and disagreement with Lord Hoffmann, and to sort out whether those agreements are the same as my areas of agreement and disagreement with Jay. I think that they are similar, but not identical.

This article will proceed in three steps.

First, I will briefly describe universal proceduralism in contradistinction to the modified universalism advocated by Professor Westbrook, and explain why I advocate it as a normative approach to cross-border bankruptcy.

Second, I will separately parse my differences with Jay and Lord Hoffmann. I will argue that Westbrook is slightly mischaracterizing universal proceduralism—possibly because he is confusing me with Lynn LoPucki; and, that he may also be slightly mischaracterizing Lord Hoffmann, or at least the holding in *HIH*.<sup>9</sup> As a result, the extent of my disagreement with Lord Hoffmann is much narrower than my disagreement with Jay, and may not be a disagreement at all. I will suggest that the appearance of disagreement between me and Lord Hoffmann arises from the fact that in *HIH* he was focusing on comity norms for courts to apply in “ancillary” or “secondary” bankruptcy proceedings, while the focus in my most recent work has been on the comity and choice of law principles that should be followed in the “main” case pending at the debtor's center of the main interest (“COMI”).<sup>10</sup>

Third, I will argue that the principle goal of a cross-border insolvency regime should be oriented toward coordinated governance rather than equality of distribution. In particular, I will argue that Westbrook's view that priority should be determined by the rules of the main jurisdiction is likely to make such coordinated governance more, rather than less, difficult.

In conclusion, I will argue that when one looks at Lord Hoffmann's stance in *HIH*, as well as the manner in which he handled the avoidance actions in *Maxwell*, he manifests (as a practical matter) the sort of bilateral comity that I applaud, and that Professor Westbrook appears to find problematic.

## I. *HIH*, MODIFIED UNIVERSALISM, AND UNIVERSAL PROCEDURALISM

This is a symposium in celebration of the *HIH* case, so it makes sense to begin with a description of that case. In *HIH*, the House of Lords was faced with an appeal from the High Court refusing to remit U.K. assets of an Australian insurance

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8. Westbrook, *A Comment*, *supra* note 3, at 13.

9. McGrath, [2008] UKHL 21, [36] 1 W.L.R. at 863.

10. Janger, *Virtual Territoriality*, *supra* note 3, at 406.

company to Australia for administration in Australia.<sup>11</sup> The question arose because, under U.K. law, insurance claimants share *pari passu* with other unsecured claimants against the estate, while in Australia, insurance claims take priority over the claims of other unsecured creditors.<sup>12</sup> Both lower courts concluded that U.K. courts did not have jurisdiction to deviate from the U.K.'s *pari passu* distributional scheme.<sup>13</sup> They therefore could not remit assets to Australia where the non-insurance claims would be subordinated.<sup>14</sup>

The House of Lords unanimously disagreed, but the Lords differed on rationale.<sup>15</sup> On the one hand, this would appear to be an easy case. Under U.K. law, there is a statutory basis for cooperating with Commonwealth countries, and the Lords found this to be the proper basis for overruling the lower court.<sup>16</sup> All of the Lords agreed that, where Commonwealth countries are involved, a U.K. court has discretion to remit assets even where the foreign priority scheme is not identical to that of the U.K.<sup>17</sup> Lord Justice Hoffmann, however, articulated an alternative basis grounded in the court's inherent power to cooperate with a foreign insolvency proceeding under the principle of modified universalism in bankruptcy cases.<sup>18</sup> By finding this inherent power to cooperate, Lord Hoffmann gives the U.K. courts the power to harmonize their approach to ancillary practice in cases where the main case is pending in a country that is not a member of either the E.U. or the British Commonwealth. It should be noted that the particular need for inherent power in such cases was substantially limited when Great Britain enacted the UNCITRAL Model Law on Cross-Border Insolvency.<sup>19</sup>

In *HIH*, Lord Hoffmann notes a longstanding tradition in British courts of universalism in bankruptcy cases.<sup>20</sup> He describes universalism as the willingness of an ancillary court to cooperate with a case pending at the debtor's center of main interest, and states that universalism may require the ancillary court to accept that the court in the main case might apply a different law of priority than the court in the ancillary jurisdiction.<sup>21</sup>

Hoffmann makes, however, an important distinction between administration and choice of law. He points out that allowing assets to be centrally administered

11. *McGrath*, [2008] UKHL 21, [1] 1 W.L.R. at 855. See also *McMahon v. McGrath (In re HIH Cas. & Gen. Ins. Ltd.)*, [2005] EWHC (Ch) 2125, [155] (Eng.) (describing the High Court's holding regarding the impropriety of remitting HIH's assets to Australian liquidators).

12. *McGrath*, [2008] UKHL 21, [2] 1 W.L.R. at 855.

13. *Id.* at [11].

14. *McMahon*, [2005] EWHC (Ch) 2125, [155].

15. *McGrath*, [2008] UKHL 21, [36], [43], [62–63], [80] 1 W.L.R. at [863–864], [872], [876].

16. *Id.* at [171]; see Insolvency Act, 1986, c. 45, Part XVII, § 426 (U.K.) (addressing the framework for jurisdiction and choice of law issues between the U.K. and “relevant” countries in insolvency proceedings)

17. *McGrath*, [2008] UKHL 21, [21], [24] 1 W.L.R. at [859]. [860].

18. *Id.* at [6–7].

19. See Insolvency Act (addressing the framework for jurisdiction and choice of law issues between the U.K. and “relevant” countries in insolvency proceedings); Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC) [hereinafter EC Regulation] (detailing the procedures for coordinating insolvency proceedings within the European Union); UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT (1997), available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> [hereinafter UNCITRAL Model Law] (model law setting forth procedures for coordinating cross-border insolvency proceedings).

20. *McGrath*, [2008] UKHL 21, [6] 1 W.L.R. at [856].

21. *Id.* at [8], [21], [24].

does not necessarily mean that the main jurisdiction will apply its own law to the dispute.<sup>22</sup> It only means that the main jurisdiction will apply its own choice of law principles to the question.<sup>23</sup> As I read *HIH*, this is as far as Lord Hoffmann goes, and as such, he is agnostic as to what those choice of law principles should be. This last point—the scope of *lex fori concursus*—is where Professor Westbrook and I differ. To what extent does bankruptcy law place a thumb on the choice of law scales in the main jurisdiction?<sup>24</sup> I think the main jurisdiction should respect local priorities. Jay thinks the priorities of the forum court (the “main”) should govern.

Jay’s “modified universalism” thus contemplates a centralizing choice of law rule. In his view, a debtor’s choice of bankruptcy forum should determine the four major choice-of-law questions in a bankruptcy case: control, priority, avoidance and reorganization policy.<sup>25</sup> To be sure, this scheme has much to recommend it. To the extent that enlightened judges, like Lord Hoffmann, are prepared to remit assets to the main case, notwithstanding the possibility of outcome differences, it is possible to administer a unified bankruptcy case and to make (hopefully) coherent decisions about how to administer a debtor’s assets.

I have, however, two concerns about this centralizing approach to choice of law that are relevant to today’s discussion. They are forum shopping (which I have discussed in my previous work) and asymmetric comity, a concept that I will develop here.<sup>26</sup> Both concerns arise because the modified universalist places the entire burden of cooperation on the ancillary court.

#### A. *Forum Shopping*

Concerns about forum shopping and jurisdictional competition arise whenever one adopts a centralizing choice of law rule because it allows one jurisdiction to impose its legal policy choices on people and property located elsewhere. This gives parties the ability to use forum choice strategically. Two classic examples of such centralizing choice of law rules can be found in U.S. law. The first is the choice of

22. *Id.* at [20–21].

23. *Id.*

24. I must note that with regard to positive law in the U.K., Lord Hoffmann assumes at paragraph 20 that a U.K. liquidator would not have the power to deviate from the U.K. distribution scheme: “The principal liquidator would have no power to distribute them according to English law any more than the English liquidator, if he were doing the distribution, would have power to distribute them according to the foreign law.” *Id.* He does not assume that this is the inevitable result, however, and assumes that other legal systems might take a different view: “The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of the law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of laws may point in a different direction.” *Id.* at [28]. As I will discuss later, Lord Hoffmann’s conduct in the *Maxwell* case suggests that he might be in sympathy with this latter view.

25. Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019, 1021 (2007) [hereinafter Westbrook, *Financial Storm*].

26. See generally Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and Race to the Bottom*, 83 IOWA L. REV. 569 (1998) (arguing that the uniform law process is not well suited to addressing distributive questions); Janger, *Virtual Territoriality*, *supra* note 3 (discussing the choice-of-law principles that should govern an universal proceduralism regime); Janger, *Universal Proceduralism*, *supra* note 3 (explaining universal proceduralism).

law rule articulated in the *Marquette National Bank* case.<sup>27</sup> In that case, the Supreme Court held that consumer credit transactions are governed by the law of the jurisdiction where the lender is incorporated.<sup>28</sup> The second is the generally accepted rule that corporations are governed by the corporate law of their jurisdiction of incorporation, regardless of the location of operations, assets, or shareholders.<sup>29</sup> In both instances, one can observe that this centralizing rule has caused certain jurisdictions to compete for incorporations. The literature on the role of Delaware in corporate law is too familiar to need discussion.<sup>30</sup> By the same token, the repeal of usury laws in both Delaware and South Dakota have made them the jurisdiction of choice for credit card banks and their payment processing centers.<sup>31</sup>

These concerns about jurisdictional competition do not arise because the location of the debtor is uncertain, or because it is difficult to determine which jurisdiction's law governs. Quite the contrary: jurisdictional competition arises because the governing law is both easily determined malleable. It takes only the filing of a few documents, the hiring of a registered agent, and the payment of franchise tax to become a Delaware or South Dakota (or Ireland) corporation. Centralizing choice of law rules give states and countries added incentive to attract venue shoppers with either efficient rules, or rules that benefit those with control over a corporation's choice of jurisdiction.

The effects of jurisdictional competition play out in various ways, sometimes leading to more efficient rules, but sometimes, and in predictable ways, leading countries to adopt inefficient rules. Debt and tax haven jurisdictions in the Caribbean are extreme examples, but the phenomenon is pervasive.

## B. Asymmetric Comity

My second concern about modified universalism is a bit less obvious. My contention is that for modified universalism to succeed there must be a strong global norm of bankruptcy comity. This is the norm that both Westbrook and Lord Hoffmann call universalism.<sup>32</sup> As Westbrook describes universalism, it is a one-way street. The courts in an ancillary jurisdiction must, in the interest of orderly

27. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

28. *Id.* at 310–13.

29. 28 U.S.C.A. § 1332(c)(1) (2005).

30. See generally William L. Carey, *Federalism in Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663 (1974); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913 (1982); Lucian Arye Bebchuk, *Federalism and Corporate Law: The Race to Protect Managers and Takeovers*, 99 COLUM. L. REV. 1168 (1999).

31. Citibank's credit card bank is located in South Dakota. MBNA and many others have incorporated their credit card banks in Delaware. See Janger, *Virtual Territoriality*, *supra* note 3, at 426 (discussing the choice-of-law principles that should govern under universal proceduralism). The Citibank website in the fine print on the bottom states that the credit cards are issued by CITIBANK N.A. available at: <http://www.citigroup.com/us/home.htm> (last visited Feb. 9, 2011). MBNA merged with Bank of America in 2005, but its credit card services are still based out of Delaware. <http://money.cnn.com/2005/06/30/news/fortune500/boa/> (last visited April. 8, 2011).

32. McGrath, [2008] UKHL 21, [7] 1 W.L.R. at [856]. See also Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2277 (2000) [hereinafter Westbrook, *Global Solution*] (describing universalism as the administration of multinational insolvencies by a leading court applying a single bankruptcy law).

bankruptcy administration, defer to the home court, even if the creditors would receive substantially different treatment.<sup>33</sup> By contrast, the court in the main jurisdiction need only apply its own law. The effect is that ancillary courts must tolerate outcome differences, but main courts need do nothing to minimize them.

### 1. Catch-22

Modified universalism thus creates a choice of law vicious circle. Its centralizing choice of law rule encourages jurisdictions that wish to attract international bankruptcy case filings to skew their bankruptcy law in favor of those LoPucki would call the “case placers.”<sup>34</sup> It then imposes a norm of cooperation that enhances the effect of this legal differentiation by requiring ancillary courts to cooperate. Modified universalism thus increases the benefits of jurisdictional competition and its stakes. This incentive to compete through differentiation, in turn, places increasing strains on the cross-border bankruptcy architecture, and requires an even greater strengthening of the “universal” norm of cooperation.

This is the “Catch-22”<sup>35</sup> of modified universalism. As Westbrook, and others, have noted, modified universalism works best if bankruptcy regimes are harmonized.<sup>36</sup> However, they do not appear to recognize that modified universalism itself creates an incentive for jurisdictional differentiation and the seeds of its own undoing.

### 2. Encouraging Harmonization Through Decentralization

This is where universal proceduralism seeks to move in a different direction. Instead of seeking unilateral cooperation by courts in of ancillary jurisdictions with the case pending at the debtor’s COMI, universal proceduralism envisions a regime of bilateral comity. Instead of using the debtor’s choice of bankruptcy court to determine which jurisdiction’s priority regime should govern, virtual territoriality would call upon the court in the main case to apply ordinary choice of law principles to determine which jurisdiction’s priority scheme should govern the debt contract. In other words, just as ancillaries are expected to defer to the main, the main would be expected to, at least, match the distribution that the creditor would have received had the assets been distributed in the ancillary jurisdiction. My claim, developed further below, is that universal proceduralism and the reciprocal comity that it entails are more likely to facilitate cross-border coordination and the propagation of the

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33. Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT’L L.J. 27, 28–31 (1998).

34. LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 17 (2005).

35. JOSEPH HELLER, *CATCH-22* (1961).

36. See generally Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT’L L. 499, 517 (1991) (arguing that choice of avoidance law is dependent on the system of international cooperation that a country has chosen); Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT’L L. 1005, 1018 (2007) (discussing how English administrators respected foreign priorities to prevent creditors from opening bankruptcy cases in their home countries in *Re Collins & Aikman SA*, [2006] EWHC (Ch) 1342, [2006] B.C.C. 861).

global norm of cooperation than the centralizing approach envisioned by the modified universalist.

## II. PARSING THE DIFFERENCES

Universalism has two centralizing strands: administrative and substantive.<sup>37</sup> For Westbrook, modified universalism requires centralization of both.<sup>38</sup> The distinction between modified universalism and universal proceduralism is that under modified universalism, a debtor's assets and claims are administered centrally under the bankruptcy law of the debtor's center of main interest. The role of the court in an ancillary case in this scheme is simply to cooperate in that global administration by assisting in the gathering of assets. In universal proceduralism, by contrast, the centralization is administrative, but *not* substantive.<sup>39</sup> Under universal proceduralism, a debtor's assets and claims are administered centrally, but ordinary, non-bankruptcy law principles are used to locate the claims and assets of a debtor and distributional floors are set according to hypothetical local distribution. This is the difference between Westbrook and me. Lord Hoffmann's position is somewhat more difficult to discern. He invokes universalism in his *HIH* opinion, but in fact, Lord Hoffmann may be more agnostic on substantive centralization than Westbrook suggests. As Hoffmann takes pains to point out, all he is deciding is to remit the assets.<sup>40</sup> His decision does not determine or even turn on whether the "main" court would apply its own law, or local law to distribution of the assets.<sup>41</sup> In this section, I will respond to Westbrook's critique of universal proceduralism and virtual territoriality, and also show that it is possible for both of us to praise Lord Hoffmann's decision in *HIH*.

### A. Westbrook's Critique of Universal Proceduralism

Jay criticizes universal proceduralism for determining distributions based on the location of assets. As he puts it: "Universal proceduralism connects local interest to local assets rather than to policies that are inherently local."<sup>42</sup> Universal

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37. Janger, *Virtual Territoriality*, *supra* note 3, at 431–32.

38. See Westbrook, *Financial Storm*, *supra* note 25, at 1021 ("The close integration among bankruptcy rules and policies in each jurisdiction applies to the big four of bankruptcy policy: control, priority, avoidance, and reorganization policy. Under modified universalism, such centralization should be the goal, although not always the result.").

39. Westbrook has argued that the line between substance and procedure is difficult to draw, and Bill Eskridge has pointed out (in comments on an earlier draft) that the *Erie* jurisprudence is replete with frustrating attempts to draw a distinction between substance and procedure. Procedures can effectively expand and contract the scope and value of substantive rights, and this point is particularly important when one talks about insolvency law, which is, at bottom, about the scope and ranking of remedies. There are a number of responses to this point. First, to say that a line is difficult to draw does not mean that it doesn't exist or that the distinction is not a helpful one. But more importantly, the difficulty in drawing the line actually counsels a narrower scope for *lex fori* rather than a broader one. To the extent that procedures are distributive they can lead to forum shopping, and should be subjected to non-bankruptcy specific interest analysis.

40. *McGrath*, [2008] UKHL 21, [28] 1 W.L.R. at [861].

41. *Id.*

42. Westbrook, *A Comment*, *supra* note 3, at 509.

proceduralism, he believes, places the location of assets as a trump over local interests.<sup>43</sup>

### 1. Universal Proceduralism Misconstrued

Westbrook's criticism oversimplifies and subtly mischaracterizes my approach. My choice of law focus is broader than just assets. Jay is right that choice of law rules are the manner in which courts determine which jurisdiction has the greatest interest in regulating a transaction. To that end, there are choice of law rules to determine which jurisdiction's property law governs a particular piece of property, and there are choice of law rules for situating contract claims based on which jurisdiction has the greatest interest in regulating the transaction. Jay takes the view that the filing of a bankruptcy proceeding in a particular venue increases that jurisdiction's interest in the transaction. I disagree. I envision a narrow role for *lex forum concursus*, and a much broader role for *lex situs*. My focus is not limited to assets. Claims must also be "located," based either on which jurisdiction's interests predominate or other applicable choice of law principles. Only once both claims and assets have been situated can one calculate a baseline bankruptcy distribution under universal proceduralism. Once assets and claims have been situated, however, it is not difficult to calculate hypothetical local distributions and to recognize that those distributions serve as distributional floors.

Indeed, universal proceduralism may be even more "territorial" than Jay suggests. I would use interest analysis to determine the location of assets *and* the location of claims. Asset location does not trump local interests—interest analysis should be used to determine asset location. To the extent that choice of law rules locate assets, they should seek to vindicate a number of policies, such as notice, predictability, and local interest in regulation. The same can be said for the choice of law principles determining the location of a claim based in contract or tort. My argument is simply that interest analysis should be relatively unaffected by the fact that the debtor's main bankruptcy case is pending in one jurisdiction or another. Just as location of assets should not be a trump, the debtor's choice of bankruptcy venue should not trump either.

### 2. Locating Assets

Notwithstanding Westbrook's oversimplification of universal proceduralism and virtual territoriality, he is correct that calculating a hypothetical territorial distribution will require the court to determine what assets would be available for distribution in a particular country.<sup>44</sup> It is an attribute of virtual territoriality, and hence universal proceduralism, that assets must be "located" for the purpose of calculating distributions. As such, I must respond to Jay's critique. I do not, however, believe that locating assets is as insurmountable a problem as Westbrook suggests.<sup>45</sup>

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43. *Id.* at 510.

44. Westbrook, *Global Solution*, *supra* note 32, at 2309.

45. See *id.* (comparing the location of assets to a game of musical chairs); Westbrook, *A Comment*, *supra* note 3, at 511.

### 3. Litigation Over Assets

In Westbrook's view, universal proceduralism is not an advance over modified universalism because litigation over COMI will simply be replaced by litigation over the location of assets.<sup>46</sup> Here, I disagree. Many, if not most, assets locate themselves. Tangible assets have a physical location and, in virtually every jurisdiction, asset location governs substantive rules of priority and distribution. Intangible assets and mobile assets are somewhat more problematic, but they are not nearly as difficult to situate as Westbrook suggests. In the U.S., locating intangible assets has not been a problem. Since the adoption of the U.C.C., the location for intangible assets and mobile goods has been the location of the debtor.<sup>47</sup> Westbrook points to the problem of securities held in the indirect holding system and cash in a company's cash management system<sup>48</sup>, but again, there are well established and increasingly uniform choice of law rules that locate these assets for the purposes of distribution.<sup>49</sup> Often, these assets will be deemed located at the debtor's COMI, or at the bank that holds the account. My point here is only that location of assets is not an insurmountable problem, and to the extent that there are difficulties they can be solved by harmonizing choice of law rules.

Here, universal proceduralism presents a significant opportunity for quicker payoff than modified universalism. One place where international and multijurisdictional harmonization efforts have been moving forward fairly quickly is in the area of secured credit. While not all of these instruments are in force, they do reflect a push to articulate uniform choice of law rules for secured transactions. UNCITRAL has promulgated a convention seeking to harmonize the law of accounts receivable financing.<sup>50</sup> UNIDROIT has prepared conventions on mobile goods and securities in the indirect holding system.<sup>51</sup> While the convention on securities in the indirect holding system leaves the question of applicable law to private international law, the Hague Securities Convention locates the securities in the jurisdiction of the securities intermediary who dealt with the customer (the "relevant intermediary").<sup>52</sup> The Convention on Mobile Goods uses a central registry

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46. Westbrook, *A Comment*, *supra* note 3, at 511.

47. U.C.C. § 9-301(1)(2005); *see also* Neil B. Cohen & Edwin E. Smith, *International Secured Transactions and Revised UCC Article 9*, 74 CHI.-KENT L. REV. 1191, 1195 (1999) (explaining that U.C.C. § 9-103, which has since been amended and moved to U.C.C. § 9-301, located intangible assets at the location of the debtor).

48. Westbrook, *Global Solution*, *supra* note 32, at 2312-14.

49. *See, e.g.*, Lynn LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2233-34 (2000) (explaining that intangible assets have well-established locations under international law); Janger, *Virtual Territoriality*, *supra* note 3, at 419 n. 68 (stating that under U.S. law intangible goods are located where the debtor is located).

50. U.N. Convention on the Assignment of Receivables in International Trade, G.A. Res. 56/81, U.N. Doc. A/RES/56/81 (Jan. 31, 2002) [hereinafter UNCITRAL Convention] (U.N. General Assembly calling on member states to consider becoming party to the draft Convention prepared by UNCITRAL).

51. International Institute for the Unification of Private Law [UNIDROIT], *Convention on International Interests in Mobile Equipment* (Nov. 16, 2001), <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf> [hereinafter UNIDROIT Mobile Equipment]; UNIDROIT, *Convention on Substantive Rules for Intermediated Securities* (Oct. 9, 2009), [http://www.unidroit.org/english/conventions/2009intermediated securities/convention.pdf](http://www.unidroit.org/english/conventions/2009intermediated%20securities/convention.pdf) [hereinafter UNIDROIT Intermediated Securities].

52. Hague Conference on Private International Law, *Convention on the Law Applicable to Certain Rights in Respect of Securities Held within an Intermediary* (July 5, 2006), [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=72](http://www.hcch.net/index_en.php?act=conventions.text&cid=72).

to locate mobile goods,<sup>53</sup> while under the Receivables Convention the location of the assignor/debtor is deemed to be the location of the asset.<sup>54</sup> This last is the same rule that is followed in the United States for intangible property and mobile goods. While that rule for receivables is a “centralizing” choice of law rules, it is somewhat difficult to imagine an alternative. Also, in most cases, it is likely to be similar to a COMI rule, and therefore no *more* centralizing than modified universalism.

By contrast, there does not appear to have been any great effort to harmonize the location rule for ordinary tangible assets. One can only speculate as to why, but it may be, as I mentioned before, that tangible assets tend to locate themselves for choice of law purposes. They tend to be governed by the law of the jurisdiction where they are physically located. Indeed, there is one notable exception to this rule, and it may be this exception that goes farthest toward proving the rule.

Under section 9-301 of the Uniform Commercial Code, the law of the jurisdiction where the debtor is located (not the location of the collateral) determines where and how to perfect a security interest.<sup>55</sup> However, here the U.C.C. makes an important distinction.<sup>56</sup> While the law of the jurisdiction where the debtor is located governs which filing system should be searched, the law of the jurisdiction where the collateral is located governs the effect of perfection.<sup>57</sup> In the U.S., the drafters were able to distinguish the interests that dominate with regard to filing (predictability and notice) from the interests relating to priority and other incidents of the secured credit relationship (local control of local assets).

In sum, choice of law rules for locating property seem to be converging in fairly predictable ways. By contrast, the rules for locating a debtor’s COMI under bankruptcy law seem to be diverging rather markedly. In the E.U., the *Eurofoods* case and the cases following it articulate a fairly strong presumption in favor of jurisdiction of registration as the debtor’s COMI.<sup>58</sup> By contrast, in cases like *Bear Stearns*, in the U.S., the courts seem to be looking more closely at where a debtor’s operations and assets are located.<sup>59</sup> Thus, focusing on the location of assets may actually reduce the amount of litigation, rather than increase it by focusing on an area where principles are converging, rather than diverging.

53. UNIDROIT Mobile Equipment, *supra* note 51, art. 16.

54. UNCITRAL Convention, *supra* note 50, art. 30 (priority governed by the “law of the state where the assignor is located”); UNIDROIT Mobile Equipment, *supra* note 51; UNIDROIT Intermediated Securities, *supra* note 51.

55. U.C.C. § 9-301(1) (2005).

56. *Id.* Under the former, pre-2000, Article 9, § 9-103(1) applied only to documents, instruments, and ordinary goods. Under former Article 9, the effect of perfection was determined by the jurisdiction where the last event occurred that was the basis for the assertion that the security interest was either perfected or non-perfected. Under current § 9-301(1), while a debtor is located in a jurisdiction, the effect of perfection is based on the local laws of that jurisdiction. Under § 9-301(2) perfection of collateral is determined by the law of the jurisdiction where the collateral is located. Under § 9-301(3), negotiable documents, goods, instruments, money, or tangible chattel paper, perfection is based on where they are located.

57. *Id.* § 9-301(2).

58. *In re Eurofood IFSC, Ltd.*, [2005] B.C.C. 999, [1] (S.C.) (Ir.); *see also In re Stanford Int’l Bank Ltd.*, [2009] EWHC (Ch) 1441, [4] (Eng.) (upholding the *Eurofood* test).

59. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129–30 (S.D.N.Y. 2007); *In re SPhinX*, 351 B.R. 103, 119–20 (S.D.N.Y. 2006), *aff’d*, 371 B.R. 10 (S.D.N.Y. 2007); *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 639 (E.D. Cal. 2006).

### B. *Different Effects of Contractual Provisions*

A second concern raised by Jay is drawn from the *Lehman/Perpetual* case.<sup>60</sup> There, a derivatives transaction contained, in effect, a “default on bankruptcy” clause that would have flipped the priority between a swap counterparty and a noteholder upon Lehman’s bankruptcy.<sup>61</sup> This would, if enforced, have excluded a significant amount of money from the estate.<sup>62</sup> Under U.S. law, such a clause would likely be unenforceable (assuming that the derivative safe harbor provisions do not apply), while a court in England determined that their cognate, “anti-deprivation” rule would not prevent termination of the derivative contract.<sup>63</sup> Jay argues that the resolution of this dispute has nothing to do with the location of the assets (which, by all accounts, were located in the U.K.).<sup>64</sup>

Here, Jay sees a disagreement where there is none. The location of the assets is not relevant to determining the effect of the contractual provision. For me, the relevant question is the “situs” of the contract. If, under non-bankruptcy choice of law rules, the transaction would be located in the U.K., then the effect of the provision should be determined under U.K. law. If it would be located in the U.S., then U.S. law would govern. The location of the debtor may be relevant to this determination, but only because the debtor is one of the contracting parties, not because the debtor is in bankruptcy. I believe that Jay would agree with me on this.

Where Jay and I differ, I believe, is on the next step: determining which country’s bankruptcy law will be used to determine the effect of bankruptcy on the transaction (and/or the assets). I would use the bankruptcy law of the jurisdiction where the transaction is located. Jay would use the bankruptcy law of the jurisdiction where the debtor is located.

### C. *Asset Stashing*

Finally, Westbrook argues that under universal proceduralism, forum shopping will be replaced with asset stashing.<sup>65</sup> Creditors and debtors will conspire to choose a favorable bankruptcy regime by locating assets in those jurisdictions. Again, this is a problem, but it is not particularly a problem of universal proceduralism. Asset havens exist and, by virtue of their non-cooperation with international bankruptcy regimes, they are a problem that will not be solved by modified universalism. Indeed, to the extent that asset havens also adopt favorable bankruptcy rules, modified universalism enhances rather than reduces the power of haven jurisdictions.

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60. *In re Lehman Bros. Holdings Inc.*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010); *Perpetual Tr. Co. Ltd. v. BNY Corporate Tr. Services Ltd.*, [2009] EWCA (Civ) 1160 (Court of Appeal).

61. *Perpetual*, [2009] EWCA (Civ) 1160, [18–19].

62. *Lehman Bros.*, 422 B.R. at 421.

63. See Westbrook, *A Comment*, *supra* note 3, at 512 (“The English courts upheld the ‘flip’ in priority, but the United States bankruptcy court held that it violated the American rule against making bankruptcy a default condition.”).

64. *Id.* at 512–13.

65. *Id.* at 513.

### III. WESTBROOK'S *HIH* AND HOFFMANN'S *HIH*

Westbrook sees *HIH* as supporting his view of local priorities. I believe, however, that Westbrook is reading more into the *HIH* case than is actually there. Westbrook reads *HIH* as a broad statement in support of modified universalism, and, while Lord Hoffmann certainly states his sympathy for the project, it is not clear that *HIH* deserves the weight placed on it by Jay.

In Jay's view, modified universalism empowers the court at the debtor's center of main interest to impose a norm of unilateral cooperation on courts in ancillary jurisdictions.<sup>66</sup> For Jay, modified universalism is also a choice of law rule for the court at the debtor's COMI that empowers that court to utilize its own insolvency law to resolve issues in the case.<sup>67</sup>

*HIH* does not go this far. The facts of *HIH* required the Court to address the question of ancillary cooperation, and here Lord Hoffmann spoke out strongly and correctly in favor of the need for ancillary courts to cooperate with the court at the debtor's COMI, even if that court might treat creditors differently than the ancillary court.<sup>68</sup> Westbrook reads this to mean that under Hoffmann's modified universalism the priority scheme of the debtor's COMI controls.<sup>69</sup> This, however, is not what Hoffmann says. Indeed, he expressly holds open the question of what law will be applied by the court at the debtor's COMI. Instead, he invokes the principle of *renvoi*.<sup>70</sup> The question of applicable priority scheme is to be determined by the choice of law rule at the COMI:

The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of the law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of laws may point in a different direction.<sup>71</sup>

In short, while Westbrook and Hoffmann clearly agree on the principle of cooperation by ancillary courts, this is only half the picture. The *HIH* opinion says nothing about what choice of law principles ought to be applied by the court at the debtor's COMI.

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66. Westbrook, *A Comment*, *supra* note 3, at 516.

67. Westbrook, *Global Solution*, *supra* note 32, at 2301–02.

68. *McGrath*, [2008] UKHL 21, [20–21] 1 W.L.R. at [859–60].

69. Westbrook, *A Comment*, *supra* note 3, at 517.

70. *McGrath*, [2008] UKHL 21, [28] 1 W.L.R. at [861].

71. *Id.*

#### IV. *HIH* AND THE PUZZLE OF *MAXWELL*: LORD HOFFMANN AND VIRTUAL TERRITORIALITY

In evaluating Lord Hoffmann's legacy, I think Jay and I must both come to grips with the fact that Hoffmann is a more Delphic oracle than either of us might like to admit. In *HIH*, Westbrook sees a strong advocate of cooperation by an ancillary jurisdiction with the court at the debtor's COMI. I do too, and I join Jay in my admiration. But to what extent should the court at the debtor's COMI take into account the interests of the creditors who dealt with the debtor in the ancillary jurisdiction? This question is not presented in *HIH*, and Hoffmann makes clear that it is a question to be determined by the choice of law rules of the principal jurisdiction. As to the content of that choice of law rule, Hoffmann leaves somewhat conflicting hints.

The first hint in Lord Hoffmann's jurisprudence is *Maxwell*.<sup>72</sup> There, Lord Hoffmann was presented with precisely the question held open in *HIH*. The story is well known. In *Maxwell*, the debtor's COMI was the U.K., but it had substantial assets and operations in the United States.<sup>73</sup> Plenary cases were opened in both the U.S. and the U.K.<sup>74</sup> On the eve of bankruptcy, a number of U.K. bank creditors of the U.K. entities received payments that would have been viewed as preferential under U.S. law, but not U.K. law.<sup>75</sup> The U.K. administrators went to the U.S. and sought to bring avoidance actions under U.S. law.<sup>76</sup> The preference defendants took advantage of Lord Hoffmann's vacation, and sought an injunction against the U.S. lawsuits.<sup>77</sup> When Lord Hoffmann returned from vacation, he vacated the injunction, saying that it was up to the U.S. bankruptcy court to determine whether U.S. law would reach the challenged transactions.<sup>78</sup>

As it happened, Judge Brozman, applying U.S. choice of law principles, concluded that the payments by an English company to an English creditor in England were not governed by U.S. preference law.<sup>79</sup> Westbrook, while happy with the outcome, was not happy with Judge Brozman's reasoning. He believed that the question of which country's avoidance law governed was determined by the fact that the U.K. was the debtor's center of main interests.<sup>80</sup> Judge Brozman, by contrast, examined the transactions themselves and determined that their center of gravity was in England.<sup>81</sup> Westbrook would have applied *lex forum concursus*. Brozman, while she reached the same result, applied *lex situs*. Lord Hoffmann was silent.

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72. *In re Maxwell Commc'n Corp.*, 170 B.R. 800 (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).

73. *Id.* at 801-02; *see also* Westbrook, *Global Solution*, *supra* note 32, at 2321 (explaining that the parent's headquarters and most of its financing were in London, but most of its assets were in the United States).

74. *Maxwell*, 170 B.R. at 801.

75. *Id.*

76. *Id.*

77. *In re Maxwell Commc'n Corp.*, 186 B.R. 807, 815 n.3 (S.D.N.Y. 1995).

78. *Id.* at 805.

79. *Id.* at 818.

80. Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2540-41 (1996).

81. *Maxwell*, 170 B.R. at 818.

*Maxwell* gives us a partial answer to the question posed by *HIH*. It shows Lord Hoffmann exercising, what I will call in the next section, bilateral comity. Even as the judge in the principal case he was willing to defer to the U.S. court and allow it to make its own decision about choice of law. We never learn, however, whether, if he had been the judge in the Southern District of New York, he would have applied Westbrook's or Brozman's approach to the question. Moreover, we do not know whether he would follow the same approach with regard to priorities as he did with regard to avoidance.

Lord Hoffmann has not, however, been entirely silent on the subject of the law to be applied in the principal case. A hint to the answer to this question comes from dicta in another case:

There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.<sup>82</sup>

A facile reading of this dictum would suggest that Hoffmann has thrown in his lot with the substantive strand of modified universalism. The obvious way to accomplish this is to adopt Westbrook's approach and to apply the bankruptcy scheme of the COMI without deviation.

But, where unsecured creditors are concerned, modified universalism is not the only route to *pari passu* distribution. Even in a territorial regime, the fact that a claim is situated in a particular jurisdiction for choice of law purposes does not mean that claims may only be asserted against the debtor in that jurisdiction. Judgments of one country can be enforced in other jurisdictions, and foreign creditors may generally assert claims against a debtor in the debtor's home country. Therefore, the "equality of distribution" that Hoffmann seeks can even be achieved in a territorial regime.<sup>83</sup> It can therefore be accomplished using a virtual territorial approach as well. A "virtually territorial" regime that assumes cross-filing will achieve the same result—eliminating the relevance of asset location to relative distribution—while at the same time giving effect to local priorities. While this is not necessarily the approach I would use, I have not ruled it out either.<sup>84</sup>

Once one recognizes that modified universalism and universal proceduralism do not differ where distributions to unsecured creditors are concerned, it becomes clear where the differences lie. They appear with regard to (1) property rules, and (2)

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82. *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 A.C. 508, [16].

83. See *McGrath*, [2008] UKHL 21, [30], [31] 1 W.L.R. [861], [862] (recommending that English courts should remit assets to Australia, the country of principal liquidation, to ensure that all the company's assets are distributed to its creditors under a single system of distribution).

84. The approach that Jay advocates is one he refers to as "universal priority." Under his approach, all countries should make their priorities available to both nationals and non-nationals. Westbrook, *Universal Priorities*, *supra* note 33, at 43. For example, a French employee of a US corporation, living and working in France, would be able to take advantage of both the French priority for employees and the US priority. I, by contrast, favor a rule of "virtual priority," where the French worker would likely be able to claim the French priority against assets located in France, but would not qualify for the US priority. This is the same distribution as would result from the opening of a territorial case in France. Both approaches, however, satisfy the constraint articulated by Lord Hoffmann in *Cambridge Gas*, [2007] 1 A.C. 508, [16].

unsecured priority creditors. I would use non-bankruptcy choice of law rules to situate those rights. Westbrook would situate both at the debtor's COMI. Again, neither *HIH*, *Cambridge Gas*, nor *Maxwell* indicate Lord Hoffmann's view on this.

## V. RECIPROCAL COMITY

One thing that makes the discussion at today's conference so rewarding is that everybody here is seeking to formulate a cross-border bankruptcy regime that accomplishes two goals to the extent possible. Those goals are coordinated, efficient decisionmaking about how to maximize the value of a debtor's assets, and fairness in distributing that value. Jay takes the view that coordinated decisionmaking can best be accomplished by administering a universal bankruptcy case from the debtor's COMI, and that fairness can best be achieved through equality of distribution, utilizing the single priority scheme used in the debtor's COMI.<sup>85</sup>

While I agree that administrative centralization is necessary, I take a different approach to "fairness." Instead of viewing fairness as equality of distribution, one can view fairness as consistency with creditor expectations. These creditor expectations may very well include reliance on a particular national approach to the rights of secured creditors, or on a particular national approach to the rights of employees or tort claimants.

The modified universalist would respond with the argument that creditor expectations are not defeated when they know that they are lending to a debtor who is located in a particular jurisdiction. This will often be the case, but not always. Westbrook accuses me of making asset location control the choice of law interest analysis.<sup>86</sup> I have rejected that characterization of virtual territoriality. However, it seems to me that Westbrook is taking a similarly monolithic approach to choice of law by declaring that once a debtor files for bankruptcy, the location of the debtor is the choice of law trump.

My concern with this "location of the debtor" trump is that it puts tremendous pressure on the courts in the ancillary jurisdiction to retain assets and therefore makes it more difficult for the ancillary court to cooperate with the principal case.<sup>87</sup> The more national distribution schemes differ, the greater the incentive creditors have to fight over whether assets will be administered locally or centrally. The more creditors have an incentive to play jurisdictional distribution games, the harder it will

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85. Westbrook, *Global Solution*, *supra* note 32, at 2309.

86. Westbrook, *A Comment*, *supra* note 3, at 503.

87. Westbrook has long acknowledged this point, saying, "[t]hus, applying Mexican priority law to the Mexican assets has the very considerable benefit of replicating the results that would have followed from the usual situation, the opening of a Mexican proceeding. The result is to make modified territorialism substantially more predictable and, perhaps more important, to lower the incentives for multiple local proceedings. If Mexican creditors, especially priority creditors, know that their claims will be given Mexican-law treatment in the U.S. courts to the extent of the Mexican assets, they have much less motive to institute Mexican proceedings. In that case, there is the prospect of much lower costs and greater speed than where each relevant jurisdiction opens a proceeding." Westbrook, *Universal Priorities*, *supra* note 33, at 41–42. These advantages are, in his view, outweighed by the pernicious effects of *situs* rules. It should be noted, however, that here he is describing a slightly different system from the one I advocate. He is describing what he calls universal cross filing with cross-priority. I am advocating something that would be described in Westbrook's terminology as universal cross filing with territorial priority. In Westbrook's view, priority claims should be given national treatment in all countries. In my view, priority claims ought only be given priority if the situs of the transaction would extend local law to cover the claim.

be for the principal court to make coordinated decisions about how to maximize asset value. By contrast, a regime that encourages the court at the debtor's COMI to disapply its own national priority scheme in favor of the scheme that would have applied if assets and claims had been administered territorially will encourage coordination without undercutting "fairness" in any a priori way.

The case that divides Jay and me, and which may divide Lord Hoffmann and me, is the case of *Collins & Aikman*.<sup>88</sup> In that case, the U.K. administrators of the European subsidiaries of a U.S. auto parts supplier recognized that German and Spanish creditors would receive a greater distribution if they opened a territorial secondary case in their own country.<sup>89</sup> The administrators also recognized that the opening of secondary cases early in the case would likely frustrate a going concern sale of the company's European assets.<sup>90</sup> To preserve the value that could be captured in a going concern sale, the administrators promised the German and Spanish creditors that they would receive the same distribution they would have had local secondaries been opened.<sup>91</sup> The problem arose when it came time to deliver on that promise. Under Article 4 of the E.U. Regulation on Insolvency, the bankruptcy law of the jurisdiction of opening would apply in the main case.<sup>92</sup> As such, the U.K. was to apply its own bankruptcy law to the case. The Court in *Collins & Aikman* managed, through a fair amount of common law maneuvering, to reach the conclusion that it was possible to allow a deviation from the U.K. priority scheme in this particular case.<sup>93</sup> In other words, the court in the principal case deferred to the priority scheme that would have been applied in a secondary case, had one been opened. In my view, this is the normatively superior approach. For Westbrook, this violates his all or nothing view that COMI choice determines bankruptcy priority.

*HIH* would allow and encourage courts in ancillary jurisdictions to defer to the distribution scheme in the main case. *Collins & Aikman* and virtual territoriality suggest that such deference should be reciprocal and symmetric, rather than unilateral. Such reciprocal deference has much to recommend it. First, it will ease the recognition of the orders of the principal court. Or, to put it differently, it will reduce the pushback that occurs when an ancillary court has to swallow hard before remitting assets because local creditors will not be treated as well in the central administration. Second, it will streamline proceedings to the extent that the need for involved proceedings in secondary jurisdictions is alleviated. The ancillary courts will be more likely to remit assets if they can be assured that the principal court will seek to mirror their distributional scheme. Third, it will reduce opportunities and incentives for the parties themselves to forum shop, or game the territorial distributions.

Virtual territoriality might be seen as adopting a distinctly British approach to choice of law. A unique aspect of British choice of law jurisprudence has long been the principle of "double renvoi." England, alone in the world, takes the view that

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88. *In re Collins & Aikman Europe SA*, [2006] EWHC (Ch) 1343, [8–10], [20], [41] (Eng.); see also Moss, *supra* note 36, at 1006–08 (noting the two different approaches used in Europe).

89. *Id.* at [8].

90. *Id.*

91. *Id.*

92. Council Regulation 1346/2000, Insolvency Proceedings, art. 4, 2000 O.J. (L 160) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:HTML>

93. *Collins & Aikman*, [2006] EWHC 1343, [36].

where U.K. choice of law rules point abroad, they point to both the substantive law and choice of law rules of the foreign jurisdiction.<sup>94</sup> Where those foreign choice of law rules point back to the U.K., the U.K. choice of law rules would again point abroad.<sup>95</sup> If both jurisdictions have a “double renvoi” rule, the result may be an infinite loop.<sup>96</sup> Luckily for the world, however, the U.K. is the only jurisdiction to use “double renvoi.”<sup>97</sup> Most other jurisdictions use only “single renvoi.”<sup>98</sup> Therefore, if the foreign court points back to the forum court, the remission is accepted. The result of the U.K. using double renvoi and the rest of the world using single renvoi is to minimize the extent to which one can forum shop one’s way into U.K. substantive law. One way of thinking about virtual territoriality might be to think of it as a rule using double renvoi in the main, and single renvoi in the ancillary. This approach will minimize the extent to which central administration of assets will disturb territorial approaches to property and/or priority.

All of these aspects of virtual territoriality suggest that such a regime will help divorce the debate over how to maximize the value of the assets from fights about how those assets should be distributed, and will reduce the stakes of any fight over where decisionmaking power should be located. Since COMI choice will have little or no effect on the distributional scheme, there will be considerably less incentive to fight over it.

## VI. CONCLUSION

In sum, while Jay and I have much to discuss about whether the location of claims and assets or the location of the debtor should determine the applicable priority scheme, and Lord Hoffmann may choose to weigh in on one side or the other, I can applaud and appreciate Lord Hoffmann’s decisions in both *HIH* and *Maxwell* because each, in their own way, embody the sort of reciprocal comity that lies at the heart of the universal proceduralist vision. Indeed, these two cases taken together demonstrate that cooperation in cross-border bankruptcy cases cannot be a one way street. The ancillaries must cooperate with the main, but the main must take into account the interests and concerns of the ancillary jurisdictions in crafting a distribution. This is just one of the many lessons taught by Lord Hoffmann.

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94. Ernest Otto Schreiber, *The Doctrine of Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523, 525–26 (1917); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 979–80 (1991); Elizabeth B. Crawford, *The Uses of Putativity and Negativity in the Conflict of Laws*, 54 INT’L & COMP. L. Q. 829, 842 (2005).

95. Crawford, *supra* note 94, at 842.

96. *Id.*

97. See Crawford, *supra* note 94, at 842 (describing the English approach to renvoi, and the resulting loop.)

98. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 89–90 (2006).