The Banking Law Journal

VOLUME 100 NUMBER 1 JANUARY 1983

Established 1889

WG&L

THE BANKING LAW JOURNAL (USPS 041-240) is published ten times a year, monthly by Warren, Gorham & Lamont, except that it is issued bimonthly during June-July and November-December. Subscriptions. $68.00 a year in the United States, United States possessions and Canada. $93.00 a year elsewhere. Editorial offices: 1633 Broadway, New York, N.Y. 10019. Business offices: 210 South St., Boston, Mass. 02111. Material for publication is welcomed, either articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. While the utmost care will be given material submitted, we cannot accept responsibility for unsolicited manuscripts. Second-class postage paid at Boston, Mass. POSTMASTER: Send address changes to Warren, Gorham & Lamont, 210 South Street, Boston, Massachusetts 02111.

FOREIGN INSOLVENCY PROCEEDINGS AND THE AMERICAN BANK: THE SECTION 304 PROBLEM

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*Recent federal and state court decisions create serious problems for U.S. creditors of foreign entities subject to the jurisdiction of U.S. courts. These cases indicate that if these foreign entities file for bankruptcy—not in the United States, but abroad—our courts may decide, on the grounds of international comity, to enjoin, stay or dismiss creditors' actions against that entity in the United States, even though the foreign entity has vast holdings in the United States and has not filed an ancillary U.S. bankruptcy proceeding in accordance with Section 304 of the Bankruptcy Act.** The author examines the recent decisions on this issue and analyzes the arguments on both sides of the issue.*

The recent extraordinary influx of foreign investment and capital in the United States has occasioned a new judicial review of U.S. public policy, and international comity, respecting recognition of foreign bankruptcy, reorganization, or receivership proceedings. The issue is: Assuming a domestic court has personal and subject matter jurisdiction over a foreign entity, and that entity has not filed for protection under any state or federal statute for reorganization or liquidation, will our courts, nevertheless, enjoin, stay, or dismiss actions against that entity on the grounds of international comity because of a foreign "bankruptcy" proceeding?

Irrespective of the various state court liquidation or assignment proceedings, under the Bankruptcy Reform Act of 1978 (the Bankruptcy Act), a foreign corporation that is "in bankruptcy" abroad

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** Last term, the United States Supreme Court in a plurality decision held that the broad grant of jurisdiction to the bankruptcy courts contained in 11 U.S.C. § 241(a) is unconstitutional. The opinion said that the decision would not be given retroactive effect and judgment was stayed until October 4, 1982 to give Congress time to make changes in the Bankruptcy Act. The U.S. Supreme Court has extended the power of bankruptcy judges to hear collateral issues until December 24, 1982. Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co., ___ U.S. ___, 102 S. Ct. 2858, 50 U.S.L.W. 4892 (decided June 28, 1982). This article has not attempted to analyze Section 304 in view of this recent Supreme Court decision or any possible resultant legislative changes respecting the Bankruptcy Reform Act of 1978.

could also file ancillary, voluntary bankruptcy proceedings here.[1] Under such circumstances, domestic suits against that entity would probably be stayed or discontinued.[2]

However, despite vast holdings in the United States, and clear personal and subject matter jurisdiction in the United States over the foreign company, the company may choose *not* to file an ancillary bankruptcy proceeding here. Would the entity then risk having its assets attached and encumbered in the United States? Could domestic creditors find comfort in the presence here of millions of dollars in assets and no "automatic" stay?

A number of recent federal and state court decisions indicate that our courts would nevertheless probably stay, dismiss, or suspend any actions against that entity as a matter of U.S. public policy pursuant to the doctrine of international comity so long as certain basic principles of "fairness" are clearly evident in the foreign bankruptcy (i.e., the courts will recognize the foreign proceeding).

Accordingly, a careful analysis of these recent decisions and the arguments for and against recognition should be made in order to protect a lender's interests.

The arguments for and against recognition may be easily summarized: On the one hand, one could argue that recognition is required as a matter of international comity and to promote judicial economy—that is, avoid having two tribunals review the same claim.

On the other hand, one could argue that recognition would be improper because (1) the foreign court does not have jurisdiction over assets located in the United States, (2) the federal policy expressed in Section 304 of the Bankruptcy Act indicates that such relief should be considered only if a case ancillary to the foreign reorganization proceedings is commenced pursuant to Section 304, and (3) the foreign entity's specific consent to jurisdiction in the United States should be enforced and should override any general concerns for comity and public policy.

Recent Litigation

An examination of several recent cases respecting the French billion-dollar conglomerate, Societe Fonciere et Financiere Agache-

[1] 11 U.S.C. § 304.
[2] *Id.*

Willot (Agache-Willot) reveals that the arguments for non-recognition may be rejected, and the argument for international comity and judicial economy will prevail, so long as the domestic court can be assured that fair treatment will be accorded the parties in the foreign proceeding.

After Agache-Willot became the subject of French bankruptcy reorganization proceedings, it moved to dismiss, stay, or suspend a number of federal and state actions filed against it in New York—even though Agache-Willot never filed for ancillary bankruptcy proceedings in the United States and never filed any state liquidation proceedings.

In most cases against Agache-Willot, for the purposes of Agache-Willot's application to stay, dismiss, or suspend the action, most judges assumed there was personal and subject matter jurisdiction and even assumed the validity of documents produced by various plaintiffs which appeared to be express consents to jurisdiction in New York by Agache-Willot.

Nevertheless, all federal and state court judges who were faced with Agache-Willot's motion to stay, dismiss, or suspend an action against Agache-Willot uniformly held in favor of Agache-Willot. On the basis of international comity, the courts recognized the French bankruptcy proceeding and stayed the action against Agache-Willot.

Kenner Products Company v. Societe Fonciere et Financiere Agache-Willot[3] is typical of the rationale advanced by the courts in granting the relief Agache-Willot requested. In *Kenner*, the U.S. District Court for the Southern District of New York held that international comity, as well as U.S. public policy, requires "suspension of the case pending a termination of bankruptcy proceedings in France against Agache-Willot even though, prior to the bankruptcy, Agache-Willot had purportedly expressly consented to jurisdiction in the United States.

Plaintiff had sued Agache-Willot on a guarantee of trade credit for merchandise sold to a third party. Plaintiff opposed Agache-Willot's motion to suspend the case on the basis of a choice of venue clause contained in the guarantee at issue which required Agache-

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[3] 532 F. Supp. 478 (S.D.N.Y. 1982).

Willot to submit to jurisdiction in the New York State courts and the U.S. District Court for the Southern District of New York. The guaranty clause provided, in pertinent part:

> This guaranty is governed by the laws of the State of New York, and the undersigned hereby submits, solely for the purposes of this Guaranty, to the jurisdiction of the State Courts of the State of New York and the Federal Courts located in the Southern District of New York, and agrees that any action in respect of this Guaranty may be brought against the undersigned in these Courts.[4]

While the court held that such clauses are prima facie valid, the court went on to hold that they are unenforceable if such enforcement would be "unreasonable." Moreover, in determining what would be reasonable, the court specifically held that public policy is a key factor in making such a determination and the recognition of a foreign bankruptcy proceeding in that case (i.e., French bankruptcy proceedings) is required by international comity and American public policy.

Subsequent to the district court's decision, Kenner made a motion for an order to take an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). The district court certified the matter for immediate interlocutory appeal finding that its decision involved "a controlling question of law as to which there is substantial ground for difference of opinion." However, the Court of Appeals for the Second Circuit ultimately denied Kenner's motion for leave to take the interlocutory appeal under 28 U.S.C. § 1292(b).

Respecting the district court's suspending the suit against Agache-Willot, similar results were reached in five other suits in state and federal court against Agache-Willot relying on the same rationale.[5]

The Arguments for Recognition

The Doctrine of International Comity

The basic argument for recognition of a foreign bankruptcy proceeding is international comity. Permitting the continuance of suits

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[4] *Id.* at 479 n. 1.

[5] Olivetti Corp. of America v. Societe Fonciere et Financiere Agache-Willot and Korvettes, Inc., Index No. 16898/81 (Sup. Ct., N.Y. County, Oct. 29, 1981); R.G. Barry Corp. v. Korvettes, Inc. & Societe Fonciere et Financiere Agache-Willot, Index No. 1877/81 (Sup. Ct., N.Y. County);

in the United States could have grave implications to the conduct of international business and, in particular, the relationship between the foreign bankruptcy courts and the American courts and, by implication, the foreign country and the United States. That is, if an American judge fails to recognize a foreign bankruptcy, the decision on "nonrecognition" could be cited for the proposition that neither country need recognize the other's bankruptcy reorganization proceedings and judgments, thus hurting an American company which files for reorganization in the United States but has assets or interests in that foreign country.

The starting point for any discussion of the doctrine of international comity is *Hilton v. Guyot,* [6] where the U.S. Supreme Court defined comity 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 other persons who are under the protection of its laws." [7]

Comity is to be accorded a decision of a foreign court as long as that court is a court of competent jurisdiction and as long as the laws and public policy of the foreign state and the rights of its residents are not violated.[8]

The doctrine of international comity is applicable in both state[9] and federal courts. Indeed, in *Kenner,*[10] the Southern District applying New York law in that diversity action, summarized the state law as narrowly construing any exceptions to the international comity doctrine. Specifically, the Southern District noted:

> New York courts, whose law we apply in this diversity action, narrowly construe exceptions to the comity doctrine, stating that "foreign-based rights should be enforced unless the judicial enforcement of such a [right] would

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Jeanetics, Inc. v. Korvettes, Inc. & Societe Fonciere et Financiere Agache-Willot, Index No. 12882/81 (Sup. Ct., Queens County, Feb. 11, 1982); Polygram Distribution Inc. v. Societe Fonciere et Financiere Agache-Willot, 81 Civ. No. 3727 (ADS) (S.D.N.Y.). In one case, Warner-Elektra-Atlantic Corp. v. Societe Fonciere et Financiere Agache-Willot, 81 Civ. 60002 (TPG) (S.D.N.Y.), Agache-Willot's motion to dismiss or stay that action is still pending.

[6] 159 U.S. 113 (1895).

[7] *Id.* at 164.

[8] Hilton v. Guyot, note 6 *supra,* at 202-203; Clarkson Co. v. Shaheen, 544 F.2d 624, 629 (2d Cir. 1976).

[9] See Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 279, 317 N.Y.S.2d 315, 322 (1970); International Fire Arms Co. v. Kingston Trust Co., 6 N.Y.2d 406, 411, 189 N.Y.S.2d 911, 913-914 (1959).

[10] Kenner Prods. Co. v. Societe Fonciere et Financiere Agache-Willot, note 3 *supra.*

be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 13, 254 N.Y.S.2d 527, 529 (1924). New York thus generally recognizes the statutory title of an alien trustee in bankruptcy as long as the foreign court had jurisdiction over the bankrupt and the foreign proceeding has not resulted in the violation of public policy. *Clarkson Co. v. Shaheen, supra*, 544 F.2d at 629 (citing *Cole v. Cunningham*, 133 U.S. 107, 122-123 (1890)).[11]

Under this standard, presumably, recognition would be required unless the transaction is "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." Faced with that standard, it is hard to see how any foreign bankruptcy proceeding in a civilized nation would ever *not* form the basis for a motion to dismiss or stay.

Stated conversely, would the plaintiff have the burden of showing wickedness? Viciousness? Shocking to the prevailing moral sense? Presumably, in the *Agache-Willot* cases discussed above, procedural safeguards of the French judicial system were deemed adequate to protect the interests of American creditors.

The Foreign Country Judgment Act

In addition to the above case law, where the foreign bankruptcy court has issued a judgment (e.g., a judgment staying any actions or any payments by the bankrupt), recognition of the foreign bankruptcy judgment may be required under the Uniform Recognition of Foreign Country Money Judgment's Act (the Foreign Country Judgment Act)—which has been adopted in a number of states.

Indeed, it appears that in at least one of the *Agache-Willot* cases, the judge treated a "judgment of adjudication" as if it were similar to a money judgment which should be recognized here.

Specifically, in *Jeanetics*,[12] the court noted the following: "On September 25, 1981, a judgment was entered by the French court adjudicating Agache-Willot a bankrupt, ordering the suspension of all payments by Agache-Willot to its creditors, and directing bankruptcy reorganization proceedings."

After citing the above "judgment," the court then held: "Under the principles of international comity and section 304(b) of the Act,

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[11] *Id.* at 479.

[12] Jeanetics, Inc. v. Korvettes, Inc. & Societe Fonciere et Financiere Agache-Willot, note 5 *supra*.

this court should give full respect and effect to the judgments and laws of other nations. (*Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270; *Loucks v. Standard Oil Co.*, 224 N.Y. 99; *SNR Holdings, Inc. v. Ataka America, Inc.*, 54 A.D.2d 406.)"

By implication, the other cases in favor of *Agache-Willot,* although not discussing the "judgment" issue, could support the proposition that the bankruptcy "judgment" in *Agache-Willot* was a judgment required to be recognized under the Foreign Country Judgment Act. Thus, some inquiry into the purpose of this Act is in order.

As adopted in New York State, the Foreign Country Judgment Act is Article 53 to New York's Civil Practice Law and Rules. In recommending Article 53 to the New York Legislature, the Judicial Conference in its January 2, 1970 Report to the Legislature stated: "*The basic purpose of this proposal is to procure for New York judgments in foreign countries much better reciprocal treatment in the hands of foreign courts than they now receive* (emphasis in the original).

The Committee further explained that the Act was *particularly* aimed at countries of civil law background who "do not accept *decisional* law as proof that New York treats foreign judgments liberally, but they rather require *statutory* proof of this fact." Moreover, the Judicial Conference acknowledged that New York's decisional law with respect to the recognition of foreign country judgments is more liberal than the standard prescribed in Article 53. However, under a savings clause, Section 5307, New York is free to exceed the Act in liberality.

Theoretically, a foreign "bankruptcy" order or judgment could meet all of the criteria for recognition required by the Act in that it would fall within the definition of a "foreign country judgment" and there may be no grounds for "nonrecognition" as set forth in that act.

Pursuant to Section 5301(b) of the Foreign Country Judgment Act as adopted in New York, the term "foreign country judgment" means "any judgment of a foreign state granting or *denying recovery* of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters (emphasis added)."

While Section 105(p) of the New York Civil Practice Law and Rules defines a New York money judgment as "a judgment, or any

part thereof, for a sum of money or directing the payment of a sum of money," Section 5301(b) defines, a *foreign country* money judgment broader to include "granting or *denying* recovery of a sum of money" (emphasis supplied). Consequently, a foreign money judgment which denies recovery of money is entitled to be relied upon by a defendant as a defense to an action commenced in a New York court.[13]

It could be, with that thought in mind, that the court in *Jeanetics*, felt it was appropriate to refer specifically to the judgment in the French bankruptcy proceedings adjudicating Agache-Willot a bankrupt, and ordering the suspension of all payments by Agache-Willot to its creditors.

Under the Act, the "foreign country judgment" need not be an affirmative judgment requiring the payment of money but could be a judgment "denying recovery." Thus, the Agache-Willot "judgment" ordering the cessation of payments to Agache-Willot's creditors could have been a "foreign country judgment."

If, prima facie, such a bankruptcy judgment is a "foreign country judgment," then under what circumstances, pursuant to the Foreign Country Judgment Act, could a court refuse to recognize the judgment?

Section 5304 of the Foreign Country Judgment Act as adopted in New York spells out the only grounds on which such a foreign country judgment would not be recognized. Those grounds are as follows:

> (a) No recognition. A foreign country judgment is not conclusive if:
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> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> 2. the foreign court did not have personal jurisdiction over the defendant.
>
> (b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:
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> 1. the foreign court did not have jurisdiction over the subject matter;
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> 2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

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[13] See 6 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 5301.03.

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based is repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in a foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

The Bankruptcy Act

An argument for recognition can also be made under the statutory scheme set forth in the Bankruptcy Act which expressly implements "[p]rinciples of international comity and respect for the judgments and laws of other nations" into its provisions.[14]

Section 362 of the Bankruptcy Act which became effective on October 1, 1979, and Rule 401(a) of the former Bankruptcy Act (applicable to cases under the new Act until new rules are presented to the Supreme Court, 11 U.S.C. § 405(d)) together provide for an automatic stay of the continuation or commencement of any action against a debtor. The cited statute and rule are intended to insure that the assets of a bankrupt are efficiently and fairly distributed among its creditors in a single proceeding instead of erratically being dissipated in a number of different lawsuits.[15]

Section 304(b) of the Bankruptcy Act provides that a bankruptcy court here may "enjoin the commencement or continuation of any action against a debtor with respect to property involved in [a foreign bankruptcy, liquidation or reorganization] proceeding [or any action against] such property."

Section 305(a) enables the bankruptcy court to dismiss an action or suspend all proceedings against a debtor if "there is pending a foreign [bankruptcy, liquidation or reorganization] proceeding." The bankruptcy court in determining whether or not to dismiss or

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[14] See H. Rep. No. 595, 95th Cong., 2d Sess. 325, reprinted in [1978] U.S. Code Cong. & Ad. News 5787, 5963, 6281.

[15] David v. Hooker, Ltd., 560 F.2d 412, 417 (9th Cir. 1977); Mar-Tex Realization Corp. v. Wolfson, 145 F.2d 360, 362 (2d Cir. 1944).

stay an action, "shall be guided by what will best assure an economical and expeditious administration of [a bankrupt's] estate, consistent with [*inter alia*] . . . comity.[16]

In considering whether or not Section 304 of the Bankruptcy Act could be relied upon as authority to stay an action, it is noteworthy that in the *Jeanetics* case, a court specifically premised its holding on both "the principles of international comity *and* Section 304(b) [of the Bankruptcy Act]." [17]

It may also be argued that the Act's provisions were intended to be consistent with the existing judicial guidelines, as expressed in *Cornfeld v. Investors Overseas Services, Ltd.*,[18] to the effect that "American public policy would be furthered, for the firm policy of American courts is the staying of actions against a corporation which is the subject of a bankruptcy proceeding in another jurisdiction." [19]

Having considered the above arguments for recognition, should domestic creditors simply "give up" trying to sue a foreign entity once it has filed for bankruptcy abroad? Could any contrary argument be made out of Section 304 of the Bankruptcy Act? Consider the following possible arguments.

The Arguments Against Recognition

Aside from the "venue" argument, which was specifically rejected by the courts in the *Agache-Willot* cases, there are two further arguments which could be made for "nonrecognition," namely, (1) the foreign bankruptcy court does not have jurisdiction over assets located in the United States, and (2) the federal policy expressed in Section 304 of the Bankruptcy Act indicates that such relief should be considered only if a case ancillary to Agache-Willot's foreign reorganization proceeding is commenced pursuant to such section.

The Foreign Court Lacks Jurisdiction Over Assets in the United States

It is a basic principle of international law that a nation has exclusive jurisdiction to enforce within its territory a rule of law validly

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[16] 11 U.S.C. § 304(c)(5).

[17] Jeanetics, Inc. v. Korvettes, Inc. & Societe Fonciere et Financiere Agache-Willot, note 5 *supra*, at 2.

[18] 471 F. Supp. 1255 (S.D.N.Y.), *aff'd* 614 F.2d 1286 (2d Cir. 1979).

[19] *Id.* at 1259.

prescribed by it.[20] This principle has been recognized by American courts as a limitation upon the jurisdiction vested in them by the Bankruptcy Act:

> By providing, under section 311 of the Bankruptcy Act (11 U.S.C. § 711) [repealed 1978] that the court in which a bankruptcy petition is filed shall have "exclusive jurisdiction of the debtor and his property, wherever located," Congress indicated that a Chapter XI court would have the power to send its process beyond the boundaries of its district to protect its jurisdiction. But no authority has construed that power to extend beyond the territorial limits of the United States to control the action of parties and tribunals without some independent basis of jurisdiction over them.

The question of "extraterritoriality" was presented in *In re Israel-British Bank (London) Limited (IBB)*.[21] In *IBB*, an English bank voluntarily filed a debtor's petition for the winding up of its affairs pursuant to Section 222 of the English Companies Act.[22] Shortly thereafter it filed a voluntary petition in bankruptcy in the Southern District of New York. The court held that the bank was eligible to commence its proceeding pursuant to Section 2a(1) of the Bankruptcy Act, 11 U.S.C. § 11(a)(1) (repealed 1978). In so holding, the court rejected the argument that the English court had jurisdiction over assets of the debtor which had a situs in the United States:

> We take the bankruptcy proceeding here to be in aid of the order of the High Court had the assets in the United States become available to the creditors on the basis of equality. If the assets involved had been situated in the United Kingdom, the High Court could have restrained and set aside the attachment and judgment as having been made within six months of the petition for winding up. *But the High Court, of course, has no extraterritorial jurisdiction beyond the United Kingdom.*[23]

Citing authorities such as *IBB*, creditors in the United States could commence in rem actions against the property of the foreign bankrupt and then argue that the "in rem" actions can only be adjudicated here and cannot be stayed because the foreign proceedings have no "extraterritorial" effect.

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[20] *Restatement (Second) Foreign Relations Law* § 20, Comment b (1965); *In re* Fotochrome, Inc., 377 F. Supp. 26, 28-29 (E.D.N.Y. 1974), *aff'd* 517 F.2d 512 (2d Cir. 1975).

[21] 536 F.2d 509 (2d Cir. 1976).

[22] 11 & 12 Geo. 6, c. 38 (1948).

[23] *In re* Israel-British Bank (London) Ltd., note 21 *supra*, at 511 (citations omitted) (emphasis supplied).

Such an argument could tie in to an argument under Section 304 of the Bankruptcy Act.

The Foreign Entity Must File an Ancillary Bankruptcy Proceeding in the United States

Section 304 of the Bankruptcy Act provides that a case ancillary to a foreign proceeding may be commenced in the country by the filing with the bankruptcy court of a petition by a foreign representative. If the petition is not timely controverted, the bankruptcy court is authorized to fashion appropriate relief including, inter alia, the issuance of a stay of any act to commence or continue a judicial proceeding to create or enforce a lien against the property of the foreign debtor. Thus, it could be argued that implicit in this section is the concept that a foreign reorganization court is without jurisdiction over property located in the United States.[24] As stated in the legislative history of Section 304, the purpose of an ancillary proceeding is "to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief."[25]

Initially, it must be noted that Section 304 provides that a stay of proceedings against the debtor is discretionary, unlike the automatic stay granted to domestic debtors. The legislative history states that "[s]ubsection (c) requires the Court to consider several factors in determining what relief, *if any*, to grant." As set forth in Section 304(c), comity is only one of six factors by which the court is to be guided in determining whether to grant relief under the section. The other factors include just treatment of all creditors and protection of American creditors against prejudice and inconvenience in the processing of their claim in the foreign proceeding.

Thus, it could be argued that Section 304(c) of the Bankruptcy Act provides the exclusive means of resolving conflicting claims to jurisdiction over property located here. Subsection (c) provides as follows:

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[24] See *id.* at 511.

[25] S. Rep. No. 989, 95th Cong., 2d Sess. 35 (1978); see also H. Rep. No. 959, 95th Cong., 1st Sess. 324-325 (1977).

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent disposition of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Thus, it could be argued that a stay is available only in conjunction with the prosecution of an ancillary bankruptcy proceeding pursuant to Section 304 of the Bankruptcy Act.[26]

Now, assuming a creditor has his foot in the American courtroom's door, how could he argue against the foreign country money judgment argument?

That is, where a specific order suspending payments or suits has been issued by the foreign bankruptcy court, in addition to the above arguments, counsel will have to carve out an exception to the Uniform Foreign Country Judgment Act to establish that the foreign court order should not be recognized.

Here, it may be argued that the foreign court order is not a "foreign country judgment" within the meaning of that Act. For example, Section 5301(b) of the Civil Practice Law and Rules defines the scope of the phrase "foreign country judgment" as follows: " 'Foreign country judgment' in this article means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."

Additionally, Section 5302 of the Civil Practice Law and Rules provides that Article 53 applies only to foreign country judgments which are "final, conclusive and enforceable where rendered." The foreign court order is not a judgment granting or denying the recov-

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[26] Cf. *In re* Comstat Consulting Servs., Ltd., 10 B.R. 134 (S.D. Fla. 1981).

ery of a sum of money, nor is it a final judgment. Rather, it commences proceedings for the reorganization of and orders suspension of all payments. Thus, arguably, it is the equivalent under foreign law of an "order for relief" which marks the commencement of bankruptcy or reorganization proceedings in this country under the Bankruptcy Code.[27]

Conclusion

It appears as if, irrespective of a foreign entity's specific consent to jurisdiction in the United States, suits against that entity may be stayed or dismissed on the grounds of international comity, American public policy, and/or pursuant to the Uniform Recognition of Foreign Country Judgment Act.

The judicial decisions in this area may accrue on a country-by-country basis (e.g., recognition of Canadian proceedings (*Cornfeld*); recognition of French proceedings (*Agache-Willot*), etc.).

While such decisions may contribute to judicial economy, avoid possible inconsistent findings and a duplication of judicial effort, it is equally clear that American creditors must face the prospect that our courts may be closed to their claims.

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[27] See 11 U.S.C. § 102(6); H. Rep. No. 959, note 25 *supra*, at 316; S. Rep. No. 989, note 25 *supra*, at 28.