January, 1990

Re Sefel Geophysical LTD: A Canadian Approach to Some Specific Problems in the Adjudication of International Insolvencies

Sarah K. Harding

Sarah K. Harding*

Re Sefel Geophysical Ltd.: A Canadian Approach to Some Specific Problems in the Adjudication of International Insolvencies

I. *Introduction*

The collapse of a corporation which carries on business and trade on an international scale, usually spawns an array of legal disputes and presents some unique problems in the conflict of laws.[1] Unlike a private commercial contractual dispute in which the competing interests are primarily, although rarely solely, defined by the parties themselves, bankruptcy law is infused with an element of public policy. The fact that bankruptcy legislation sets out a scheme of priorities and explicitly provides the basis upon which a court may assume jurisdiciton to declare a bankruptcy and appoint a trustee, is in itself an indication of the public nature of bankruptcy law. In some jurisdictions there may even be serious penal and social consequences attached to a bankruptcy.

A common element of all bankruptcy law is that it aims to facilitate the distribution of the property of the debtor amongst a group of creditors in the most expeditious, economical and equitable manner. Most juridictions also seek to achieve this through the appointment of a single administrator. Beyond this, however, bankruptcy laws may diverge in many ways. To begin with, there is the question as to whether the debtor's estate should be adjudicated in one jurisdiction, or should any jurisdiction have the right to adjudicate the bankruptcy concurrently? If a state adopts the former approach, that is, it attempts to facilitate a single system, upon what basis should a court be permitted to assume jurisdiction? Although domicile of the debtor is a common basis upon which jurisdiction may be maintained, the mere presence of assets may also be sufficient in accordance with the policies of some nations.

---

*Sarah K. Harding, LL.B. 1989, Dalhousie University, presently of the BCL programme at Oxford University. This paper originated as an independent research project under the guidance of Professor Vaughan Black.

1. The collapse of International Overseas, Ltd. (I.O.S.) provides an excellent example of the complexity and volume of litigation which may arise in conjunction with the insolvency of a multinational enterprise. Some of the reported disputes which arose out of the I.O.S. collapse are: *Schiowitz v. I.O.S. Ltd.* (1971), 24 DLR (3d) 102 (N.B.S.C.); *Re. I.O.S. Ltd.* (1973), 43 DLR (3d) 684 (N.B.S.C.A.D.); *Cornfeld v. I.O.S. Ltd.* (1979), 34 CBR (NS) 124 (U.S.D.C. - Southern District of N.Y.).

The treatment of property may also differ quite substantially. In some jurisdictions a declaration of bankruptcy may result in the transfer of all of the assets, wherever they are located, to the trustee or it may merely result in the transfer of those assets within the territory. If the former universal approach is adopted, as opposed to the latter territorial approach, it is necessary to further determine what effect adjudication will have on property outside of the jurisdiction and conversely, what effect will a foreign adjudication have on property within the jurisdiction.

Thus it is apparent that the policies inherent in the bankruptcy laws of any one particular nation will provide an additional concern for a court in adjudicating an international insolvency. In resolving disputes, it must keep in mind the interests of the debtor, the creditors, and the interests of other nations in which assets or creditors are located. The legislation in any jurisdiction, and Canada is no exception, will provide an array of specific rules, but it is the courts which must ultimately weigh the competing interests. Although reform in local legislation and/or international agreements would lessen the burden on the courts, there has been no recent formal changes in Canada and it appears unlikely that there will be any in the near future. Thus, although the policies involved in an international insolvency dispute may be best sorted out by the policy-makers themselves, the task at present rests with the courts.

The most recent attempt at a resolution of an international insolvency dispute in Canada is *Re Sefel Geophysical Ltd.*[2], (hereinafter *Re Sefel).* This article will focus on the particular problems raised in *Re Sefel* as a key to broader issues. In order to deal with these problems, I will detail the facts in the *Re Sefel* decision and discuss the law in Canada at present regarding the treatment of international insolvency disputes. The majority of this paper, however, will examine the specific problems raised in *Re Sefel* and suggest some alternative approaches. The final portion will discuss the need for an ultimate solution in the form of an international agreement or at the very least a bilateral agreement with Canada's largest trading partner, the United States.

Prior to embarking on this analysis, it should be noted that conflict of laws problems which occur in the adjudication of international insolvencies do not often arise between separate provinces within Canada. This is a consequence of the fact that bankruptcy law in Canada, in accordance with section 91(21) of the *Constitution Act, 1867*[3] is

2. (1988), 62 Atla. L.R. (2d) 193 (Q.B.). This decision is presently under appeal to the Alberta Court of Appeal.

3. Mr. Justice Wurtele of the Quebec Superior Court stated in *Dupon v. La Cie de Moulin a Bardeau Chanfrene* (1888), 11 L.N. 255:

> It is ... in the interest of the trade and commerce of the whole dominion that there should be one uniform law for all of the provinces, regulating proceedings in the case of insolvent debtors,

governed by federal legislation. The *Bankruptcy Act*[4] stipulates in section 188(1) that any order made by a court in accordance with the Act shall be enforced "in courts having jurisdiction in bankruptcy elsewhere in Canada". Section 188(2) further states that all courts shall "severally act in aid of and be auxiliary to each other". As a consequence, when international bankruptcy problems arise there is no substantial body of intra-federal conflicts/bankruptcy law to draw on.[5]

II. *The Facts of Re Sefel Geophysical Ltd.*

Sefel Geophysical Ltd., (hereinafter Sefel), carried on seismic and geophysical activity in Canada, the United States and the United Kingdom. In 1985 Sefel encountered some financial difficulties and a petition was filed pursuant to the *Companies' Creditors Arrangement Act,*[6] (hereinafter CCAA). In conjuction with this petition, Sefel obtained a stay of proceedings against all creditors while the negotiations under the CCAA were ongoing. The majority of the unsecured assets were, however, located in the United States. Consequently, it was necessary to obtain a similar stay in the United States to prevent the creditors who were located in that jurisdiction from attaching the assets. Affidavits and oral evidence were submitted to the United States Bankruptcy Court for the district of Colorado in an attempt to obtain the stay of proceedings in accordance with section 304 of the Bankruptcy Code (11 U.S.C.). The effect of s. 304 was not discussed in *Re Sefel,* but it essentially gives the U.S. courts remedial powers with respect to assets in the U.S. at the behest of a foreign trustee. A Canadian lawyer also gave oral evidence as to the effect of the CCAA. It is unclear, however, whether he provided any evidence concerning the effects of a bankruptcy if the CCAA solution failed.

The order was granted enjoining the U.S. creditors from taking any action with respect to the assets in the U.S., but it must be noted that the

---

> unrestricted in its operations by provincial boundaries; that it should be possible to obtain a national execution, and not merely a limited provincial one, against the estate of an insolvent debtor, who might hold property in several provinces, or transfer it from one province to another.
>
> (from David Rubin, "Canadian Comment: The U.S. Creditors' Unfair Advantage over Canadian Creditors" (1979), 84 Comm. L.J. 470 at p. 470)

The words of Mr. Justice Wurtele are still very pertinent with respect to international insolvency problems. The justifications which he notes for federal jurisdiction over bankruptcy may be used to support a move towards adopting international agreements to deal with international insolvencies.

4. R.S.C. 1985, c. B-3.

5. As will be noted further on, provincial conflict of law rules are applicable with respect to the validity of a debt or obligation. To this extent, it is possible to have a conflict problem in a bankruptcy proceeding which is strictly domestic.

6. R.S.C. 1985, c. C-36.

evidence given by the Canadian lawyer led the court to believe that the U.S. creditors would receive equal treatment under the CCAA agreement. The U.S. court was under the belief that there would be no discrimination against creditors on the basis of origin. In addition to the order, a document was filed entitled, "Findings of Facts and Conclusions of Law", in which it was explicitly stated that the Bankruptcy Court was operating under the assumption that the creditors located in the U.S., who would have received preferential status under American bankruptcy laws, would receive similar status in any Canadian proceedings.

The agreement pursuant to the CCAA was never actually put into effect and on November 28, 1985 the Royal Bank of Canada filed a petition for bankruptcy for Sefel Geophysical Ltd. The court appointed Clarkson Gordon Inc. as the trustee. Clarkson Gordon was able to recover roughly $1,250,000.00 in unsecured assets, approximately $1,130,000.00 of which was received from the liquidation of assets located in the United States. The U.S. assets were apparently preserved solely as a result of the stay of proceedings issued with respect to the failed CCAA compromise. The remainder was collected from assets in Canada. There were no unsecured assets in the United Kingdom and thus nothing was collected from that jurisdiction.

The major issue concerned the status of the preferred creditors located in the United States and the United Kingdom in the Canadian bankruptcy proceeding. The claims of the U.S. creditors included, as stated by the court, tax, workers' compensation and unemployment insurance claims. The status of the creditors located in the United Kingdom was not as contentious, primarily because there were no assets in that jurisdiction. There was nothing which they could have attached to satisfy their claims. Consequently they had no choice but to exercise forbearance with respect to any proceedings in the United Kingdom and voluntarily submitted to the proposed Canadian agreement and the subsequent bankruptcy proceedings from the outset.

Thus, the Alberta Court was left with the primary question, should the American creditors be allowed to maintain preferred status as would have been accorded to them under American bankruptcy laws. Predictably the problem was, however, that claims such as those which were asserted by the American creditors are denied preferential status in the Canadian *Bankruptcy Act*[7]. The priorities section in the *Bankruptcy*

7. *Supra,* note 4, s. 136. At the time *Re Sefel, supra,* note 2, was decided, the relevant section was s. 107 of R.S.C. 1970, c. B-3 which provides:

> 107. [Priority of claims] (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows...
>
> (e) municipal taxes assessed or levied against the bankrupt within two years next preceding his bankruptcy and that do not constitute a preferential lien or charge against the real property of the

Act grants preferential status to tax claims, workers' compensation claims and unemployment insurance claims, but only if they are domestic. It does not provide for the recognition of similar foreign claims. As the majority of the U.S. preferential claimants were tax creditors of some form, the subsequent question was whether their claims should be recognized at all.

The preferred creditors in the United States attempted to get around this by arguing firstly, that the doctrine of comity of nations required the Alberta court to recognize their claims. Secondly, if comity was not adequate, equity, more specifically the equitable remedy of unjust enrichment, provided the court with sufficient justification for the recognition of the claims. It should be noted that the U.S. Bankruptcy Code affords recognition for similar foreign claims in a U.S. bankruptcy proceeding.[8]

Comity is certainly not a new concept in the adjudication of international insolvencies. The court was able to point to a number of American bankruptcy cases which resorted to the doctrine of comity to resolve disputes.[9] The essential problem with the application of comity is that, according to Forsyth J., it has only been used with respect to the recognition of foreign bankruptcy proceedings. The court was unable to find an example where comity was used to determine priorities, which are traditionally determined by the *lex fori.*

Forsyth J. went on to note that the Bankruptcy Act is not the sole source of the problem. In addition to the legislative prohibition, the common law denies recognition of foreign revenue claims. A foreign revenue claim is not provable in a liquidation, or in any proceeding for that matter, and thus cannot be enforced regardless of the question of priorities. It appears from the information provided in the written decision that the claims of the U.S. creditors with which the court was

---

bankrupt, but not exceeding the value of the interest of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee...

(h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the *Income Tax Act* ... creating an obligation to pay to Her Majesty amounts that have been deducted or witheld *pari passu*...

(j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding ant statutory preference to the contrary.

This section has not changed in any way in the recent 1985 revised edition.

8. *Re Sefel, supra,* note 2, p. 203 The court refers to sections 726, 507 and 101(24) of the Bankruptcy Code which if read together provide for the recognition of unsecured claims of "governmental units". "Governmental units" is defined in s. 101(24) as including "a foreign state".

9. *Cornfeld v. Investors Overseas Ltd.* (1979), 34 C.B.R. (N.S.) 124 (U.S.D.C.); *Drexel Burnham Lambert Group Inc. v. A.W. Galadari,* 610 F. Supp. 114 (D.C.N.Y., 1985); *Cunard Steamship Co. v. Salen Reefer Services AB,* 773 F.2d 452 (U.S.C.A., 1985).

concerned were substantially, if not wholly, claims which fall within the classification of tax claims.[10]

Forsyth J. concluded that comity was not of any assistance. In defining the restrictive application of comity, he stated "Comity does not allow me to alter priorities set out in the *Bankruptcy Act,* but it does dictate the recognition of foreign sovereigns and governments to some extent in liquidation proceedings."[11] After rejecting comity, Forsyth J. turned to equity for assistance. He isolated a specific rule in equity whereby money paid by mistake of law is recoverable so as not to unjustly enrich the estate of the bankrupt.[12] In light of the fact that the U.S. creditors refrained from attaching and realizing on the assets located in the U.S., which as previously stated, comprised at least 90% of the total unsecured assets, Forsyth J. commented that it would be "grossly unfair" if at that point they were denied any preference. He stated, "to turn around and prevent the parties with priority to those assets from asserting similar priority in the present proceedings seems manifestly unjust."[13]

Thus the U.S. preferred creditors succeeded in obtaining preferential status in the Canadian proceedings on the basis of a principle in equity. It should be noted that the court also remarked that the same thing could have been achieved through the doctrine of remedial constructive trust.[14] Similar to the equitable principle originally referred to, constructive trust depends on the existence of unjust enrichment. It was this aspect of the doctrine which persuaded Forsyth J. of its applicability.[15] As will become apparent further on in this paper, there are other aspects of the doctrine of constructive trust which cast some doubt on its suitability to the facts in *Re Sefel* and to bankruptcies in general.

It logically follows that as the U.S. creditors were granted preferential status on the basis of unjust enrichment, the U.K. creditors were denied priority in its absence. The court stated that due to the fact there were no unsecured assets in the U.K. available to the creditors in that jurisdiction, Sefel's estate was not unjustly enriched at their expense.[16] The fact that the U.K. creditors voluntarily submitted to the Canadian proceedings was discredited as a valid consideration. The U.K. creditors were thus relegated to the status of general creditors.

---

10. *Ibid.,* pp. 198, 201-202. There was no discussion of claims other than those characterized as tax claims.
11. *Re Sefel, supra,* note 2, p. 202.
12. *Condon, Re; Ex parte James.* 9 Ch. App. 609, [1874-80] All E.R. 388 (C.A.).
13. *Re Sefel, supra,* note 2, p. 204.
14. *Pettkus v. Becker,* [1980] 2 S.C.R. 834.
15. *Re Sefel, supra,* note 2, pp. 205-206.
16. *Ibid.,* p. 206.

The issues raised in *Re Sefel,* primarily the application of comity in the adjudication of international insolvencies, the subsequent use of equity and the prohibition on the recognition of foreign tax claims, will all be addressed in due course. At this point, however, I would like to review the approach adopted by Canadian courts in general to problems encountered in international bankruptcies. This will hopefully provide a basis for the ensuing discussion on the problems raised in *Re Sefel.* The following analysis will focus on situations where a Canadian court has accepted jurisdiction and assigned a trustee in bankruptcy. It will not deal explicitly with the recognition in Canada of claims of foreign trustees, although references to recognition issues will occasionally be made.

III. *Canadian Adjudication of an International Insolvency*

The adjudication of an insolvency, regardless of the presence of foreign facts, may be approached or characterized in three separate ways.[17] The "judgment approach" emphasizes the declaratory nature of a bankruptcy adjudication. In accordance with this approach, the recognition of a Canadian bankruptcy proceeding in a foreign jurisdiction would simply be a matter of the recognition and enforcement of a foreign judgment. In the second approach, bankruptcy proceedings are primarily viewed as a means to collect and preserve assets for distribution to various established creditors. It entails focusing on creditor's remedies over and above any other interests. This results in an extremely protective approach towards creditors within a particular jurisdiction. Consequently, if a court in a foreign jurisdiction maintained this position, it would not recognize a Canadian proceeding if it thought such proceedings might prejudice the rights of domestic creditors.

The final approach, in which a bankruptcy is viewed as a general assignment of the assets of an insolvent to the creditors is, not surprisingly, referred to as the "general assignment approach". The emphasis of this approach is on the transfer of property.[18] This is the approach most commonly adopted in common law jurisdictions and specifically in Canada.[19]

If we accept that the "general assignment" approach is followed in the adjudication of bankruptcies in Canada it is somewhat difficult to determine what type of approach a court would take in dealing with an insolvency involving foreign creditors or property in a foreign

---

17. R.N. Robertson, "Enforcement and Other Problems in International Insolvencies", (1985), *The Meredith Lectures* (McGill University) 266 at p. 267.
18. *Ibid.,* p. 267.
19. *Ibid.,* p. 267.

jurisdiction. Although it is clear in adopting this approach that all assets are assigned to the trustee for the benefit of the creditors, it does not provide any assistance as to what law should apply to foreign assets and how to deal with the prospect of non-recognition. One might consider that as title to all assets vests in one entity, the law of the jurisdiction in which that entity is situated should govern everything. In other words the estate would be administered in accordance with the concept of universality. R.N. Robertson describes this concept as follows:

> When a country professes that its decrees are entitled to recognition internationally, because unity of insolvency, equality of treament of foreign and domestic creditors, application of common rules with respect to transactions before and after adjudication, effective relief of the insolvent and economy of administration are desirable, that is universality.[20]

This would appear to be a logical extension of the "general assignment approach". There is, however, some indication that territoriality, which is derived from the doctrine of the sovereignty of nations, plays a part in resolving disputes encountered in international insolvencies. In the field of international insolvencies, this would provide that proceedings in one jurisdiction would not effect creditors or assets in another jurisdiction.[21] Any state which adopts the creditors' remedies approach to bankruptcy proceedings would necessarily view an international insolvency from a territorial perspective.

Canadian courts do not consistently adjudicate international insolvencies on the basis of either universality or territoriality. There is essentially no uniformity in approach. Rather, the Canadian approach to international bankruptcies, most likely out of necessity considering the diversity in bankruptcy laws throughout the world, is essentially referred to as the plurality doctrine.[22] This is a compromise between the two basic philosophical perspectives, universality and territoriality. The plurality doctrine proceeds from the premise that bankruptcies should essentially be an extension of the private law which exists between the insolvent debtor and the creditors. In keeping with this, it is acceptable under the plurality doctrine to initiate separate bankruptcy proceedings in different jurisdictions if necessary. Each court would, accordingly apply its own substantive law to the proceedings initiated within its jurisdiction.[23]

There are a few other theories which relate specifically to the adjudication of an international insolvency which should be mentioned.

---

20. *Ibid.*, p. 266-267.
21. *Ibid.*, p. 267.
22. J.G. Castel, *Canadian Conflict of Laws,* (2d) (Toronto: Butterworths, 1986), p. 490-491.
23. *Ibid.*, pp. 490-491.

These doctrines or theories are acknowledged and discussed by numerous authors including Castel in his text, *Canadian Conflict of Laws.*[24] The first theory which Castel identifies, "unity of bankruptcy" was previously referred to in the discussion on universality. The doctrine, "unity of bankruptcy", provides that one court, usually the court of the domicile of the debtor, determines all of the issues and its decisions are to be universally accepted.[25] Whether jurisdiction is assumed on the basis of the domicile of the debtor or some other factor, for example, wherever the majority of the assets are located, would depend on the distinct bankruptcy laws of each jurisdiction. Castel comments that this approach is impractical given the diversity in bankruptcy laws and the fact that such laws are most often viewed as an extension of state policy.[26]

The second theory which Castel comments on is the "doctrine of priority". This provides for the exclusion of all proceedings except the one initiated first time. The administrator appointed in such proceedings would take priority over the claims of any other subsequently appointed administrator regardless of the location of the assets. Castel states that this doctrine simply has no rational basis and is not considered an acceptable approach in Canada.[27]

Castel is, therefore, fully in favour of the "doctrine of plurality". He states, "the doctrine of plurality is the only one in which the policy of a state with respect to bankruptcy can be preserved and implemented."[28] In spite of the fact that he considers it the best approach, he does discuss numerous difficulties with the application of this doctrine. One such difficulty is that it does not provide an easy solution to the question should the claims of foreign creditors be admitted on the same basis as

---

24. *Ibid.,* p. 489.

25. Kurt Nadelmann comments in a number of articles, including *"Solomon v. Ross* and International Bankruptcy" (1946), 9 Mod. L.Rev. 153 and "International Bankruptcy Law Its Present Status" (1943-44), 5 U. of Toronto L.J. 324, that in spite of the fact there is a general assignment of all assets to the trustee in English and Canadian law, "unity of bankruptcy" is certainly not a commonly adopted approach. Regardless of the fact that both of these articles were written a number of years ago, it appears that these statements are still applicable today.

In *Re Artola Hermanos* (1890), 24 Q.B.D. 640, Fry J. commented on the "unity of bankruptcy" doctrine as follows:

"Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicile, for the forum of every foreign country, every country not of the domicile, shall act only as accessory and in aid of the forum of the domicile. That, it is said, is *forum concursus,* to which all persons interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favour of that view, and there are certainly some conveniences in it." (As cited in R.H. Graveson, *Conflict of Laws,* (London: Sweet & Maxwell, 1974), p. 547.

26. Castel, *supra,* note 22, p. 490.

27. *Ibid.,* p. 491. Graveson, *supra,* note 25, discusses this in more detail at pp. 548-549.

28. Castel, *supra,* note 22, p. 490.

local creditors[29]; precisely the problem which existed in *Re Sefel.* The next logical step is therefore to examine the bankruptcy laws in Canada to determine whether they provide any guidance with respect to such problems. It should be noted, however, before I proceed with an analysis of Canadian bankruptcy law, that the U.S. creditors would have been fully within their powers to initiate proceedings in the U.S. in the absence of the stay, which was a product of American bankruptcy policy, particularly in light of the amount of unsecured assets which were located in that jurisdiction. This would apparently have been acceptable to a Canadian court if it was to abide by the "doctrine of plurality".

The first issue to confront in dealing with international bankruptcies is jurisdiction. When will a Canadian court assume jurisdiction over an insolvent debtor? In accordance with section 43(5) of the *Bankruptcy Act,* a court will take jurisdiction if it is in "the locality of the debtor". This is defined as:

> (a) where the debtor has carried on business during the year immediately preceding his bankruptcy,
>
> (b) where the debtor has resided during the year immediately preceding his bankruptcy,
>
> (c) in cases not coming within paragraph (a) or (b) where the greater portion of the property of the debtor is situated.[30]

Thus in order to assume jurisdiction a Canadian court must be able to point to a substantial contact between the operations of the business or individual and a Canadian jurisdiction. The contact must not be merely occasional.[31] It is important to note that a Canadian court will not take jurisdiction merely on the basis of the presence of assets.[32] The CCAA

---

29. The other two difficulties which Castel points out at p. 491 are: 1. the territorial scope of local bankruptcy laws are not easy to determine and; 2. to what extent should foreign administrators be recognized and does it matter whether proceedings were initiated before or after notice of the foreign administrator.

30. *Supra,* note 4, s. 2.

31. Robertson, *supra,* note 17, p. 270. Robertson further comments, however, that the presence of an administrative office usually constitutes adequate contact.

32. The converse of this position is that in a foreign bankruptcy, a Canadian court will usually turn over assets, even if they have already been attached or garnished, to a foreign trustee. The first case to determine this conflict rule was *Solomons v. Ross* which is discussed in Nadelmann *"Solomons v. Ross ...", supra,* note 25. Nadelmann also discusses this rule, or perhaps it is better described as an approach, in "Bankruptcy in Canada: Assets in N.Y. (1962), 11 Am. J. of Comp. Law 628 at p. 630.

As noted in footnote 25, "unity of bankruptcy" is not consistently adopted in Canadian or English bankruptcy law and it appears to simply be a matter of discretion whether a court adopts the rule in *Solomons v. Ross*.. A foreign trustee's title to assets will prevail if the foreign bankruptcy was declared prior to the attachment of the assets in Canada: *Williams v. Rice,* [1926] 3 D.L.R. 225 (Man. Q.B.). If, however, the assets are attached prior to the foreign declaration, a Canadian court may permit the Canadian creditors or a trustee to retain the proceeds from the attachment: *Galbraith v. Grimshaw,* [1910] A.C. 508 (H.L.).

does, however, provide a jurisdictional basis on the mere presence of assets.[33] If a foreign court were to assume jurisdiction over an insolvent debtor on the basis of an insufficient connection, for example, the corporation was neither incorporated, nor carrying on business in the jurisdiction, a Canadian court would probably refuse to recognize the foreign trustee's title to any assets situated in Canada and appoint a Canadian trustee to deal with such assets.[34] The connection must, however, in this instance be extremely deficient.

Once a Canadian court accepts juridiction, a trustee is appointed. The *Bankruptcy Act* provides that title to all assets, regardless of where they are situated, is assigned to the trustee in bankruptcy.[35] This very broad scope of power over the bankrupt's assets may not necessarily be of any assistance to the trustee. Although a Canadian trustee may claim title to assets outside of Canada, there is no guarantee that such title will be recognized by the foreign authorities. The trustee must further recognize and abide by any procedural formalities which are required to transfer title in the jurisdiction where the assets are located. Otherwise, title will simply not vest in the trustee. The attitude adopted in the U.S. in the past to foreign trustees clearly exemplifies the problems which may be encountered.

The U.S. courts have historically displayed a considerable amount of protectionism over its domestic creditors. American courts have shown no reservation in permitting local creditors to attach or garnish assets of a foreign debtor located within the jurisdiction in spite of the fact that a foreign trustee has been appointed. This was the case even if the foreign trustee was appointed prior to the attachment. American courts were more or less hostile to foreign administrators claiming assets located in the U.S.[36] This has been referred to as the "race of diligence" system

---

It should further be noted that U.S. law does permit a court to assume jurisdiction to initiate bankruptcy proceedings merely on the basis of the presence of assets.

33. *Supra,* note 6, s. 2.

34. *Schemmer v. Property Resources Ltd.,* [1974] 3 All E.R. 451 (Ch.) In this case, a British court stated that an American court lacked jurisdiction to appoint a trustee for a corporation that was neither incorporated nor doing business in the U.S.

35. *Supra,* note 4, ss. 17(2), 67(c), (d) and 2.

36. The best example of this approach can be found in Chief Justice Marshall's opinion in *Harrison v. Sterry* 9 U.S. (5 Cranch) 289 (1809). The case is discussed in detail in Stefan A. Riesenfeld, "The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey" (1976), 24 Am. J. of Comp. Law, 288 at pp. 290-292. It is interesting to note that in spite of the fact that this was the standard approach in the U.S. until quite recently, it was not the position which Mr. Justice Story advocated. In his *Commentaries on the Conflict of Laws* (1834), Story praised the ubiquity approach of the British courts and commented that comity required recognition of extraterritorial effect of foreign bankruptcy laws.

A recent example of this protective approach can be found in the case of *Re Toga Manufacturing Ltd.* 28 Bankr. 165 (Bankr. E.D. Mich, 1983).

which is more or less "first-there, first-served".[37] This is also obviously the problem which is raised in *Re Sefel.* The Canadian trustee had, by virtue of the assignment in bankruptcy full title, at least in the eyes of Canadian law, to the assets of Sefel which were located in the U.S. The U.S. creditors were not, however, obliged to recognize that title in the absence of the stay. They might have seized the assets to satisfy their claims or appointed their own trustee in bankruptcy to deal with such assets.[38] They were however, forced to respect the Canadian proceedings as a result of the stay, issued pursuant to section 304 of the Bankruptcy Code. This section, which has the potential to bring about a dramatic change in the U.S. approach, will be discussed further on in this paper.

If a foreign creditor successfully attaches the assets of an insolvent which are located within the jurisdiction, but such assets are insufficient to satisfy the debt, it is possible for the creditor to make a claim pursuant to any bankruptcy proceedings in Canada. The creditor will, however, be unable to claim anything unless he releases to the trustee the amount which has already been obtained in the foreign jurisdiction. This is referred to as the "hotchpotch rule".[39]

In determining the validity of a debt or obligation involving a foreign party, the rules applicable are those which would normally apply within the Province.[40] In other words, the validity of a debt would be determined by the conflict of law rules in force in that province. Thus, in most common law jurisdictions, a contractual debt obligation will be determined by the proper law of the contract. The actual administration and distribution of the insolvent's estate would however, be governed by Canadian federal law in a Canadian bankruptcy proceeding as the *lex fori.*[41] This is simply an extension of the general conflict of laws rule that all matters of procedure are governed by the *lex fori.*[42] The priority rules which must be followed for the distribution of funds are those found in section 136 of the *Bankruptcy Act.*[43]

---

37. Nadelmann, *"Solomons v. Ross..." supra,* note 25, p. 282; Nadelmann, "Assumption of Bankruptcy Jurisdiction Over Non-Residents" (1966), 41 Tul. L.Rev. 75 at p. 77; Rubin, "Canadian Comment...", *supra,* note 3, p. 471.

38. As previously noted, the U.S. the Bankruptcy Code permits the taking of jurisdiction merely on the basis of the presence of assets. Kurt Nadelmann discusses the problems which this creates and the evolution of the U.S. Bankruptcy laws in this respect in, "A Reflection on Bankruptcy Jurisdiction: News from the European Economic Community, the United States and Canada" (1982), 27 McGill L.J. 541.

39. Castel, *supra,* note 22, p. 499; Graveson, *supra,* note 25, discusses this in more detail at p. 554.

40. *Re Viscount Supply Co. Ltd.,* [1963] 1 O.R. 640 (S.C. in bankruptcy).

41. Castel, *supra,* note 22, p. 495.

42. *Huber v. Steiner* (1835), 132 E.R. 80 (C.P.).

43. This section is identical to section 107 of the previous revised edition of the *Bankruptcy Act* which was used in *Re Sefel* and which is detailed in note 8.

Within this framework foreign creditors are theoretically treated the same as Canadian creditors. *Re Sefel* obviously provides an example of how this does not necessarily occur in practice. If one closely examines the wording of the priority section, subsections (e), (h) and (j) when read together, indicate quite clearly, as was pointed out in *Re Sefel*, that foreign tax claims, workers' compensation claims and unemployment insurance claims are not recognized or granted the same preferential status as are identical domestic claims.[44] Subsection (j) refers to "claims of the Crown not previously mentioned in subsections (a) to (i) in right of Canada or of any province ..." This implies that the categories of preferential claims in subsections (a) to (i) are restricted to purely domestic claims. This is most likely an extension of the common law rule which prohibits recognition of foreign revenue claims. The appropriateness of this rule today, more particularly in the context of bankruptcies, will be addressed later in this paper. Within the *Bankruptcy Act* itself, however, this creates a somewhat anomalous situation. Title to all of the assets in the U.S. are vested in the trustee and yet there is no recognition of the claims of the creditors located within that jurisdiction. They are denied preferential status by the *Bankruptcy Act* and further denied any recognition under the common law.

Irrespective of the agreed upon "Findings of Fact and Conclusion of Law" in *Re Sefel* which assumed that the U.S. creditors would receive a status similar to that which they would have received under U.S. bankruptcy laws, the situation presented in the *Bankruptcy Act* is inconsistent for a number of reasons. To begin with, the claims of the American creditors would have been recognized and granted preferential status under the Bankruptcy Code if concurrent proceedings were initiated in the U.S. where the vast majority of the unsecured assets were located.[45] Concurrent proceedings are, if necessary, certainly acceptable as an alternative method for dealing with an insolvent debtor who has assets in a foreign jurisdiction.[46] It seems illogical and inefficient that the claims of the American creditors are not recognized solely because the proceedings are situated in Canada when there are other means by which those same claims could be recognized.

Secondly, although bankruptcy laws are often considered an extension of state policy,[47] this appears to interfere with the whole purpose of

---

44. *Re Sefel, supra,* note 2, p. 201-202.
45. *Ibid.,* p. 203. Sections 726, 507(7) and 101(24) would give preferential status to the creditors' claims in the U.S. As stated in note 8, they would also recognize foreign claims of a similar nature.
46. *Re E.H. Clarke & Co; Trustee v. Royal Bank of Canada,* [1923] 1 D.L.R. 716 (Ont. S.C.).
47. Castel, *supra,* note 22, p. 490.

assigning title to all of the assets of the debtor to the trustee, regardless of where they are located. It is obvious that the scope of the assignment is to facilitate an equitable and just distribution of an insolvent's assets to all of the creditors. To allow a Canadian trustee to assume title over all of the assets in the U.S. and simultaneously not require the recognition of the majority of the claims from that jurisdiction flies in the face of justice and common sense. If the U.S. court which issued the stay was aware of the true situation, it would most likely not have granted the stay of proceedings which was obviously beneficial to the Canadian creditors. This is, furthermore, most likely not a unique occurence; I would speculate the majority of bankruptcies include some type of tax claim.

The Alberta Court recognized the inequity of this situation and attempted to search for a way to circumvent the prohibition in the *Bankruptcy Act* and the common law against foreign tax claims. The court examined two arguments for this purpose as presented by the American creditors. This first argument was based on the doctrine of comity. Comity is a doctrine which, oddly enough, does not arise very often in conflict of law problems. It does not appear in any of the cases which provide the foundation for conflict of law rules. It does, however, appear to be used quite frequently in specific types of cases, most notably cases involving the recognition and enforcement of foreign judgments, issues pertaining to evidence rules and procedures, anti-suit injunctions and international insolvencies. It is more or less a last resort doctrine in that it is used when the applicable rules or legislation do not give rise to an equitable solution. To this extent, it resembles the concept of equity; but it is unique in that it focuses on problems arising out of the interaction of two jurisdictions. Given the inadequacies of the present *Bankruptcy Act* to deal with foreign facts in international insolvencies and the lack of any substantial uniformity of law in this field on an international level, or for that matter between the United States and Canada, comity may be a very useful tool.

IV. *Comity*

The concept of comity has been around much longer than the defined body of rules known as conflict of laws. Hessel Yntema in his article, "The Comity Doctrine", traces the origins of this doctrine to the Netherlands in the late seventeenth century.[48] He states at the outset of his article that, "[t]he doctrine of comity for the first time posed in stark

48. Hessel Yntema, "The Comity Doctrine" (1966), 65 Mich. L.R. 9 at p. 9. I do not intend to discuss this article in detail, but it does provide a fundamental picture of the philosophical development and role of the comity doctrine in private international law.

simplicity the basic doctrine of conflicts law in modern times to mediate between the pretensions of territorial sovereignty and the needs of international commerce."[49]

Yntema supports the proposition that the origin of the principles of private international law, specifically in the area of international trade and commercial disputes, which would encompass international insolvencies, may be found in the doctrine of comity.[50] In addition to discussing the historical relationship between comity and private international law principles, Yntema further advocates the resurrection of the doctrine of comity to address the problems created by the "plurality of national laws."

This opinion is by no means universally recognized. Dicey & Morris have probably been most vocal in rejecting comity as a basis for conflict of law rules. In Dicey's original treatise on private international law, which was entitled *Law of Domicile,* his rejection of comity is juxtaposed to his acceptance of the vested-right theory:

> the application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconveniences and injustice to litigants, whether natives or foreigners.[51]

In spite of the fact that the most recent edition of Dicey & Morris has abandoned the vested-right theory,[52] they continue to reject comity as a basis for private international law.[53] As a consequence of this rejection by these and other influential authors, comity has not been widely utilized in private international disputes. Although in its present day use, courts have consistently rejected the notion that reciprocity is a pre-condition for its application,[54] it necessarily implies some element of reciprocity and, as

49. *Ibid.,* p. 9.

50. *Ibid.,* p. 20. Yntema refers to E.M. Meijers for this proposition, who is the author of a comprehensive history of the fundamentals of Private International Law: L'Histoire des Principes Fondamentaux du Droit International Prive.

51. Cited in, Graveson, "Philosophical Aspects of the English Conflict of Laws" (1962), 78 L.Q. Rev. 337 at p. 344.

52. The vested-right theory toward conflict of laws was apparently very popular in the earlier stages of the development of conflict of laws principles and was the approach adopted by the First Restatement of Conflict of Laws (1934). The Second Restatement has, however, dropped this original approach and adopted a more "interpretive" approach. (see Willis Reese, "Conflict of Laws and Restatement Second", *Perspectives on Conflict of Laws,* (Toronto: Little, Brown and Company, 1980) p. 42.

53. Graveson, "Philosophical Aspects . . ." *supra,* note 51, p. 345.

54. See R.H. Webb, "Comity and Reciprocity" (1966), 15 Int'l and Comp. L.Q. 269. In this article, the author discusses a decision in which a comity and reciprocity approach was rejected. The case involved the recognition of a Belgian judgment. It is clear from this case and the article that reciprocity plays no part in at least the recognition of foreign *in personam* judgments.

another conflict of laws scholar notes, "the absence of a state of war".[55] These simply are not suitable premises for the resolution of private disputes.

Comity may, however, be appropriate in cases which are on the frontier between private international law and public law. That is cases which concern interests beyond those of private individuals and which involve state policies. It is thus apparent why comity has primarily been considered in the recognition and enforcement of foreign judgments,[56] anti-suit injunctions,[57] evidentiary disputes and international insolvencies.

In an anti-suit injunction application, a court is not merely concerned with the interest of the individual parties. It must consider the sovereign immunity of another judicial system and the interests of the state in sanctioning such proceedings. Vaughan Black comments in an article which discusses the appropriateness of comity in anti-suit injunctions in Canada that comity implies a certain amount of deference.[58] This is necessary in proceedings which may potentially spark political disputes if competing state interests are disregarded. As the English Court of Appeal has stated, comity is "shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards."[59]

Given this explanation of the appropriate use of comity, it is not surprising that it also arises in cases involving evidentiary disputes. One of the leading cases in Canada in which the doctrine of comity was employed is *Zingre v. R.*[60] In this case a Swiss court was requesting the issuance of a commission to an "investigating officer" in Switzerland. There was a question as to whether the request violated Canadian evidence law based on the fact the order emanated from an "investigating officer" rather than a court or tribunal. It should be noted that the Swiss proceedings which precipitated the order were originally at the request of the Canadian Minister of Justice and involved an issue which arose in Canada. The issues were obviously not restricted to the interests of the private parties to the original proceedings in Switzerland and required some deference to the Swiss judicial system. Thus the principle of comity

---

55. Graveson, "Philosphical Aspects . . ." *supra,* note 51, p. 364.
56. *Henfrey Samson Belair Ltd. v. Carter* (1988), 29 C.P.C.(2d) 150 (Ont. H.C.).
57. Black, "The Antisuit Injunction Comes to Canada" (1988), 13 Queen's L. J. 103.
58. *Ibid.,* p. 119.
59. *British Airways Bd. v. Laker Airways,* [1984] 1 Q.B. 169 at pp. 185-186 (C.A.), as cited in R.W.R. "Anti-Suit Injunctions and International Comity", (1985), V.A. Law Rev. 1039 at p. 1064.
60. [1981] 2 S.C.R. 392. See as well *Re Mulroney and Coates* (1986), 54 O.R. (2d) 353 (H.C.).

was employed to allow the "investigating officer" to proceed with the inquiry.

Within this context, it is not difficult to comprehend the role that comity can and has played in international insolvencies.[61] It has, however, as noted in *Re Sefel,* appeared more in international bankruptcy proceedings in the United States than in Canada. It has also been used primarily with reference to the recognition and enforcement of foreign bankruptcy proceedings. In each instance, the U.S. courts have adopted the same definition of comity as expressed in *Hilton v. Guyot:*[62]

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of laws.[63]

One of the earlier cases in which comity was applied is *Canadian Southern Railroad v. Gebhard.*[64] This case, similar to many others in which comity has been used, involved an attempt to circumvent a Canadian arrangement pursuant to Canadian laws by attaching assets located in the United States. The court stated in that case that there is an actual presumption that U.S. courts should defer to bankruptcy proceedings in other jurisdictions provided they were relatively just.

The court in *Clarkson Co. v. Shaheen,*[65] a case involving an attempt by a Canadian trustee in bankruptcy to take possession of corporate records located in a New York office, pursuant to a statutory duty under the *Bankruptcy Act* and against the wishes of U.S. directors, made a number of similar observations. The court, however, in that case also singled out the special relationship which exists between Canada and the U.S. and stated that Canada is a "sister common law jurisdiction with procedures akin to our own." This special relationship appears to have facilitated the application of comity in that case as well as in a number of other cases.[66] Various other cases in the U.S. have made very broad statements regarding the application of comity. These statements reflect the fact that comity is certainly not limited to situations where a special

---

61. *Re ITT* (1975), 8 O.R. (2d) 359, 19 C.B.R. (N.S.) 263, 58 D.L.R. (3d) 55 (H.C.); *Re C.A. Kennedy Co. and Stibbe-Monk Ltd.* (1976), 14 O.R. (2d) 439, 23 C.B.R. (N.S.) 81 (Div. Ct.).
62. 159 U.S. 113 (1895, U.S.S.C.).
63. *Ibid.,* p. 164.
64. 109 U.S. 527 (1883). The court stated at p. 539, "Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail... Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."
65. (1976), 23 C.B.R. (N.S.) 278 (U.S.C.A. 2nd Circ.).
66. *International Firearms v. Kingston* 6 N.Y. 2d 406 (1959).

relationship exists. In *Somnoportex Ltd. v. Philadelphia Chewing Gum Corp.*[67] the court stated:

> Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative obligation. Rather it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interests of the nation called upon to give it effect.[68]

In *International Hotel Corp. v. Golden,*[69] the court again reaffirmed the existence of a presumption in favour of comity in stating that it applies unless it would result in the "approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[70]

This rather liberal approach to comity was also exemplified in the *Drexel v. Galadri*[71] case which was noted in the *Re Sefel* decision. In this case a New York court was being asked to concede to bankruptcy proceedings initiated in Dubai on the basis of comity. The court stated in that instance that even if the Dubai proceedings arrived at a different result than what would most likely be the result in the United States, comity is still applicable. The basis for this decision appears to have been the fact that the premise and goals of the proceedings were similar to those in the U.S..

Although in the *Drexel* case, as in numerous others, reciprocity was essentially rejected as a prerequisite for the application of comity,[72] there does appear to be a requisite element of similarity in the laws of the foreign jurisdiction and the laws of the forum prior to the application of comity. This was implicit in *Cornfeld v. Investors Overseas Ltd.,*[73] in which it was held that comity requires recognition of Canadian proceedings because of the similarity in the policies which underlie both the U.S. and Canadian bankruptcy laws. The court particularly emphasized the fact that the creditor in question would receive adequate protection in the Canadian proceedings.

---

67. 453 F. 2d 435 (3rd Circ. 1971).
68. *Ibid.,* p. 440.
69. 15 N.Y. 2d 9 (1964).
70. *Ibid.,* p. 13.
71. *Supra,* note 9.
72. *Johnston v. Compagnie Generale Transatlantique,* 242 N.Y. 381 at 387: comity "therefore rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment."
73. *Supra,* note 9.

It is apparent from these cases that comity is pervasive in U.S. international decisions. Comity has, in fact recently been codified in section 304 of the U.S. Bankruptcy Code.[74] This was, as previously mentioned, the legislative basis upon which the stay of proceedings was issued in *Re Sefel.* Section 304 was specifically designed to resolve disputes in international bankruptcies where there is property or a party located in the U.S.[75] This section permits a foreign trustee to file a petition to provide for the administration of assets within the U.S. and to prevent creditors from within that jurisdiction from dismembering those assets from the estate. The section further provides guidelines for determining the appropriateness of a particular remedy. One of these guidelines, found in section 304(c)(5), explicitly provides for the recognition of comity in considering an application pursuant to that section. Although

---

74. Section 304: Cases Ancillary to Foreign Proceedings
(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may:
(1) enjoin the commencement or continuation of:
(A) any action against:
(i) a debtor with respect to property involved in such foreign proceedings; or
(ii) such property; or
(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
(3) order another appropriate relief.
(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 all claim holders in the United States against such prejudice and inconvenience in the processing of claims in such foreign proceedings;
(3) prevention of preferential or fraudulent dispositions 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.

75. Bruce Leonard, Jay A. Carfagnini and Professor Richard McLaren, "Can there be International Cooperation in Foreign Bankruptcies?: A Canadian Examination of Some Alternative Models" (1988), 3 Rev. of Int'l. Bus. 23. In addition, this article outlines the purpose and application of Section 303 of the Bankruptcy Code which provides "an alternative method for a foreign trustee to manage and protect the U.S. assets of the foreign debtor by permitting the foreign trustee to start an involuntary bankruptcy proceeding in the U.S." (p. 33). The authors suggest that this may be a more useful approach to dealing with international insolvencies in the absence of a treaty or uniform legislation which are obviously the most appropriate solutions.

the purpose of the section was to further creditor equality, it does not completely legislate away protectionism. Section 304(c)(2) sets out a competing principle recognizing the need for "protection of claim holders in the U.S. against prejudice and inconvenience". Thus the dispute between creditor equality and protectionism has not disappeared in the U.S., but section 304 does indicate a definite move towards a more internationally acceptable approach.[76]

In one of the leading and most recent cases in the U.S. on international insolvencies, *Cunard Steamship Co. v. Salen Reefers*[77] the court quoted from a House Report on this section of the Bankruptcy Code as follows:

> Principles of international comity and respect for judgments and laws of other nations suggest that the court be permitted to make appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.[78]

Perhaps one of the most persuasive indications of the willingness of the U.S. courts to lend support and recognition to foreign proceedings through the application of comity is also found in the *Cunard Steamship* case. In that case it was explicitly stated that comity has a unique purpose in bankruptcies. It "enables the assets of a debtor to be dispersed in an equitable, orderly and systematic manner, rather than in an erratic haphazard piecemeal fashion."[79] This certainly recognizes, and encourages through the application of comity, the advantages to be gained from the resolution of a bankruptcy in an single jurisdiction.[80] Not only does this make eminently good sense, it appears to propose an expansion of the application of the doctrine of comity beyond the simple recognition of foreign proceedings.

It is surely quite safe to assume that one of the primary purposes in bankruptcy proceedings is to insure that whatever assets remain in the insolvent's possession at the date of bankruptcy are distributed in an equitable and just manner.[81] Although concurrent proceedings are an acceptable alternative for dealing with foreign assets or parties, restricting the administration of the entire estate to one jurisdiction certainly facilitates this purpose. It is apparent as stated at the outset, that most

---

76. *Ibid.,* pp. 29-32. The authors further suggest that in enacting this section, the U.S. authorities were hoping that other nations, specifically Canada, would also adopt a similar clause thus enabling some uniformity in approach. This is according to the authors, however, not an ideal approach and probably should not be adopted in Canada.
77. *Supra,* note 9.
78. *Ibid.,* p. 455.
79. *Ibid.,* p. 458.
80. This was also explicitly recognized in the *Cornfeld supra,* decision as being a legitimate goal in bankruptcy proceedings.
81. *Stewart v. LePage* (1916), 53 S.C.R. 337.

nations would advance this same general purpose. To employ comity where necessary to promote this purpose would appear to be in line with Yntema's suggestion. Comity would be utilized to effect a more equitable solution encompassing broad international principles.

In light of the fact that comity, as stated in *Cunard Steamship,* can be used to reach an equitable result and one which embodies the basic purpose of a bankruptcy, it seems somewhat odd that the Alberta Court did not consider extending its application in *Re Sefel* to, at the very least, the recognition of the U.S. claims. Forsyth J. was obviously searching for a way around the statutory prohibition of the U.S. claims and yet ultimately rejected comity as a viable approach on the basis that it is restricted to the recognition and enforcement of foreign bankruptcy proceedings. If one accepts Yntema's characterization of comity, it is contrary to the principle itself to restrict it with formal rules of application. Forsyth J. stated that principles of comity are to

> provide for the recognition of foreign liquidation proceedings in the interest of distributing the assets of a debtor in a manner that is orderly, efficient and fair. Comity itself does not allow the judicial rewording of local bankruptcy statutes to adopt pieces of legislation to the demands of international trade.[82]

Mr. Justice Forsyth's position, as conveyed in the above statement certainly bears some merit, but in using equity to recognize the U.S. claims, he is doing exactly that which he refused to do through comity: re-word the legislation to "satisfy the demands of international trade". The question which remains is whether or not the principle in equity which the court applied was actually more appropriate in the circumstances.

V. *Equity: A Viable Alternative to Comity?*

Mr. Justice Forsyth relied on the case of *Re Condon; Ex parte James*[83] in which money was voluntarily paid to a trustee under mistake of law. Mistake of law is normally not a sufficient ground upon which money paid may be recovered. The court stated in that instance, however, that a trustee in bankruptcy is "in truth an officer of the court and the money he holds are trust funds." Thus, if it arises that such funds actually belong to someone else, "the court ought to do equity just as anyone else would

---

82. *Re Sefel, supra,* note 2, p. 201.

83. [1874-1880] All E.R. 388 (C.A.). In this case, the claimant succeeded in obtaining an execution against the bankrupt and was paid over the proceeds of the sale of the bankrupt's goods, prior to the declaration of bankruptcy. On being advised that he was obliged to pay over the money to the trustee in bankruptcy, he did so only to subsequently discover that he was under no such legal obligation.

be bound to do, and order the money to be paid to persons entitled to it."[84] If Sefel's estate was permitted to disregard the U.S. claims, there would undoubtedly be an element of unjust enrichment. I am not sure, however, that the stay of proceedings can be accurately described as a voluntary payment, or even an involuntary payment of money. This would presume that the U.S. creditors were actually in possession of the U.S. assets as opposed to only maintaining a right to such assets. Furthermore, the principle enunciated in *Ex parte James* was concerned with a purely domestic bankruptcy. Although this would not preclude the use of this doctrine in an international situation, it does become important if one is deciding whether equity is a more appropriate doctrine than comity. The mistake of law which the court relied on in this instance must necessarily be the reliance on the evidence adduced at the stay proceedings in the U.S. as it must be something distinct from the experience of the U.K. creditors. This being the case, surely the transnational character of the problem assumes greater relevance. The mistake concerned the nature of Canadian bankruptcy laws. Comity appears to be more tailored to dealing with transnational problems, in comparison to the principle raised in *Ex parte James.* Comity more keenly recognizes the unique interest of a foreign creditor and the underlying reasons why such interests should be considered. Furthermore, it could be stated that comity is more or less a very broad equitable principle applicable to international disputes. Hessel Yntema intimates in his article that comity was actually founded on equity.[85]

As an alternative to this principle in equity, Mr. Justice Forsyth proposes an analysis based on "remedial constructive trust principles". In doing so, he not surprisingly focuses on the unjust enrichment ingredient as dealt with by the Supreme Court of Canada in *Pettkus v. Becker.*[86] Through an anlysis that is similar, albeit briefer, than the one previously discussed, Mr. Justice Forsyth arrives at the conclusion that a "constructive trust remedy is appropriate on these particular facts". The constructive trust doctrine would appear, however, to be less appropriate than the principle expounded in *Ex parte James* with respect to international insolvencies. The beneficiary of a constructive trust, the U.S. creditors in this instance, would actually acquire an equitable title in the funds themselves under this doctrine. To find the existence of a constructive trust it is necessary to first isolate property to which it can attach because the "constructive trust is a proprietary remedy, that is it

84. *Ibid.,* p. 390.
85. Yntema, *supra,* note 48, p. 12.
86. [1980] 2 S.C.R. 834.

lies with respect to property."[87] A mere right to establish a claim to property arising out of a debt does not constitute a proprietary right. A creditor/debtor relationship is not the same, nor does it set up the same rights as a trustee/beneficiary relationship. Take for example the distinction between a secured and unsecured claim in a bankruptcy. Secured claims are not included in the administration of the estate as the creditors have an actual proprietary right in certain assets of the debtor. The rights held by secured creditors, whether or not they have been accorded preferential status are clearly not the same as the rights of the secured creditors. Holding that the preferred creditors actually have a proprietary right in the assets of the insolvent debtor may be one way to arrive at an equitable solution in this instance, but in light of the existence of an alternative method, that is comity, it is simply bad law.

Regardless of what approach was ultimately adopted, Mr. Justice Forsyth evaded what appears to be the heart of the problem: the prohibition on the recognition of foreign tax claims and the statutory adoption of this rule through a refusal to grant preferential status to such claims. The common law rule is firmly embedded in Canadian conflict of laws jurisprudence and Mr. Justice Forsyth cannot truly be criticized for attempting to navigate around it rather than rejecting it outright. I am certainly not as constrained and intend to deal with some of the problems in the application of this principle.

VI. *Recognition of Foreign Tax Claims*

The rule with respect to foreign tax claims is stated by Castel as follows: "As Canadian courts will not entertain an action for the enforcement either directly or indirectly, of a foreign . . . revenue law, they will not enforce a foreign judgment ordering the payment of taxes . . ."[88] The first case in which this doctrine was asserted is *Boucher v. Lawson,*[89] decided in 1734. In that case, Lord Hardwicke refused to recognize a Portugese revenue law which prohibited the exportation of gold from Portugal. In discussing this case, one author has quite intuitively noted that England was at war at this time and highly dependent on the shipping industry.[90] He went on to state: "Thus the commercial necessity of an insular economy gave birth to a rule of law."[91] The rule of law in this instance

---

87. A.H. Oosterhoff, *Text, Commentary and Cases on Trusts,* (3d) (Toronto: Carswells, 1987) p. 394.
88. Castel, *supra,* note 22, p. 255.
89. Eng Rep. 53 (K.B. 1734).
90. Mark McElroy, "The Enforcement of Foreign Tax Claims" (1960), 38 Univ. of Detroit L.J.1.
91. *Ibid.,* p. 1.

neither died, nor even withered, when England's economy became less insular or less dependent on shipping.

The pivotal case on the recognition of foreign tax claims today is *Government of India v. Taylor* (hereinafter referred to as *India v. Taylor*).[92] This case concerned a claim by the Revenue division of the Government of India for an amount of income tax due from a company which entered into a voluntary wind-up. The claim was therefore against the liquidator of the estate. In determining the existence of an actual rule of law which prohibits such claims, the House of Lords examined a number of cases. Amongst the cases mentioned was *In re Visser*[93] in which it was stated:

> there is a well recognized rule, which has been enforced for at least two hundred years or thereabouts, under which the courts will not collect the taxes of foreign states for the benefit of sovereigns of those sovereign states.[94]

In addition to reciting a number of such passages from various cases which stressed the pervasiveness of this rule, Lord Keith of Avonholm outlined the basic justification for its application. He gave two possible justifications, the first one being that the enforcement of a claim for taxes is merely an extension of sovereign power. The enforcement of a foreign tax claim would, as stated by Lord Keith, more or less be an assertion by a sovereign authority of one state within the territory of another. The second justification was derived from a statement by Judge Learned Hand in *Moore v. Mitchell*.[95] He stated:

> To pass upon the provisions for the public order of another state is, at any rate should be, beyond the powers of the court; it involves the relations between the states themselves, with which courts are incompetent to deal and which are entrusted to other authorities.[96]

Essentially, Judge Learned Hand equates revenue laws with penal laws: "They affect a state in matters vital to its existence as its criminal laws." Thus on the basis of these justifications and the case law, the House of Lords unanimously decided that there is a rule of law which precludes recognition of foreign revenue claims. The only other comment in *India v. Taylor* which is relevant here was made by Lord Somervell of Harrow. He stated that the only possible justification for recognizing a claim would be on the basis of comity, but "it would be remarkable

---

92. [1955] 1 All E.R. 292 (H.L.).
93. *In re Visser, The Queen of Holland v. Drukker,* [1928] Ch. 877.
94. *Ibid.,* p. 884.
95. *Moore v. Mitchell* (1929) 30 F. (2d) 600.
96. *Ibid.,* p. 604.

comity if state B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of state A."[97]

The *India v. Taylor* case was fully endorsed by the Supreme Court of Canada in *U.S.A. v. Harden.*[98] The Supreme Court relied quite substantially on *India v. Taylor* in concluding that an actual judgment on a debt for taxes entered in the U.S. District Court for Southern California was unenforceable in Canada. Thus there is little doubt that this rule is firmly entrenched in Canadian jurisprudence.[99]

The law in the United States regarding foreign tax claims has developed on a somewhat different line. The rule was originally adopted in the U.S. and, "buttressed" by Judge Learned Hand in the above-noted decision. The first few courts to reject Judge Learned Hand's propositions, based their opinion on the presumption that tax is a form of debt which a debtor impliedly contracts to pay. Regardless of the public nature of the debt, as long as a judgment had been obtained, there was no apparent reason why it should not be enforced.[100]

The first case to step outside of the restriction that a judgment was necessary was *Oklahoma Tax Commissioner v. Rodgers.*[101] In commenting on this case, Mark McElroy states in his article: "Comity compelled enforcement and modern conditions demanded it. To permit a citizen to enjoy the benefits of a government and then evade taxes by stepping across its border was unwarranted and not to be encouraged."[102] The court in that case also specifically addressed Judge Learned Hand's comments on the comparable nature of penal laws and revenue laws and stated quite simply that, "a penal law is punitive in nature, while a revenue law defines the extent of the citizen's pecuniary obligation to the state, and provides a remedy for its collection."[103]

This statement recognizes that although penal laws and revenue laws are similar to the extent that they both serve as instruments of public policy, the main purpose of revenue laws are to generate revenue. This distinction warrants recognition in the treatment of tax claims and judgments in the context of conflict of laws. The above statement further emphasizes the contractual element in a tax debt. Similar to any contractual obligation, if a corporation enters into a foreign jurisdiction, takes advantage of whatever that jurisdiction has to offer which

---

97. *Supra,* note 96, p. 301.
98. [1963] S.C.R. 366.
99. See as well *Re Reid* (1969), 2 D.L.R. (3d) 155 (B.C.S.C.); *Re Dwelle Estate* (1969) 69 W.W.R. 212 (Alta. S.C.).
100. McElroy, *supra,* note 91, p. 3.
101. 238 Mo. App. 1115, 193 S.W. 2d 919 (1946).
102. McElroy, *supra,* note 91, p. 4.
103. *Supra,* note 102, p. 1122, 193 S.W. 2d at 926-927.

compelled the corporation to enter it in the first place, relies on the laws and perhaps special advantages associated with such laws and is allowed to carry on business, it is simply a matter of the expectations of the parties that the corporation should be liable for the payment of taxes. To reject foreign tax claims in the context of a bankruptcy obscures the expectations of the parties. The fact that one of the parties is a government entity should not, and usually does not make a difference. There is no rule which prohibits the recognition of a judgment obtained by a government entity on a straight breach of contract. The same rules would apply to the recognition of such a judgment as if the two parties were private.

The final point that I wish to raise with respect to the development in the United States in the area of recognition of foreign tax claims is the use of reciprocity. For sometime, many decisions respecting foreign state tax claims hinged on the probability of reciprocal treatment. In *City of Detroit v. Gould*[104] the Supreme Court of Illinois explicitly dropped the requirement altogether and stated, "there remains no reason of comity upon which the courts of this state should deny this action."[105]

Thus it appears that the U.S., at least with respect to the recognition of tax claims from other States, has developed far beyond the approach adopted in *Re Sefel.* Most significantly, the U.S. courts have done so with the basic principle of "comity" as a primary tool. As pointed out above, the U.S. Bankruptcy Code further provides for the recognition of claims of foreign "governmental units" including revenue claims. In any event, comity certainly warrants consideration in determining whether to recognize a foreign tax claim. As you may recall, comity has traditionally been used in situations which involve public as well as private law considerations. That being the case, there would be no theoretical barrier to its application with respect to tax claims given the inherently public nature of revenue law. It was further stated above that there are no particularly convincing reasons why comity should be restricted in resolving international insolvency disputes. The Alberta Court refused to extend it beyond the recognition of foreign proceedings. To stop short of applying it to the recognition of a foreign tax claim in an international insolvency, a field in which it is recognized as being a wholly acceptable doctrine, is anachronistic and too formalistic.

Another way to approach this problem can be found in the law of maritime liens[106] and specifically the decision in *Todd Shipyards v.*

---

104. 12 Ill. 2d 279, 146 N.E. 2d 61 (1957).
105. *Ibid.*, p. 300.
106. W. Tetley, "The Law of Conflicts and Maritimes Liens: The U.S., Canada, the U.K. and France" and Vaughan Black, "One If By Land, Two If By Sea", *New Directions in Maritime*

Altema Compania Maritima.[107] This case was referred to in the *Re Sefel* decision. Forsyth J. used this case to support his conclusion that comity has no place in the determination of priorities which are strictly a matter of the *lex fori.* In my reading of this case however, the Supreme Court of Canada appears to be saying much more which may bear upon the problems in *Re Sefel.* Briefly, *Todd Shipyards* raised the issue of the priority to be accorded to a claim for the cost of necessary repairs resulting in a maritime lien in accordance with the law of New York. Although maritime liens are accorded priority in Canada over a mortgage, a claim for necessaries for repairs does not constitute a maritime lien in Canadian courts. The Supreme Court of Canada nonetheless recognized the claim and granted it priority applying the following reasoning:

> Although the supplier of necessaries is not entitled to a maritime lien under Canadian law and all the cases cited by the learned author are concerned with claims which are so recognized in this country, the cases nevertheless clearly indicate that a valid maritime lien takes priority over a mortgage, and as the claim for necessary repairs furnished in the U.S. is recognized as creating that particular kind of lien and as being enforceable as such in Canadian courts, it follows in my opinion, that the appellants' claim in this case must be accorded priority over the mortgage held by the respondent.[108]

Thus the court first determined the nature of the right prior to working it in to the Canadian priority scheme. This approach is probably impossible in the case at hand given the fact that the restriction in Canadian bankruptcy legislation on foreign revenue claims is not based on any substantive difference in the perception of what constitutes a tax claim, but rather merely the fact of the claim being foreign. The legislation has transformed what would typically be decided in accordance with the proper law of the contract, that is the validity of the claim, into a matter of priorities. Perhaps the legislature has public policy reasons beyond those which are associated with the common law prohibition and upon which I have hopefully cast some doubt, for enacting this rule. Whatever may be the case, it does not accord with one's sense of justice and certainly lacks flexibility.

Another possible approach may be rooted in the treatment of the administration of estates. A duly appointed administrator[109] obtains title

---

Law 1984, (Toronto: Carswells, 1985). Both of these authors comment on some of the approaches that have been adopted in maritime law, which has always dealt with conflict problems. The approaches adopted in the past in this area may provide some guidance for the resolution of modern international commercial disputes.

107. [1974] 2 S.C.R. 1248.

108. *Ibid.*, p. 1259.

109. The law of administration of estates is within provincial jurisdiction in Canada. An

to only those assets which are located within the forum. To deal with assets in a foreign jurisdiction, it is necessary to seek the appointment of an administrator within that jurisdiction to distribute the assests in accordance with the law of the forum.[110] Thus an estate with assets soley in Canada would accept foreign claims, but only to the extent that the law of the particular province recognizes such claims. If, however, the same estate also had assets in Colorado, they could only be distributed in accordance with the laws of Colorado.[111] If this were to be applied to the distribution of assets in an international insolvency, and particularly to the facts in *Re Sefel,* a trustee would have to be appointed in Colorado and the assets located there would be distributed in accordance with the U.S. Bankruptcy Code. The U.S. creditors would obviously be granted preferential status.

In general, however, this rather protective territorial approach is not suitable in the realm of bankruptcy law. As previously stated, the aim of bankruptcy law is to affect an equitable distribution of all the assets to all of the creditors. This is most effectively achieved if there is at least an attempt made to settle the estate in one jurisdiction with one trustee. Canada has never adopted a strictly territorial approach to international insolvencies and I would certainly not advocate doing so now. Furthermore, a territorial approach is on the whole, inconsistent with the general trend towards facilitating international and cross-border transactions.

Both of these purported solutions would obviously require amendments to the legislation, although the maritime lien approach could be attempted in the absence of an amendment. It would simply be another way to circumvent the legislation as was done in the *Re Sefel* decision through unjust enrichment. Amending the *Bankruptcy Act* in this way, however, is not advisable as it would only provide a patchwork solution. Removing the restriction on the recognition of foreign revenue

---

administrator therefore only maintains the right to deal with assets within the particular province in which the appointment is sought.

110. Castel, *supra*, note 22, chapter 27, p. 447-459.

111. The classic case in the administration of estates involving foreign facts is *In re Kloebe; Kannreuther v. Geisbrecht,* (1882) 28 Ch.D. 175. The case involved the recognition of a foreign claim in an estate with no foreign assets. The court confirmed at p. 178 that, "a person suing in this country must take the law as he finds it, he cannot by virtue of any regulation in his own country, enjoy greater advantages than the other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer." In commenting on the situation where foreign assets are involved, the court further stated at p. 180, "And when the legal representative has been constituted in the foreign country, whether he be the executor of the domicile or another, the administration of assets must take place in the foreign country, with the effect of giving the foreign creditors priority as regards the foreign assets..." See as well Nadelmann, "Insolvent Decedent's Estates" (1951), 49 Mich. L.R. 1129.

claims would solve many of the problems raised in *Re Sefel,* but would likely only put a slight dent in the vast array of problems which arise in the adjudication of international insolvencies. As in many other areas of law which are associated with commercial activities,[112] it is essential to adopt a unitary system. This could be achieved either in the form of an international agreement or the uniformity of laws.

VII. *A Unitary Approach to International Insolvency Law*

The doctrine of "unity of bankruptcy", as previously mentioned, has experienced little success in Canada, the United States and the United Kingdom. This is as well true of the vast majority of nations[113] and perhaps again reflects the fact that bankruptcy laws are considered an extension of state policy. Most countries today would agree, however, that an approach which embodied the principles and purposes of the "unity of bankruptcy" doctrine would be advantageous. Nadelmann notes that acceptance of this approach will only result when each nation is assured that the others are following the same policy. This necessarily requires a high degree of cooperation which Nadelmann comments, "cannot be presumed."[114]

It is apparent that the private international law approach to bankrupticies has shown no signs of achieving uniformity, and concomitantly a modicum of certainty in fairness of treatment, on its own accord. In light of this fact, it is surprising that there is not a more significant body of bankruptcy treaties or international agreements. The idea of adopting an international approach to bankruptcy rules is by no means a recent development. Nadelmann discusses in one of his articles a pamphlet entitled, "Outline of a Plan of an International Bankruptcy Code for the Different Commercial States of Europe", which was written by Jabez Henry in the early nineteenth century.[115] It is interesting to note that bankruptcy treaties themselves have been around for a long time.

---

112. For example there have been a number of tax treaties between Canada and the United States which govern some of the problems raised by the overlapping of the two systems.

113. Nadelmann, "International Bankruptcy Law Its Present Status" (1943-44), 5 U. of Toronto L.J. 324 at p. 343. This is essentially a survey article which examines the bankruptcy laws of most European countries, Canada, the U.S., the U.K., South America and Latin America as well as a few other countries. In spite of the fact that this article is somewhat dated, it provides an excellent overview of the general approach to bankruptcies adopted throughout the world.

114. Ibid., p. 343.

115. Nadelmann, "An International Bankruptcy Code: New Thoughts on an Old Idea" (1961), Int'l and Comp. L.Q. 70, at p. 70. J. Henry also wrote "Tract on Foreign Laws" which Nadelmann notes came out in London in 1828.

John D. Honsberger mentions a treaty between two Italian City States, Verona and Trent, concluded in 1204.[116]

Most notably, it is suprising that there is not an agreement between Canada and the United States. Nadelmann commented in 1941 that, "the fact that the United States and Canada, immediate neighbours with a similar bankruptcy law, still are without any agreement on questions of bankruptcy administrations involving both countries, must appear strange."[117] It has been recognized that some form of agreement is needed to govern bankruptcies which involve both Canada and United States. Mr. Justice Nesbitt of the Supreme Court of Canada stated in 1905:

> I think it is a very great pity that there should not be some legislation immediately regulating many questions on international law, at any rate between Canada and the United States. The growing interchange of business, owing to the geographical continuity, makes it very important that there should be well-defined rules applicable to both countries upon many questions which are constantly arising. Take for instance, bankruptcy, receiverships, administrations, etc. . . .[118]

Recently, there has been some action towards formalizing an agreement. In 1971 the Committee on Canada-United States Relations was set up by the National Bankruptcy Conference of the United States to examine the possibility of coordinating the two systems of law.[119] In 1970, a Canadian Committee, the Canadian Study Committee on Bankruptcy and Insolvency Legislation, issued a report which remarked on the problems encountered in the adjudication of international insolvencies and determined that a treaty would provide a better solution as compared to simply coordinating legislation.[120] There were no negotiations, however, with respect to either approach until 1979 at which time negotiations to draft a treaty got underway.

A draft treaty was released pursuant to these negotiations on October 29, 1979. The Treaty promotes a jurisdictional solution based upon the territory within which the greater portion of the debtor's property is

---

116. John D. Honsberger, "The Negotiation of a Bankruptcy Treaty" (1985), *The Meredith Lectures,* (McGill University) p. 287 at p. 288.

117. Nadelmann, "International Bankruptcy Law . . .", *supra,* note 25, p. 351.

118. David Rubin, "Canadian Comment: The U.S. Creditors' Unfair Advantage over Canadian Creditors" (1979), 84 Comp. L.Q. 470, at p. 470. The comment by Mr. Justice Nesbitt was made in an address to the Universal Congress of Lawyers and Jurists.

119. Rubin, *supra,* note 3, p. 471. Rubin quotes the actual stated purposes of this Committee which were essentially to identify problems in the two systems which result in discrimination of creditors on the basis of origin or which unecessarily hinder the smooth resolution of disputes.

120. E. Bruce Leonard, "Can There Be International Cooperation in Foreign Bankruptcies?", *supra,* note 75, at pp. 36-37.

located.[121] Incorporeal property is presumed to be located at the debtor's principal place of business. Nadelmann criticizes this "property" oriented approach primarily because of the volatility of property.[122] He also comments that in failing to adequately address the private international law rules, applicable in determining the extent to which the law of the forum as opposed to foreign law should be applied, the drafters of the treaty presumed that Canadian and American law is more or less the same. This, as Nadelmann states, is "unrealistic."[123] The Committee adjourned shortly thereafter at the request of the Canadians to await the new proposals in the Canadian *Bankruptcy Act.* Negotiations have not since resumed and there has yet to be any major reforms to the Canadian legislation.[124]

Honsberger outlines the two approaches which can be adopted in a treaty. It may either impose a unitary international system which overrides local law or in the alternative, provide for a choice of law to be applicable to individual proceedings on a case-by-case basis. The U.S.-Canada Draft Treaty adopted the latter approach. The Treaty determines which forum has jurisdiction, then the law of that jurisdiction steps in to govern the adjudication of the proceedings. The declarations of that court would consequently be accorded transnational effect. A Draft EEC Convention which appeared in 1970 adopted the former approach.[125]

The EEC Draft Bankruptcy Convention of 1970 has been discussed in numerous academic works and need not be addressed here in any detail.[126] A second Draft Convention emerged in 1980 which is at present still under consideration.[127] The only aspect of the Convention that warrants discussion here is the treatment of preferential claims. Unlike the 1970 Convention, the 1980 Convention does not provide for a unitary system, but rather proposes a code of private international law for the Community.[128] The rules pertaining to secured and preferential claims are, however, a "derogation from the general rules referring the effects of a bankruptcy to the private international law rules of the country in

---

121. Nadelmann, "A Reflection on Bankruptcy Jurisdiction: News From the European Common Market, the United States and Canada" (1982), 27 McGill L.J. 541, at p. 550.
122. *Ibid.,* p. 550.
123. *Ibid.,* p. 551.
124. Leonard . . . , *supra,* note 76, p. 37.
125. Honsberger, *supra,* note 116, p. 294-295.
126. The pivotal work on the 1970 Treaty is Muir Hunter, "The Draft Bankruptcy Convention of the European Economic Communities" (1972), 21 Int'l. and Comp. L.Q. 682. The 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters excluded bankruptcies.
127. D. Lasok, P.A. Stone, *Conflict of Laws in the European Community,* (London: Professional Books Limited, 1988), p. 397.
128. Honsberger, *supra,* note 116, p. 295.

which the bankruptcy has been opened."[129] Lasok and Stone comment that, "these provisions submit securities and preferences to the law of the country in which the property in question is situated". This results in what is referred to as a "sub-estate for accounting purposes in relation to each Member State in which assets to be realized are situated".[130] Thus, for the most part, one court is seised with jurisdiction of the bankruptcy,

> but not so as to prejudice the jurisdiction of otherwise competent courts and authorities to determine the existence, amount or preferential status of fiscal or similar debts [and] social security debts . . . nor so as to prejudice the jurisdiction of the courts of the *situs* of the registered property to determine what secured or preferential rights affect the property.[131]

In spite of the fact that this appears to be an ideal solution, especially to the problems encountered in *Re Sefel,* the possibility of ever actually formalizing an agreement in Treaty form is slim. This is particularly true of the existing situation between Canada and the United States. One author has commented that:

> realistically there is little prospect of reaching a consensus on a treaty within a reasonable time frame. The conflict of law issues, the national jurisdictional jealousies of the two countries and the ideological and political differences of the countries in matters such as Crown priorities all result in the unlikelihood of a Canada/United States treaty in the near future.[132]

This being the case, the only other possible alternative is uniform legislation. Nadelmann comments that, "Unification of law through uniform legislation is a long drawn-out affair, but it is the only practicable approach to the problem in the United States."[133] The American International Bar Association has taken some initiative in this respect in proposing a Model International Insolvency Co-operation Act (MIICA). This document essentially suggests that what is needed is "comparable legislation" in each country based on a less flexible version of section 304 of the present Bankruptcy Code. The legislation would, "proceed on a basis that presumptively recognized the authority of the court having jurisdiction over the debtor, provided that jurisdiction was properly supportable on what might be termed 'generally accepted conflicts of law principles'".[134]

The MIICA does provide a universal approach to the administration of bankruptcies, but it does not appear to remedy the problems

129. Lasok, *supra,* note 127, p. 406.
130. *Ibid.,* pp. 406-407.
131. *Ibid.,* pp. 401-402.
132. Leonard, *supra,* note 76, p. 38.
133. Nadelmann, "An International Bankruptcy Code . . . ." *supra,* note 115, p. 82.
134. Leonard, *supra,* note 75, p. 40.

encountered as a result of the separate private international laws of both countries and their application to bankruptcy proceedings. It does not, for example, remedy the problems in *Re Sefel.* At the very most, it may in such a situation serve as an indicator of the prevailing attitude towards the administration of bankruptcies and consequently lead a court to adopt principles such as comity to recognize otherwise prohibited claims.

The prospect of actually putting the MIICA or any other agreement into effect is unlikely. Canada has been attempting to amend its own bankruptcy legislation to bring it more in line with some of the demands of increasing global integration and multinational business for some time, but even these efforts have been fruitless to date.[135] There simply appears to be a lack of political motivation to bring about any major changes in this area of law on a domestic, bilateral or multilateral level.

VIII. *Conlcusion*

Kurt Nadelmann has noted that, "As in all areas of conflicts, in bankruptcy the most serious difficulties come from statutory provisions preventing courts from reaching reasonable and equitable results".[136] In light of the fact that it is improbable that any substantial legislative or treaty reforms will occur in the field of international insolvencies, perhaps the doctrine of comity affords the most hope at present. It provides a flexible, albeit uncertain, approach to recognizing foreign claims and proceedings and permits a court to arrive at an equitable solution. Furthermore it is established as an acceptable doctrine in the realm of international insolvency law in both Canada and the United States. Comity has also been recognized, at least with respect to the United States, in determining the recognition of foreign revenue claims. Although Canada has to date refused to adopt this position, I hope that I have succeeded in casting some doubt upon this approach in pointing out its inability to reflect the realities of transnational business ventures. It is thus apparent that comity may provide all of the answers to the problems raised in *Re Sefel* and although such solutions do not address the inherent problems in the treatment of international bankruptcy law, comity does furnish the court with an acceptable and appropriate temporary remedy.

---

135. *Ibid.,* p. 37. The authors note, however, that "the promise of new legislation" has recently resurfaced.

136. Nadelmann, "Assumption of Bankruptcy Jurisdiction Over Non-Residents" (1966), 41 Tul. L. Rev. 75 at p. 81.