A New Role for Secondary Proceedings in International Bankruptcies

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Secondary proceedings—the ugly stepsisters to main proceedings—get short
shrift in international bankruptcy scholarship. This article seeks to remedy that

* Professor of Law, University of Michigan. I appreciate the comments of colleagues at the
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1. Negative propositions are difficult to support. For example, one article with the subject right in its
title was only three pages long. See Adam Al-Attar, Using and Losing Secondary Proceedings, 22(5)
INSOLV. INTELL. 76-78 (2009). Secondary proceedings do, of course, receive passing analysis in more
lengthy scholarly work. See, e.g., Jay L. Westbrook, The Lessons of Maxwell Communication, 64
FORDHAM L. REV. 2531, 2533 (1997) (claiming secondary proceedings are preferable to territorialism, but
are a "less-bold advance" than modified universalism).
deficiency. First, it describes what it argues are the traditional conceptions—both stated and implicit—of secondary proceedings in international bankruptcies. Second, it offers a revised way of thinking about secondary proceedings, proposing to restrict their scope through the use of “synthetic” hearings. Third, it addresses some problems with the proposed new role of secondary proceedings and sketches a possible solution involving the creation of an international priorities registry.

I. THE SECONDARY PROCEEDING AS TRADITIONALLY UNDERSTOOD

The Europeans get the principal credit with popularizing the secondary proceeding. True, “ancillary,” “parallel,” and other related proceedings existed all along, stitched together ad hoc in the haphazard comity-based precedent book of cross-border bankruptcy, but the concept of the “secondary proceeding” did not really take off until the EU Insolvency Regulation. The purpose of a secondary proceeding is to allow local creditors of a foreign debtor the opportunity to open a bankruptcy case in their native country, chiefly to enjoy the benefit of local bankruptcy law. They exist only in contrast to a main proceeding, which is a plenary bankruptcy case opened in the country housing the debtor’s center of main interests (COMI). Thus, secondary proceedings serve as a form of definitional residuum: proceedings that are not main proceedings. (One preliminary point of lexical air must be cleared, however, at the outset of this discussion. Secondary proceedings are not, strictly speaking, a true residuum class, because there can be proceedings so remote to the debtor that they are neither COMI-based main proceedings nor the lesser class of secondary proceedings (which require, under the EU Insolvency Regulation and U.S. chapter 15 an “establishment”). As such, there can be non-main, non-secondary proceedings. These tangential affairs have yet to find a good

2. See Council Regulation 1346/2000, art. 12, 2000 O.J. (L 160) 1 (EC) [also referred to throughout the article as EU Insolvency Regulation]. This Regulation became effective in May 2002 for all members except Denmark; see also Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. Doc. A/Res/52/158, art. 21 (Jan. 30, 1998) (model law based largely on EU Insolvency Regulation) [hereinafter Model Law].


7. See Westbrook, supra note 5, at 11; see also 11 U.S.C. § 1502(5) (defining “foreign non-main proceeding”).

name.9 Others have explored these oddities,10 but they are beyond the scope of this
enquiry.)

Why allow secondary proceedings? The traditional justification is to respect the
sovereignty of local courts that have direct jurisdictional power over locally situated
assets, as well as to accord local creditors their rights under domestic bankruptcy
law.11 In other words, secondary proceedings are needed to counteract a perceived
"over-relinquishment" of sovereignty in a cross-border insolvency to the main
proceeding.12 The tension flows from the extra-territorial application of the main
proceeding’s substantive bankruptcy law under a universalist international
insolvency regime. (On the off-chance anyone reading this article is unfamiliar with
this debate, “universalism” refers to the theory that advocates resolving cross-border
insolvencies to the maximal extent possible by one substantive bankruptcy law.13 Its
doctrinally promulgated version is “pluralist,” i.e., the substantive bankruptcy law is
chosen from among various jurisdictions for export from the one housing the
debtor’s COMI.14 It is contrasted with “territorialism,” which advocates strict
territorial application of bankruptcy laws to those assets—and only those assets—
within a country’s physical borders.15)

Universalism challenges states that are sensitive about the rotating subjugation
of sovereignty a universalist system inherently requires.16 This concern spawned the
secondary proceeding as a compromise to these territorialists.17 While in a pure
universalist system, the deferring state might open an “ancillary” or “auxiliary”
proceeding to marshal assets, exercise jurisdiction, and otherwise compel
performance of bankruptcy actors to assist the COMI state’s proceedings,18 a true

9. One insightful author proposes “non-qualifying proceedings” as the best term. Alesia Ranney-
Marinelli, Overview of Chapter 15 Ancillary and Other Cross-Border Cases, 82 AM. BANKR. L.J. 269, 298-
300 (2008).
10. See, e.g., id.
11. Council Regulation 1346/2000, 12th Recital (“To protect the diversity of interests, this Regulation
permits secondary proceedings to be opened to run in parallel with the main proceedings.”), 19th Recital
(contending that secondary proceedings “protect local interests”); see also, e.g., Frederick Tung, Fear of
Commitment in International Bankruptcy, 33 GEO. WASH. INT’L L. REV. 555, 566-68, 576-77 (discussing
theoretical underpinnings).
12. See John A. E. Pottow, Greed and Pride in International Bankruptcy: The Problems of and
Proposed Solutions to “Local Interests,” 104 MICH. L. REV. 1899, 1915 (2006); see also Council Regulation
1346/2000, 19th Recital (“Cases may arise ... where differences in the legal systems concerned are so great
that difficulties may arise from the extension of effects deriving from the law of the State of the opening to
the other States where the assets are located.”).
13. See, e.g., Jay L. Westbrook, A Global Solution to Multinational Default, 98 MICH. L. REV. 2276,
2277 (2000).
15. See, e.g., Lynn LoPucki, The Case for Cooperative Territoriality in International Bankruptcy, 98
MICH. L. REV. 2216 (2000). For a discussion of the tension between these paradigms, see Pottow, supra
note 14, at 945-951.
16. See Frederick Tung, Fear of Commitment in International Bankruptcy, 33 GEO. WASH. INT’L L.
REV. 555, 576 (“Universalism effectively requires a state’s precommitment to wholesale deferral to other
states’ various prescriptions for financial distress.”).
17. See Pottow, supra note 12, at 1915 (describing why states might want their own laws enforced).
18. See, e.g., Pottow, supra note 12, at 1904-05 (discussing operation of universalist system’s true
ancillary proceedings).
"secondary" proceeding accords the putative deferring state the opportunity to entertain a full-fledged parallel action. And the rub comes in choice of law: while an ancillary proceeding would presumably defer to COMI bankruptcy law (operationalized by transferring jurisdiction of assets to the main proceeding or perhaps liquidating and sending proceeds for disbursement to the main proceeding), a secondary proceeding distributes the local assets under local substantive bankruptcy law, not the bankruptcy law of the COMI jurisdiction.

Viewed thus—which should not be a contentious characterization—secondary proceedings are driven by a choice of law compromise. International bankruptcy conventions like the EU Insolvency Regulation are presumptively universalist, but territorialists are accorded a veto power by permitting local creditors the opportunity to open a secondary proceeding and bask in the comforting familiarity of local bankruptcy law. Whence the choice of law anxiety? Among other things, it comes from priority rules: those pesky normative distributional differences that the cynical cast as rent-seeking outputs of domestic lobbying efforts and the naïve see as the culmination of a thousand flowers of important socio-cultural differences blooming. In other words, secondary proceedings owe their existence in large part to the persistence of the territorialism-fomenting priority differences between domestic bankruptcy systems.

Accordingly, what might be considered the "doctrinal" basis for secondary proceedings is the vindication of domestic bankruptcy priority rules, and what might be considered the "theoretical" basis is the inchoate adoption of universalism as the dominant paradigm of cross-border insolvency resolution in the face of lingering

19. Council Regulation 1346/2000, art. 27, 2000 O.J. (L 160) 1 (EC). This choice of law discussion somewhat conflates secondary proceedings with plenary proceedings, an intentional sacrifice of precision for exposition. Nothing of import to this analysis turns on it.

20. See, e.g., 11 U.S.C. § 1521(a)(5) (turnover of U.S. assets to foreign bankruptcy representative). Local proceedings in cross-border insolvencies may either be "ancillary" (assisting a primary jurisdiction) or "plenary" (rivaling a primary jurisdiction by insisting on parallel actions). Ancillary proceedings in the U.S. Code would fall under chapter 15 and plenary ones would be under chapters 11 or 7.


22. See Council Regulation 1346/2000, art. 28 ("Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.").


24. See Pottow, supra note 12, at 1011–12; see also Bob Wesssels & Ian Fletcher, Global Principles for Cooperation in International Insolvency Cases 151 (International Insolvency Institute 2010). These of course are not the only issues driving secondary proceedings. For example, actions to quiet title of real property likely require the exercise of judicial power by the situs jurisdiction. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223, 226, 228, 234–36, 239, 241 (1971).

25. See Westbrook, supra note 23, at 30 (noting the difficulties presented by national variations in insolvency priorities).
vitality to territorialism. But there is also a more “hidden” reason, again related, but analytically distinct, lurking beneath the surface. The concern is that universalism will lead to jurisdiction fights, because the stakes are larger. After all, the COMI jurisdiction gets to export its bankruptcy law worldwide in a transnational insolvency. “Universalism is an all-or-nothing system. A single court gets the case, and runs it worldwide.” The concern, therefore, is that even if we were all good universalists on paper, we might fight over who gets to be the COMI in any given bankruptcy. Secondary proceedings are a way to blunt this competitive impulse by lowering the stakes.

The preceding characterization might lead one to conclude that secondary proceedings, if and when opened, are co-equal legal affairs to the main proceedings afoot in the debtor’s COMI. Yes and no. True, secondary proceedings under local law are available to local creditors “as of right,” so to speak, when the debtor has an establishment and assets in a non-COMI jurisdiction, but there are deliberate jurisdictional hierarchies designed to subordinate the secondary proceedings and make them, aptly, secondary. For example, the jurisdictional scope of the secondary proceeding is expressly limited to assets within the physical territory of the secondary country. In contrast to many bankruptcy laws that exert extraterritorial scope (the United States being the paradigmatic example), the secondary proceedings are

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26. See Pottow, supra note 14, at 947 (“Accordingly, the dominant theory of an ideal international insolvency regime, ‘universalism,’ advocates one law to control a bankrupt’s worldwide assets, regardless of their location.”).

27. See Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 CORNELL L. REV. 696, 709, 711 (1999) (“[I]n a universalist system, the priority of Mexican workers’ employment claims against a U.S. firm operating in Mexico would be determined by U.S. priority rules of priority—much to the disappointment of the affected Mexican workers.”).

28. See Lynn M. LoPucki, Universalism Unravels, 79 AM. BANKR. L.J. 143, 151 (2005) (“When courts compete for cases internationally, the stakes are higher than when courts compete domestically.”).

29. Id. at 148.

30. See id. (discussing the discomfort that arises when selecting which country’s court and laws will control); see also John A. E. Pottow, The Myth and Realities of Forum Shopping in Transnational Insolvency, 32 BROOK. J. INT’L L. 785, 812 (2007) (challenging this concern and discussing cases where it may be unfounded).

31. See Pottow, supra note 14, at 995–96 (discussing importance of stakes-lowering in bankruptcy reform). For a recent case suggesting this concern is overstated, see In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685 (Bankr. S.D.N.Y. 2010) (enforcing Canadian bankruptcy plan’s release of third-party debtors in chapter 15 ancillary proceeding that would arguably have been impermissible under U.S. law).


33. See 11 U.S.C. § 1528 (“The effects of such case shall be restricted to asset of the debtor that are within the territorial jurisdiction of the United States.”); Council Regulation 1346/2000, art. 27, 2000 O.J. (L 160) 1 (EC).

34. See 11 U.S.C. § 541(a) (asserting in rem jurisdiction over assets worldwide); 28 U.S.C. § 1334(e)(1) (assigning exclusive subject-matter jurisdiction to federal courts of same). Compare Council Regulation 1346/2000, 12th Recital (“This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets.”).
expressly constrained.  Similarly, there are other more indirect restrictions on the scope of a secondary proceeding’s jurisdictional reach, such as the lack of an automatic stay that a COMI proceeding enjoys.

In sum, the most accurate understanding (from the normative perspective of a universalist) of secondary proceedings is that they are a necessary evil. They are required to dampen territorialist and competitive impulses—perhaps tolerated due to the idiosyncrasies of local property law—but sit as an otherwise theoretical thorn in the side of universalists confronting a divergent array of priority rules. This begrudging tolerance explains why they are cut down through explicit scope restriction in universalist-animated legal documents like the UNCITRAL Model Law, chapter 15, and so forth. The corollary observation to this characterization is that if one of the anchoring sticking points—divergence in priority rules—can be resolved, then secondary proceedings (at least in their current, stronger form) may no longer be needed.

II. LEGAL INNOVATION: THE “SYNTHETIC” SECONDARY PROCEEDING

The preceding analysis envisions priority law differences and secondary proceedings going hand-in-hand: a priority fight among creditors in a multinational bankruptcy will likely result in a secondary proceeding being opened, and a cross-border insolvency that raises no meaningful priority squabbles will not. That may be too quick an assessment. Consider the landmark U.K. experience with the Collins and Aikman (C&A) bankruptcy. (This is extrapolation from a sample size of one, but at the cutting edge of international commercial practice, such inference is often required.) There, administration proceedings were opened in the United Kingdom, which was the COMI of certain European operations that spanned several jurisdictions within the Union. (As such, under the EU Insolvency Regulation “main” proceedings were opened in the U.K.) One of the problems that arose involved the treatment of certain Spanish trade creditors and, as often happens in such disputes, objection by those creditors that they would not be accorded the favorable treatment for their claims that they would otherwise receive under Spanish bankruptcy law if the C&A distribution were conducted under U.K. rules. Unsurprisingly, and consistent with the contention of this article that secondary proceedings are driven by priority fights, a secondary proceeding was “threatened” by the Spaniards. This was perceived as a real problem to the expeditious and unified resolution of the C&A estate sought by the Brits.

36. See 15 U.S.C. §§ 1519, 1521; Council Regulation 1346/2000, art. 33. There are also important doctrinal constraints, such as that secondary proceedings are restricted to liquidation. See id. art. 3(3) (“Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.”).
37. They may of course persist in their weaker, universalist incarnation of the ancillary or auxiliary proceeding.
39. Although C&A is by no means an outlier. See, e.g., Eurotunnel Finance Ltd., No. 200647559 (Tribunal de Commerce de Paris (Commercial Court of Paris), Aug. 2, 2006) (achieving effect similar to synthetic secondary proceeding).
A creative solution, however, emerged. Cynically, one might describe it as buying off the Spaniards, but a more elegant label is warranted. The debtor constructed what might be considered a “synthetic” secondary proceeding. How was this done? C&A carved out a special claim category for the Spanish creditors to entitle them to identical distribution they would receive under Spanish law, all within the main U.K. bankruptcy distribution. The losers fought this synthetic secondary proceeding as essentially “un-British,” lodging objections to the court’s jurisdiction to sanction such an innovation. C&A nevertheless prevailed and the Spanish creditors went home happy (or, more precisely, as happy as creditors of a bankrupt foreign company can be). The treatment of the claims was therefore the same economically as if a secondary proceeding had been opened, i.e., they were synthetically resolved. Yet there were two important distinctions: first, considerable cost was saved (likely to the pleasure of C&A creditors and disappointment of the Spanish insolvency bar); and second, control was preserved by the British decision-makers (the lawyers, principals, and judge), without risk of having a Spanish court inject unpredictability into the matter.


41. See id. (discussing how administrators sought assurance from local creditors that they would not open secondary proceedings). This concern was wholly apart from the liquidation posture that would have attached to a secondary proceeding. See Council Regulation 1346/2000, art. 3(3).

42. See In re Collins & Aikman, [2006] EWHC (Ch) 1343, [41] (Eng.) (concluding that the joint administrators could permissibly implement the synthetic secondary proceedings):

By April 2006, then, the joint administrators had a problem before them. They had given assurances which they wished to honour, assurances given not only with a view to the benefit of creditors generally but assurances which had conduced to achievement of that benefit. Those assurances had included performance by the joint administrators of differing provisions, country by country, as to local law as to, for example, the preferences to be given to particular classes of creditors and the subordination or not of inter-company indebtedness, provisions which were different from the applicable provisions of English law, the law of the main proceedings.

43. Id. at [8] (“With only minor exceptions creditors did not seek to open secondary proceedings or take other divisive steps but rather supported the broad strategy which the joint administrators had proposed.”). While the court ultimately authorized the synthetic secondary proceeding, the actual basis of its holding admits of some ambiguity. For example, as quoted in the previous footnote, the court’s opinion underscores strong estoppel considerations, emphasizing the fact that the administrators promised the Spanish creditors their priority treatment would be vindicated if they supported the administration; the outcome-determinative relevance of this reliance, however, is never made explicit.

44. Ted Janger proposes the term “virtual territoriality” to cover situations just like this one. See Edward Janger, Virtual Territoriality, 48 COLUM. J. TRANSNAT’L L. 401 (2010); see also Michael Menjucq & Reinhard Dammann, Regulation No. 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon, 9 BUS. L. INT’L. 145, 154 (2008) (using the phrase “virtual contractual secondary proceedings” to describe the practice of providing creditors the same treatment as if secondary proceedings had been opened).

45. Beyond the scope of this article—because it requires greater treatment—is Jay Westbrook’s important recognition of the role control plays in restructuring proceedings. See Jay L. Westbrook, The Control of Wealth in Bankruptcy, 82 TEX. L. REV. 795 (2004). Although C&A (and the proposals of this article) synthetically achieve “the same” outcome regarding treatment of priority claims as secondary proceedings, they do so under the control of a different judicial actor (the COMI judge). While the universalist likely applauds this unified control, the territorialist is apt to feel either conscious or
The success of the C&A synthetic secondary proceeding invites re-examination of the traditional role of the regular secondary proceeding. On the one hand, it seems that the divergence of local creditor priorities did not require (only "threatened") the opening of a secondary proceeding, suggesting that the priority dispute-secondary proceeding linkage implied earlier is overstated. On the other hand, the only way this outcome was possible was through complete capitulation on the priority difference: the Brits had to swallow their own priority rule to allow ad hoc accession to the Spanish one—directly contrary to the universalist injunction that Spanish law should have ceded to British. (Practice once again slighted theory.) Does one thus score this as a victory for uncoupling priority fights from the need to open secondary proceedings, or is it merely confirmation that priority fights will cause secondary proceedings, with the grim corollary that forfeiting those fights will not? The former, more positive interpretation is preferable: priority fights risk secondary proceedings, but they do not assure them, as workarounds can be achieved. In other words, the synthetic secondary proceeding is a positive outcome reflecting a glass half-full: better than the whole headache and expense of a real secondary proceeding. To be sure, this may not assuage the pure theoretician, who doubtless chafes at the holdout power accorded the local creditor under the secondary proceeding model, but it should at least count as a victory for those wishing to maximize efficiency within the given negotiating endowment of the local law veto that exists under the EU Insolvency Regulation regime.

III. THE SECONDARY PROCEEDING RE-ENVISIONED

A. The Proposed New Scope: (Chiefly) Non-monetary Relief

C&A suggests that a priority fight does not necessitate the opening of a secondary proceeding, because one can always be synthetically created as a sidebar within the main proceeding in the debtor's COMI. Can we generalize to the death of the secondary proceeding? That is, if priority fights are what in large part drive secondary proceedings, does their resolution through synthetic means sound secondaries' death knell? No. This is because there are priority differences in bankruptcy laws, and there are "Priority" differences in bankruptcy laws. This distinction can be understood several ways, but the most helpful is probably a loose comparison to the Anglo-American division between law and equity. Under this legal tradition, there is an historical distinction that survives in several forms today between legal and equitable claims and, more significantly, relief. The classic example is in the law of remedies, where, for example, claims for a breach of contract are treated differently depending on whether they are legal or equitable.

unconscious angst. Note too the doctrinal constraint that a true secondary proceeding would had to have been a winding-up procedure. Council Regulation 1346/2000, art. 3(3), 2000 O.J. (L 160) 1 (EC).


47. A synthetic secondary proceeding is much better given the doctrinal requirement that a secondary proceeding would had to have been a liquidation one. See Council Regulation 1346/2000, art. 3(3).

48. Wessels & Fletcher, supra note 24, at 151 (reminding in a nod to Voltaire that "the best should not be allowed to become the enemy of the good").

49. See, e.g., Christopher Langdell, A Brief Survey of Equity Jurisdiction, 1 HARV. L. REV. 111 (1887).
are reduced to monetary damages, with specific performance only rarely available.\textsuperscript{20} This distinction can arguably map onto some of the priority differences in bankruptcy laws. Consider, for example, the important priority of employee wage claims (at the heart of many cross-border priority fights). Under U.S. law, employees are entitled to preferential claims up to around $10,000 going back a few months for unpaid wages.\textsuperscript{51} Other systems are different.\textsuperscript{32} But while there are variations around the contours of the priority, these sorts of jurisdictions envision monetization of the employee relationship: the damages translate into claims.\textsuperscript{53}

By contrast, other bankruptcy systems reflect stronger socialist sensibilities. This is not just the unlimited wage priority of some,\textsuperscript{44} or even the security-trumping priority of others.\textsuperscript{55} There are some systems that parachute state judicial actors into the employment termination context by, for example, requiring judicial assent to layoffs.\textsuperscript{56} Indeed, some expressly rank the preservation of employment as equal or

\begin{thebibliography}{99}
\bibitem{52} \textit{See}, e.g., R.S.C., c. 47, s. 1 (2009) (Can.) (guaranteeing employees payment up to maximum of $2,000 but surcharging the estate for government subrogation claim to these guarantees).
\bibitem{54} \textit{See}, e.g., \textit{id.} at 8 ("France grants a priority based on a particular timeframe, granting super-priority for wages not paid 60 days prior to insolvency, over secured claims but not those with retention of title, and general preference over personal property and real estate for unpaid wages up to six months prior to insolvency.").
\bibitem{55} \textit{See}, e.g., \textit{id.} at 2. In fact, many countries give wage claims some priority over secured creditors. \textit{See} \textit{INTERNATIONAL LABOUR OFFICE, THE PROTECTION OF WORKERS’ CLAIMS IN THE EVENT OF THE EMPLOYER’S INSOLVENCY} 30 (Edward Yemin & Arturo S. Bronstein eds., 1991) ( naming France, Spain, Brazil, Ecuador, Mexico, Peru, Benin, Chad, Cote d’Ivoire, Gabon, Guinea, Algeria, Tunisia, and Philippines as countries that prioritize employee claims over secured debt); \textit{see also} Sarra, \textit{supra} note 53, at 838 (describing Mexico’s absolute priority system for employee wage claims). Some countries have backed off this super-priority. For example, Brazil’s reforms capped wage claims for the first time. \textit{See} Christopher Andrew Jarvinen et al., \textit{The International Scene: Bankruptcy Reform Coming to Brazil}, \textit{AM. BANKR. INST. J.} 32, 69 (Dec.–Jan. 2005).
\bibitem{56} \textit{For example}, Dutch law requires court approval to dismiss employees. \textit{See} \textit{International Insolvency Institute Fifth Annual International Insolvency Conference at Fordham Law School} (June 6–7, 2005) (presentation on file with author). French law apparently involves the public prosecutor in the event of mass layoffs. \textit{See} Paul J. Omar, \textit{The Internationalisation of Insolvency Law: An Anglo-French Comparison}, 39 \textit{INT’L LAW.} 107, 119 (2005) ("[T]he chief features of the French system are that the courts are interventionists providing close supervision at all stages of the insolvency process."); \textit{see also} Isabelle Didier, \textit{The Reform of Insolvency Proceedings in France—A Professional’s Point of View}, 15 \textit{J. BANKR. L. & PRAC.} 5, art. 4 (2006) ( noting French law requires dismissals by a company in bankruptcy to be approved by the bankruptcy judge); Sarra, \textit{supra} note 53, at 860–61 ("[I]nsolvency law is aimed at protecting companies while labour law is favorable to the employees, sometimes even at the expense of the companies, and that it is clear under French law that the employees cannot be treated as mere assets of the companies and have the right to a certain degree of protection."). French law also of course offers wage claim priority. \textit{See} Sarra, \textit{supra} note 53, at 844 (citing section L.143-7 of the French Labor Code (providing that wages are guaranteed by the general preference that exists in the French Civil Code (section 2331-4 and section 2375-2, créances privilégiées)) and section L.143-10 (providing that créance super-privilégiée wages are “guaranteed by a super-priority, which supersedes any other preferential debt”)).
superior to the maximization of creditor value as an aim of bankruptcy law.\textsuperscript{57} It is these latter types of jurisdictions that can be likened to having “equitable” authority to vindicate what is, in essence, a bankruptcy law priority. (One can quibble over this characterization. Some might say it is a non-bankruptcy employment law “priority” that is protected or respected in bankruptcy proceedings, but likely the better characterization is that it reflects a bankruptcy policy or “priority” of deference to non-bankruptcy legal entitlements.)\textsuperscript{58} Thus, some jurisdictions say that employees get not just a priority claim when reduced to a monetary judgment, but “priority” in a stronger policy sense—absolute employment protection requiring judicial oversight even in the insolvency context.\textsuperscript{59}

The implication of this distinction for secondary proceedings is straightforward. If the employees hold certain employment rights that require judicial sign-off before alteration, then they cannot be effectively addressed in a synthetic secondary proceeding. Why? The answer treads on incommensurability.\textsuperscript{60} These jurisdictions essentially say that it is not just about money when employees are discharged and, relatedly, that the state ought to be involved. If the jurisdiction’s policy preferences are strong enough to require state intervention, then it is unlikely that the jurisdiction will accord comity to a foreign state’s remote exercise of that authority regarding local workers (or expect a foreign state to accord its judicial actors comity regarding foreign employees). This should not surprise those versed in the norms of cross-border litigation. Consider, for example, the hoary distinction between recognition of foreign monetary judgments and foreign injunction orders. (Generally, the former yes, and the latter no.)\textsuperscript{61} Comity’s diminished solicitude for non-monetizable claims is thus well established.\textsuperscript{62}

Accordingly, territorialism’s heightened persistence in the subset of bankruptcy decisions that require “equitable” judicial involvement assures that secondary proceedings will be around for quite some time. Recognizing this reality, the proposal of this article is to accept, but then cabin, their role. The new role of secondary proceedings should be constrained in line with this distinction, limited to


\textsuperscript{58} This aesthetic fight finds roots in Butler v. Goreley, 146 U.S. 303, 304 (1892). Nothing at present turns on it; I flag only for the curious.

\textsuperscript{59} Consider in this regard the German labor requirement of one-third union representation on a corporate board of directors. See Works Constitution Act, Div. V, § 76 (1) (“Representation of employees on advisory boards.”).


\textsuperscript{61} Compare Uniform Foreign Money-Judgments Recognition Act (U.L.A.) § 4 (enacted by at least eleven U.S. states) (recognizing foreign monetary awards) with Medellin v. Texas, 552 U.S. 491, 520–22 (2008) (reminding that in the United States “judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign states, are not generally entitled to enforcement”) (internal quotation marks omitted) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt.b at 595).

\textsuperscript{62} Of course, in the bankruptcy context, injunctive relief by way of enforcing a confirmed bankruptcy plan under comity doctrines is well established, going all the way back to Hilton v. Guyot, 159 U.S. 113 (1895). For a recent example under chapter 15 enforcing a foreign injunction as part of a confirmed foreign reorganization plan, see In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 700 (Barkr. S.D.N.Y. 2010) (enforcing Canadian release of and injunction protecting non-debtor third parties as part of confirmed Canadian reorganization plan).
two specific circumstances: first, cases involving real property, as this historical
distinction is too old to fight; and second, cases in which the creditors or debtor
need to avail themselves to non-monetary relief in the local jurisdiction, which would
operationalize the division between a mere bankruptcy priority divergence amenable
to synthetic resolution and a big-P "Priority" divergence reflecting some higher
policy interest of incommensurability. (Doctrinally, of course, there could be a third
category: an escape clause residuum, covering, e.g., "any other circumstances
necessary to vindicate fundamental policies of the local jurisdiction or fundamental
rights of the local creditors," to give wiggle room to the unforeseen case as well as to
tantalize the skeptical by offering a ready defection route.)

B. Problems with the New Scope

This proposed new scope of secondary proceedings will not make priority fights
go away; it will just shift their venue. In other words, all that is advocated is a
centrifugal pull of the activity of putative secondary proceedings to resolution in the
COMI, without necessary change in actual outcome. Still, even such an
incrementalist universalism advance is likely to face objection, both doctrinal and
theoretical.

1. Doctrinal Challenge: Jurisdictional Authority

On the doctrinal front, it is possible to envision some jurisdictions as initially
paralyzed by the prospect of "applying" foreign bankruptcy priority law to a subset
of creditors within their purview. A clear example of this angst can be seen in the
first rounds of the HIH case, where the challenging creditors successfully cast the
frame that according Australian preferred creditors priority in the U.K. court would

63. See Restatement (Second) of Conflict of Laws § 230 ("(1) Whether a lien creates an
interest in land and the nature of the interest created are determined by the law that would be applied by
the courts of the situs. (2) These courts would usually apply their own local law in determining such
questions."). Of course real estate on its own is not a sufficient basis to open secondary proceedings. Cf.
Council Regulation, 1346/2000, 12th Recital, O.J. (L 160) 1 (EC) (stating in preamble requirements for
opening secondary proceedings):

The line can be drawn at real property. Consider that the revision to Article 9 of the
Uniform Commercial Code in the United States largely abolished a conflicts rule based
on the location of immovable personal property in favor of a location of the debtor
approach, see UCC 9-301, and the world, on information and belief, did not stop
spinning.

64. This would be analogous to the standard escape clause in conflicts rules. See, e.g., 11 U.S.C. §
1506 (2011); Symeon C. Symeonides, Exception Clauses in American Conflicts Law, 42 AM. J. COMP. L.
be to allow recognition of liens that vindicate normative priority preferences. See 11 U.S.C. § 545 (2011)
(respecting some but not all state law liens in federal bankruptcy proceedings); Pottow, supra note 12, at
1934–35 (discussing translation of priority preferences into liens).

65. McMahon v. McGrath (In re HIH Cas. & Gen. Ins. Ltd.), [2005] EWHC (Ch) 2125 (Eng.).
lead to the "disapplication" of U.K. law.\textsuperscript{66} Disapplication? The very term smacks of renegade judicial activism. But as the ultimate resolution of the case revealed (even through its fractured-reasoning prism), "disapplication" simply begs the question whether such deference is imminent in the system already. (Compare, for example, the torturous renvoi doctrine.)\textsuperscript{67} Synthetic secondary proceedings, therefore, need to be properly framed. For example, preambles to a new model law or best practices guide should "remind" adopting jurisdictions that the power to conduct synthetic secondary proceedings may well already exist within their own doctrines of comity, co-operation, and so forth.\textsuperscript{68} That said, it is also surely the case that there are some jurisdictions (likely civilian in origin) that will require more explicit textual conferral of authority.\textsuperscript{69} There is not much that can be done about that other than to recommend the adoption of the specific legislative power that would accord such flexibility. (Such is the prerogative of the normative commentator simply to recommend what states should do; execution is left to those more expert in such matters.)

2. Theoretical Challenge: Priority Divergence and Outcome Differences

There is, however, a looming theoretical problem to the viability of synthetic secondary proceedings. The recommendation of shifting most of the action of a secondary proceeding into synthetic resolution within the COMI bankruptcy case presupposes the main jurisdiction's amenability to enforce those foreign priorities. This may not be the case, as was revealed in the long, tortured history of former

\begin{itemize}
  \item \textsuperscript{66} Id. para. 73. ("But the judicial authority which has established the power of the court to give, in general terms, the direction to which I have referred has certainly not established the power of the court to disapply rule 4.90 or any other substantive rule forming part of the statutory scheme under the Act and Rules of 1986.").
  \item \textsuperscript{67} See \textsc{Restatement (Second) of Conflict of Laws} § 8 (1971) (describing renvoi, or the applicability of another state's choice of law rules in a choice of law analysis).
  \item \textsuperscript{68} McGrath v. Riddell (\textit{In re HIH Cas. & Gen. Ins. Ltd.}), [2008] UKHL 21, [6], 1 W.L.R. 852 (H.L.) (Lord Hoffmann) (appeal taken fromEng.):

Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets.

\item \textsuperscript{69} See, e.g., A.L.I., \textsc{Transnational Insolvency: Cooperation Among NAFTA Countries}, \textit{International Statement of United States Bankruptcy Law}, General Principles Volume at 5 n.6 (2003) (discussing restriction on Mexican judicial discretion), cited in Jay L. Westbrook, \textit{Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation}, 76 \textit{Am. Bankr. L.J.} 1, 41 n.109 (2002). Indeed, even in the United Kingdom, dictum from the Privy Council suggests some hesitance at reading into the common law a judicial power to permit synthetic secondary proceedings. \textit{See} Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC, [2006] UKPC 26 [22], [2007] 1 AC 508, (Isle of Man) ("At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency.") (dictum) (undermined by contravening dictum of Lords Hoffman and Walker in \textit{HIH}, discussed \textit{infra} at text accompanying notes 82 to 87).
\end{itemize}
section 304 of the U.S. Code (and analogous case-by-case adjudication of other countries' approaches) when considering whether to cooperate or otherwise assist a foreign bankruptcy court trying to vindicate a foreign priority. What if the main proceeding simply does not want to conduct a synthetic secondary?

Stepping back a bit, recall that the animation of secondary proceedings is a compromise to territorialist impulses that in turn are driven largely by fierce protection of local priority rules. A secondary proceeding is thus required in part because states will not accept the wholesale subjugation of their domestic priority rules when they are in the ancillary position that full-fledged universalism dictates. A synthetic secondary proceeding, however, pushes the priority subjugation the other way: the main proceeding must recognize the foreign priority rule for the protected creditors—in essence, carving out a portion of its estate for foreign resolution and thus subjugating a portion of its own bankruptcy law. If one cannot anticipate this willing deference in the traditional universalist model by the ancillary jurisdiction, why would one be more sanguine the other way around simply because the courtroom has changed?

The question is a fair one. The positions, however, while similar, are not identical, which may help find the path to a solution. First, the main jurisdiction controls all the action of the bankruptcy; asking for a synthetic secondary to vindicate a foreign priority rule requires only a partial subjugation of what may be a small carve-out. By contrast, under strict universalism the ancillary proceeding's sole purpose is to open a bankruptcy case exclusively designed to implement foreign priority rules, an arguably more galling task. Second, the main proceeding court may be swayed by indirect considerations. For example, in C&A the preservation of

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71. See Pottow, supra note 12, at 1915–19 (discussing aggressive enforcement of regulatory sovereignty).

72. See text accompanying notes 11–16 in Part I of this article (describing the traditional understandings of secondary proceedings). This theoretical concern may actually be blunted in practice. See, e.g., In re Metcalfe and Mansfield Alternative Invs., 421 B.R. 685 (Bankr. S.D.N.Y. 2010) (enforcing Canadian third-party release in U.S. ancillary proceeding under chapter 15 that arguably would have been impermissible under U.S. bankruptcy law).

73. This clearly rubbed the trial judge the wrong way in HIH. See McMahon v. McGrath (In re HIH Cas. and Gen. Ins. Ltd.), [2005] EWHC (Ch) 2125, [155] (Eng.) (“[I]n the event of a winding-up order being made against the Companies the English Court would not direct or authorise the English liquidators to remit the assets collected by them to the Australian liquidators, having regard to section 562A of the [Australian] Corporation Act 2001 and section 116 of the [Australian] Insurance Act 1973, unless some means could be found of ensuring that those assets could be distributed as if in an English liquidation.”).


time and expense, as well as the increase in certainty, was emphasized in advocating resolution of the Spanish claims through a synthetic secondary in England—the "threat" of the Spanish secondary was real enough to make those costs seem undesirable. Thus, there are reasons to believe the main proceeding's resistance may not be as robust as the non-main proceeding's to the application of foreign insolvency law.77

That said, those considerations are realistically marginal tweaks around a theoretical edge: there surely must be some priority differences so vast that they have outcome-determinative effects on the distribution of the estate. Consider Treco, for example, where administrative claims threatened to devour even the secured creditor's collateral. One of the reasons the local Spanish creditors could be paid off in full in C&A likely was because doing so did not substantially imperil the U.K. estate—it was a distributional hiccup at worst. The evil, Treconian doppelganger to C&A, however, still lurks out there in the dark—a case where the priority fight would be much more distributionally disruptive.

IV. A POSSIBLE SOLUTION: INTERNATIONAL CERTIFICATION

The theoretical concern that priority fights will scuttle the attempt to constrict the scope of secondary proceedings can only be addressed by forcing main states to accept some bankruptcy outcome differences. HIH shows that this can happen. The real question then, as it has always been, is how much is too much? One possible answer takes a lead from the pagebook of HIH itself, but takes that page very carefully.

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76. In re Collins & Aikman Eur. SA, [2006] EWHC (Ch) 1343, [8] (Eng.) (“[T]he opening of such secondary proceedings and the appointment of local officeholders would have been likely to have impeded the achievement of the purposes of the administration by making it difficult to continue to trade the businesses, fund the administrations and conduct sales processes on a group-wide basis.”).

77. Cf. Pottow, supra note 12, at 1941–42 (discussing ancillary court’s imposition when deferring to main court).

78. In re Treco, 240 F.3d 148, 159 (2d Cir. 2001) (“The difference in prioritization under U.S. and Bahamian law is particularly acute in this case because of the strong possibility that MIBL’s estate will have little or no funds after payment of administrative expenses.”).

79. The Collins & Aikman court analyzed foreign priority distribution and concluded that it would only meaningfully affect one of twenty-four foreign subsidiaries not already in secondary proceedings. Collins & Aikman, [2006] EWHC (Ch) 1343, [9] (“By April 2006 the realisations were virtually complete and the joint administrators held over $125m for distribution to the creditors of the European companies.”).

80. Consider the Yukos tax priorities, for example, discussed infra at text accompanying notes 112 to 114.

81. This is one of the main theoretical challenges of universalism. See Westbrook, Theory and Pragmatism, supra note 21, at 458 (discussing “acceptance of outcome differences” as a requirement of universalism); Pottow, supra note 14, at 952 (characterizing that requirement as “the commitment of rationally selfish states—which generally prefer to see their own substantive bankruptcy laws govern—to cede sovereignty when another state has been chosen to control an international bankruptcy”).

82. McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.), [2008] UKHL 21, [36], 1 W.L.R. 825 at 863 (H.L.) (Lord Hoffmann) (appeal taken from Eng.) (turning over assets from U.K. insolvency proceeding to Australian main proceeding in to be distributed under (different) Australian priority rules).
A. What and Why?

Recall that in HIH, the court split on the role of certification. That is, U.K. bankruptcy law has a certification provision, indicating that jurisdictions falling on the certifying schedule may be accorded cooperation in a cross-border bankruptcy by way of turnover or other remedies (effectively permitting the application of foreign priority rules and laying the basis for a possible synthetic secondary proceeding). Their Lordships divided on its import. One group thought that certification was the exclusive answer to the question whether foreign bankruptcy law could be recognized in U.K. proceedings (i.e., whether a synthetic secondary was possible). The other group thought certification was only one possible avenue for permitting the application of foreign insolvency law, mindful of such alternatives as international comity and the inherent power of common law courts. The deciding vote demurred from answering that question as unnecessary to resolve the appeal because certification was present. Thus, the lesson from HIH is that certification can galvanize consensus: certification spells out answers clearly and cleanly in black and white. Australia was “in the club” of certification and so enjoyed deference to its insolvency laws (technically, enjoyed eligibility to have discretion exercised in favor of applying its insolvency laws through turnover).

One must tread carefully here. The lesson from HIH to deploy in designing a path forward on resolving priority disputes (and hence viably restricting the scope of secondary proceedings) is limited to the general attraction that “lists” and “schedules” have in providing judicial actors clarity in the uncertain world of cross-border insolvency. One should not embrace the narrower holding of the opinion advocating certification as the only permissible basis on which to apply foreign insolvency law; on the contrary, the flexible common law addendum upon that certification power is important. Rather, the more modest point to appreciate is that certification drives consensus. The operationalization of this insight in service of this article’s proposal, then, requires assembling something that looks like a Good

83. Compare id. at [66] (Lords Scott and Neuburger) (requiring certification of Australia under section 426(5) of the Insolvency Act in order to cooperate with Australian bankruptcy main proceeding through turnover of assets), with id. at [36, 44] (Lords Hoffmann and Walker) (permitting turnover of such assets even without certification for Australia under section 426(5)).

84. Insolvency Act, 1986, c. 45, § 426 (Eng.).

85. See HIH, [2008] UKHL 21 [62], [77], 1 W.L.R. at 873–4 (Lords Scott and Neuberger).

86. Id. at [36], [63], 1 W.L.R. 873 (Lords Hoffmann and Walker).

87. See id. at [44], 1 W.L.R. 864 (Lord Phillips). Note that HIH may be functionally revisited soon. As this article goes to press, the new U.K. Supreme Court has granted leave to appeal in Rubin v. Eurofinance, [2010] E.W.C.A. (Civ.) 895, [2010] All E.R. (D) 358 (C.A.). The unanimous Court of Appeal opinion in Eurofinance quotes extensively and approvingly from Lord Hoffman’s prior opinions endorsing universalist positions, ultimately affirming a lower court’s recognition of a U.S. bankruptcy court order that arguably would have been void for lack of jurisdiction under U.K. law—all in the name of universalist bankruptcy cooperation. It will be interesting to see whether the U.K. Supreme Court follows this lead.

88. One stark example of this is the schedule to the EU Insolvency Regulation itself, which certifies certain procedures in foreign courts that will count as candidates for deference. See Council Regulation 1346/2000, Annex A, 2000 O.J. (L 160) 1 (EC) (listing foreign court insolvency proceedings).

89. In this regard, universalist that I am, I align myself normatively with Lord Hoffman’s resolution of the appeal.
For insolvency priority rules—a “Registry of Recognized Insolvency Priorities.”

B. Who?

Priorities seem to be the third rail of insolvency reform. No one wants to touch them, and even voluminous reform projects, such as the UNCITRAL Legislative Guide, fall into conspicuous silence and vagary on just what the priority rules should be.\textsuperscript{92} This augurs ill for finding candidates to take up the reformist torch. Academics—especially tenured academics—are of course happy to strike out on such foolishness (coming up with, for example, such bizarre ideas as carving out portions of secondary proceedings for adjudication under different substantive bankruptcy laws).\textsuperscript{93} The problem with academics, however, is they have only limited impact on their own; if there is “hard” law and “soft” law, scholarly proposals are downright gelatinous.

This sounds too cynical. There are reform-minded institutions, and they can get stuff done. For instance, UNCITRAL, notwithstanding the gentle ribbing above, performed brilliantly with the Model Law on Cross-Border Insolvencies.\textsuperscript{94}


\textsuperscript{91.} Guidance for a registry system could come from the A.L.I.’s Proposed Foreign Judgments Recognition Act, which envisions certification by the Secretary of State of countries whose judgments would be recognized by U.S. courts. See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7(e) (Proposed Final Draft 2005) (“The Secretary of State is authorized to negotiate agreements with foreign states or groups of states setting forth reciprocal practices concerning recognition and enforcement of judgments rendered in the United States.”). Interestingly, the A.L.I. proposes excluding bankruptcy judgments from this certification procedure, explaining that the “definition of final judgment and the limitations on enforcement of injunctions in this Act do not fit easily into bankruptcy practice, and cooperation among courts of different states is subject to separate formal and informal agreements.” RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 1 cmt. n.1(C)(2) (Proposed Final Draft 2005). For a discussion of the third draft of the full A.L.I. proposal, see Susan L. Stevens, Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments, 26 HASTINGS INT’L & COMP. L. REV. 115, 129–35 (2002). For a discussion of the final draft of the proposal, see Melinda Luthin, U.S. Enforcement of Foreign Money Judgments and the Need for Reform, 14 U.C. DAVIS J. INT’L L. & POL’Y 111, 139 (2007); see also Montré D. Carodine, Political Judging: When Due Process Goes International, 48 WM. & MARY L. REV. 1159, 1217 (2007) (discussing the project and related due process concerns). Another example of a registry list could be the “grey list” that the Organization for Economic Cooperation and Development (“OECD”) kept of countries whose tax policies it considered to meet tax haven criteria. The OECD has subsequently abandoned this system in favor of maintaining progress reports on problematic countries. See Fighting Tax Evasion, OECD, http://www.oecd.org/document/21/0,3746,en_2649_37427_42344853_1_1_1_37427,00.html (last visited Apr. 7, 2011).

\textsuperscript{92.} See U.N. COMM. ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW 67 (2004). The Guide tepidly bemoans that “[t]he provision of priority rights has the potential to foster unproductive debate on the assessment of which creditors should be afforded priority and the justifications for doing so,” but does not actually propose any priority rules for inclusion. Id. at 270. This timidity sits in striking contrast with the Guide’s forcefulness in prescribing, for example, optimal voting rules for reorganization proceedings. Id. at 274.

\textsuperscript{93.} See Pottow, supra note 12, at 1939.

International Insolvency Institute (III) too seems productive, especially as it comes fresh off the heels of its Global Principles project. In fact, the III might be the perfect party to step up to this plate, not just because of its increasingly recognized and respected status, but because of the legitimacy it likely enjoys from having such a diverse representation base. The downside, of course, with having the III generate this registry is that the III is extra-judicial (indeed, extra-governmental). Perhaps all the attraction of certification inferred from the HIH case above dissolves when instead of coming from Parliament it emanates from a bunch of bankruptcy lawyers who like to have nice dinners. Indeed, one senses a conservatism in the HIH narrow holding, bristling at the purported “activism” of “disapplying” British law in favor of some foreign rule. Certification of parliamentary provenance would prove a balm for those judges, who doubtless fear the rebuke of activism. Such comfort may be absent if it is simply the soft—considerably soft—pronouncements of the III upon which they were to rely.

Yet therein, exquisitely, lies the strength of having a group such as the III generate this international certification of priorities. Precisely because it can only offer soft law—recommending but not compelling judicial action—its voice can be heard but it cannot threaten. Sovereignty persists, reigning supreme and unbullied by internationally drafted recommendations, but the wonkish experts get to have their say. Their creation of a tangible list of internationally studied and mulled priorities could have traction and give the cooperatively inclined judge cover to

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95. See Fletcher and Wessels, supra note 24 (International Insolvency Institute’s Global Principles for Cooperation in International Insolvency Cases).

96. See INTERNATIONAL INSOLVENCY INSTITUTE, BOARD OF DIRECTORS, http://www.iiiglobal.org/board-of-directors (last visited Feb. 8, 2011) (showing wide-ranging diversity of the III’s Board of Directors). This diversity should not be overstated. The III is still quite Western-dominated, so perhaps a better candidate might be UNCITRAL. This sort of legitimacy analysis is beyond the scope of this article but rigorously explored in Terence C. Halliday, Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead, 32 BROOK. J. INT’L L. 1081 (2007) (demonstrating the legitimacy of banking regimes, including UNCITRAL) and Susan Block-Lieb & Terence C. Halliday, Incrementalisms in Global Lawmaking, 32 BROOK. J. INT’L L. 851 (2007) (demonstrating how UNCITRAL derives legitimacy from incrementalism). The III could supplement in areas where it lacks representativeness through reports from the World Bank’s insolvency law ROSCs (Reports on Standards and Codes).

97. See INTERNATIONAL INSOLVENCY INSTITUTE, BOARD OF DIRECTORS, http://www.iiiglobal.org/about (last visited Feb. 8, 2011) (explaining III’s membership includes academics and financial industry professionals in addition to legal practitioners and judges).


99. A tangential comparison might be to the Canadian Constitution’s so-called “Notwithstanding Clause.” See Canadian Charter of Rights and Freedoms, Part 1, § 33 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) (allowing Parliament to override a Supreme Court finding of unconstitutionality). That parliamentary supremacy is protected in the document that formalizes judicial review does not mean that the courts are toothless in their adjudications of unconstitutionality. Quite to the contrary: this power has never been invoked to date by the Canadian Parliament.
justify a decision to defer to foreign law. To be sure, it will not be as much cover as statutory law would give, but an international registry of approved priorities will provide something to show that an exercise of discretion has been sound. Again, clarification is in order: the suggestion is not that cooperation in international bankruptcy cases is unprincipled or that judges exercising discretion are not already performing careful analyses; that would imply a comity-based system is lawless, which it is not. Rather, the virtue of an international registry is to provide a structural support for the bankruptcy judge who will face a battle in issuing a priority deference decision (someone will always be on the losing end and hence want to fight), because the loser will have to impugn both the judge’s exercise of sound decision-making and the III’s decision to include/exclude a given priority in its registry.

C. How?

Just exactly how would the III (or other entity) go about determining the content of this registry? There are a few possibilities. First, it could adopt a positivist procedural approach, something like a Hartian rule of recognition. Under this approach, the list of “acceptable” priorities could be generated not by looking at the content of the priority rule itself but only at the body or jurisdiction generating it. So, for example, the approval would not be for priority to insurance company claimants but rather to Australia’s priority rules generally. The advantage of such an approach would be to stay out of the muck of passing on the substantive content of specific insolvency rules, and there is much to be said for that. Certainly, such a process would spark the least opposition ex ante by states who may be embarrassed by one or two nakedly protectionist boondoggles in their priority rules but otherwise have a logically cohesive system that they could present for review with heads held high. (Note that this approach would find some

100. The citations for this proposition beyond cases already discussed in this article could be infinite. See, e.g., Stonington Partners, Inc. v. Learnout & Hauspie Speech Prods. N.V., 310 F.3d 118 (3d Cir. 2002) (demonstrating tenacious priority fight); see also Antwerp Bulktainer N.V. v. Holt Cargo Sys., Inc., [2001] S.C.R. 951 (Can.) (litigating priority case all the way to country’s highest court). Indeed, this proposition is generalizable beyond priority fights to any choice of law fight in a cross-border bankruptcy with enough at stake. Compare Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. (In re Lehman Bros. Holdings Inc.), 422 B.R. 407 (Bankr. S.D.N.Y. 2010) (noting bankruptcy law divergence between U.S. and U.K. law), with Perpetual Trustee Comp. Ltd. v. BNY Corp. Trustee Servs. Ltd. & another, [2009] EWCA (Civ) 1160, (Eng.) (announcing U.K. rule in same cross-border dispute). The Perpetual/Lehman Bros. dispute settled pending appeal, and so the choice of law divergence, while identified, was never resolved.

101. Lest I be accused of unfounded optimism regarding the power of registries, let me be the first to point out the unusual situation of South Africa, whose “adoption” of the UNCITRAL Model Law contains a requirement that its Minister of Justice must first designate each country with law that “justifies the application of this Act to foreign proceedings in such State” before deference can be accorded in an insolvency proceeding. Cross-Border Insolvency Act 42 of 2000 § 2 (S. Afr.). To the best of my knowledge, no such country has been designated to date!


103. See McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.), [2008] UKHL 21, [55], 1 W.L.R. 852 (H.L.), 868 (Lord Scott) (appeal taken from Eng.) (“Australia was designated a ‘relevant country’ for the purposes of section 426.”).

104. Some of it is said in Pottow, supra note 12, at 1929-34.

pedigree with the broadest approach taken to former section 304(c)(4) of the U.S. Code.)

The problem with such a purely proceduralist approach would be the danger of exploitation. Once a state got the green light, it could then modify rules ex post to nefarious end. True, secondary rules could be established to dampen this temptation (perhaps re-certification requirements), but the difficulty remains that there would be wiggle room for states inclined to promote "excessive" priorities. Consequently, the alternative approach of actually rolling up one's sleeves and conducting a substantive analysis of different states' priority rules must be considered. Yes, it is a political minefield, but is it possible? The answer is a resounding maybe. The goal would be to employ some metric of "plausibility" to the priority rules of an insolvency law, perhaps self-referentially defining that plausibility in part by an empirical canvassing of other jurisdictions. Thus, one can imagine an employee priority rule being so commonplace as not to engender serious controversy. The question for such an uncontentious category would be what limits (if any) to impose. This question in a sense is a second-order recursion of the earlier rule-of-recognition issue: will the simple fact that the priority under review is for an agreeable category ("workers") be sufficient to conclude the enquiry and secure a place on the registry, or will the analysis of content be even more demanding?

Taking the hard case for further scrutiny, the anchoring question will be quantitative: will there be a cap on the amount of properly classified claims or can they be unlimited? The better path is to endorse caps, because every bankruptcy lawyer knows tales of unlimited priorities that swallow a case. Then again, the requirement of caps need not be universal. For example, maybe certain priority

106. See generally Buxbaum, supra note 70, at 31 (discussing former section 304(c) case law).
108. See Pottow, supra note 12, at 1928 (underscoring the difficulty of comparing utility between state policies).
109. Further discussion exploring this issue is in Pottow, supra note 12, at 1929-34. Note that the III has conducted an analysis of the priority rules in other jurisdictions, see SOCIAL CLAIMS COMMITTEE OF THE INTERNATIONAL INSOLVENCY INSTITUTE, DRAFT REPORT ON EMPLOYEE, PENSION AND RELATED SOCIAL CLAIMS IN INSOLVENCY (Jun. 9, 2009), http://www.iiiglobal.org/component/jdownloads/?task=view.download&cid=1828. Other scholars have done so in specific domains, such as workers' priority rules. See Sarra, supra note 53 (surveying multiple jurisdictions and finding widespread prioritization of employee claims).
110. Sarra, supra note 53, at 836 (noting prevalence of employee priorities).
111. As discussed previously, many countries have an uncapped employee claim priority. See Yemin & Bronstein, supra note 55, at 30 (listing countries). Indeed, uncapped protections, at least in consumer exemptions, are not foreign to the United States. See, e.g., TEX. CONST. Art. XVI, § 50 (2010) (unlimited homestead exemption); 31 OKLA. STAT. tit.1 § 1 (2009) (same).
claims would be more politically feasible without caps. Staying with the example of wage priorities, for instance, what would be the problem with an unlimited priority for backwages? After all, how large can the backwages get of a company seeking to reorganize? Surely after a point the employees will walk out. Contrast this to tax claims, which can be unbounded by a sufficiently creative and motivated government. As such, notwithstanding the theoretical resistance to unlimited priorities—for the reason that priorities are in general problematic for universalism—pragmatism should prevail. The field of international bankruptcy is rife with compromise, and the most politically salient priorities might well be the ones requiring the lightest touch. (On the other hand, if it were decided that caps were desirable to certify a priority as internationally compliant, those caps could perhaps be calculated by references to an index of existing priority caps, an approach consonant with a new provision of the U.S. Bankruptcy Code policing excessive compensation.)

The toughest issue will be the treatment of secured claims. This is because some countries consider secured creditors not even meaningfully “in” the bankruptcy system (e.g., immune from moratorium rules) and so the idea of ranking a bankruptcy priority ahead of a security pledge may be too much to swallow. Indeed, many of these jurisdictions envision secured claims as property rights and hence of an altogether different legal species as “mere” contractual bankruptcy claims, such that the discussion of their subordination would be almost unthinkable. This issue is tough, and the right answer is uncertain. Choice of law rules that have tried to wrestle this beast in the past have given up, concluding simply that main proceedings must respect the rights in rem of secured creditors. Thus, the trend to date has been “security wins.” If this is so, then maybe discretion is the better part of valor, especially for incremental change, and so reformers should strike a conciliatory stance. Still, even the United Kingdom has flirted with a carve-out

113. See Sarra, supra note 53, at 845 (noting that workers in France are entitled to unlimited priority for wage claims dating six months prior to bankruptcy).
114. See Yukos, supra note 112.
115. See Ian Fletcher, Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency, 46 Tex. Int'l L. J. 489, 497-98 (2011) (“Some degree of compromise seems inevitable if the perceived advantages of an internally standardized approach are not to be marred due to an unduly-strict adherence to a ‘pure’ form of the universality principle—a further example of how the best can become the enemy of the good.”).
117. See, e.g., Corporate Law Reform Act 1992, § 441A (exempting from stay secured creditors with substantially all of a debtor's property under a lien), 441B (exempting from stay secured creditors who have acted to enforce their claims before the appointment of an administrator), 441C (exempting from stay secured creditors who have a lien on perishable property) (Austl.).
118. An example of this approach is implicit in the choice of law rules under the EU Insolvency Regulation, where the property rights “in rem” of secured creditors must be protected. See Council Regulation 1346/2000, art. 5, 2000 O.J. (L 160) 1 (EC). This conceptualization of the secured creditor's lien as an inviolable property right necessarily presupposes the wrongfulness of its subordination to other contractual rights.
119. See id.; id. at 25th Recital.
121. See generally Pottow, supra note 14 (advocating incremental reform in international insolvency).
for unsecured creditors, so perhaps the answer might be some form of carve-out: security generally wins, but in jurisdictions where security is subordinated to certain protected claims, those super-priorities should be certified as acceptable— notwithstanding the purported infringement on in rem rights—provided they stay within a small threshold of the encumbered collateral’s value. Finding a middle path here is a fine needle to thread, but it may be possible.

V. CONCLUSION

The proposal presented in this article is to re-envision—and drastically reduce the scope of—the secondary proceeding, a necessary evil (at least to the universalists) in international bankruptcy. To do so, ongoing reform efforts should explicitly limit the scope of these proceedings to: (1) real property disputes; (2) disputes where local judicial authority is needed to exercise equitable or other non-monetary bankruptcy-related relief; and (3) other extraordinary circumstances pursuant to some safety valve escape clause. Conspicuously absent from this list is disputes involving a divergence in priority rules between the main and secondary jurisdiction. This redesign effectively requires shifting priority recognition up to the main proceeding—including priorities unrecognized by the main proceeding’s own bankruptcy laws. While the true universalist consequence of this move would be to subjugate those priorities as unrecognized by the COMI laws, this article suggests relaxing that purity and embracing “synthetic secondary proceedings” within the confines of the main proceedings as a way to vindicate these foreign local priorities.

Permitting synthetic secondary proceedings within the main proceeding will require the COMI jurisdiction to subjugate its own conflicting priority rules in favor of the foreign jurisdiction’s. Rather than rely upon doctrines of comity alone to encourage this deference by the COMI jurisdiction—which surely would suffice in some but not all circumstances—this article also recommends the creation of an international registry of “approved” bankruptcy priorities by a respected non-state actor (e.g., the III). The adoption of that registry should be by express statutory provision in jurisdictions where such authorization is required or by judges in the exercise of their discretion in places where it is not. These suggestions for incremental reform are designed to hobble—but not yet kill—the secondary proceeding. They may reflect wishful thinking, and they may have problems with implementation, but they are earnest attempts to deal with the most difficult bankruptcy issue—priority—that has so far stubbornly refused meaningful reform.


123. Cf. Yemin & Bronstein, supra note 55, at 30 (listing Brazil, Ecuador, and Peru as the only countries that place caps on neither the lookback period nor amount of employee priority claims (though Brazil has since capped claims, see Jarvinen et al., supra note 55, at 69)).