Comity and Choice of Law in Global Insolvencies

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TABLE OF CONTENTS

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A difficult mechanical problem in cross-border insolvency scholarship is the English-language usage that a corporate proceeding responsive to financial distress is called "bankruptcy" in North America and some other places while in most of the world it is called "insolvency." I will to be careful in using the term bankruptcy with reference to US law and proceedings and insolvency otherwise, but combining purity and clarity in that regard is elusive.

INTRODUCTION

Two recent decisions, one on each side of the Atlantic, threaten fragmentation and incoherence in the management of the financial distress of multinational enterprises. At the heart of both decisions lie two confusions: confusion between choice of bankruptcy law and choice of contract law; and confusion of choice of law with comity (choosing to defer to a foreign forum). This article works through an analysis of each of the two cases, combining fundamental bankruptcy concepts with recent scholarship. Choice of bankruptcy law controls choice of contract law because bankruptcy is inherently a unitary mechanism and because it is a central function of bankruptcy law to modify contracts. The choice of bankruptcy law is governed by systemic rules arising from the nature of bankruptcy. By contrast, comity in deferring to foreign proceedings and rulings is necessarily discretionary and case-specific, although in bankruptcy cases we have an overall system of cooperation that guides the results. Modified universalism is an extended evolution of comity specific to bankruptcy.

One of the cases discussed permits the identification of the next frontier in multinational insolvency: the choice of bankruptcy law to be applied where the two parties to a single contract are International Double Debtors, each in a "main" bankruptcy proceeding in different countries under different bankruptcy laws. This article provides an approach to identifying key issues in such cases.

In Manhattan and London, two decisions have recently taken us backwards in the management of global insolvency cases. To analyze them, I propose here a new distinction between comity and choice of law doctrines, following the recent work of Judge Alan Gropper.[1]

I. THE CASES

SunEdison was unusually difficult because it was an International Double Debtor case.[2] The protagonists were both in bankruptcy/insolvency cases, one in Korea and the other in Southern New York. The New York debtor had granted an intellectual property license to a Korean joint venture between itself and a Samsung affiliate.[3] The Korean joint venture grantee committed to build a plant to produce certain products that required the IP license from the US debtor-grantor.[4] The contract in which all this was mutually promised had a two-way *ipso facto* clause: either party could terminate the contract if the other filed for bankruptcy or could not pay its debts.[5]

Things did not go well. The Korean plant closed with the joint venture owing considerable amounts to the US grantor of the license, which filed for bankruptcy in Manhattan shortly thereafter. Then the joint venture filed for rehabilitation in Korea. The US debtor under a liquidating plan sold itself to a buyer that stipulated elimination of the IP grant to the Korean company as a condition of the sale.[6] The Korean debtor objected, but agreed to

1. *See generally* Allan L. Gropper, *The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases*, 9 BROOK. J. CORP. FIN. & COM. L. 152 (2014). Of course, all the things I get wrong are my fault, not his.

2. SMP Ltd. v. SunEdison, Inc. (*In re* SunEdison, Inc.), 577 B.R. 120, 123 (Bankr. S.D.N.Y. 2017) [hereinafter SunEdison]. I want to concede at the start that when I criticize a result, I am very conscious of the great difficulty facing a judge in these cases to make a decision in real time, while I am relatively free to ponder and research.

3. *Id*. The corporate structures do not seem important here, so I ignore them.

4. *Id*.

5. *Id.* at 124.

6. *Id.* at 125.

let the sale go through without prejudice to its rights to litigate the termination of the contract in the US bankruptcy court.[7] The US debtor sent a notice of termination of the license based on the Korean bankruptcy filing, and the Korean debtor initiated an adversary proceeding to challenge the validity of the termination.[8]

The bankruptcy judge held that the *ipso facto* clause gave the US debtor the right to terminate the contract and reclaim the IP grant despite the provision in Korean bankruptcy law that made such a clause unenforceable against the Korean debtor.[9] The court treated the issue as one of comity choice of law.[10] Because the IP contract was governed by New York state law, which had no rule against *ipso facto* clauses, the clause was enforceable and the termination valid.[11] The buyer got its IP, and the creditors of the US debtor presumably got a much higher dividend.

In the English case, the court had recognized a proceeding in Azerbaijan involving a bank, the International Bank of Azerbaijan (IBA). As in New York, the foreign proceeding was recognized as a main proceeding under the UK version of the Model Law on Cross-Border Insolvency, and the English court had barred creditors of the bank from suing in the English courts during the pendency of the foreign proceeding.[12] Nonetheless, two substantial creditors claimed that the approval of the plan in the Azerbaijan was not binding on them because their contracts were governed by English law, so that their claims could not be treated as discharged in England.[13] They argued that they would be entitled to proceed in the English courts against the reorganized bank as soon as the foreign proceeding was closed by the approval of the reorganization plan by the foreign court.[14] They claimed that the Model Law provided only a temporary moratorium, relying upon the rule in a 19th Century case called *Gibbs*, which held that an English choice of law in a contract makes the obligations of that contract non-dischargeable in a foreign insolvency case ("the Gibbs rule").[15]

Although the opinion contains some hints that the judge thought a 21st Century view might be preferable (including a courteous reference to something I had written), he felt constrained by precedent—especially in light of *Rubin*[16] and *Pan Ocean*[17]—to follow the rule in *Gibbs*.[18] Thus, the moratorium granted by the UK version of the Model Law, which had

7. *Id.*

8. SunEdison, *supra* note 2. at 126. Post-termination, the Korean debtor filed for recognition of the Korean proceeding under Chapter 15 of the Bankruptcy Code. The US court recognized the Korean case as a "main" proceeding under section 1517 of the Bankruptcy Code. *Id.*

9. *Id.* at 133-34.

10. *Id.* at 130-31. A very helpful recent article has done a large-scale analysis of the shifting and confusing doctrine of comity. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).

11. SunEdison, *supra* note 2, at 133-34.

12. IBA v. Sberbank of Russ. [2018] EWHC 59 (Ch) at [7])Eng.) [hereinafter IBA].

13. *Id.* at [9].

14. *Id.* at [14].

15. *Id.*; *see* discussion *infra* VII for two distinct readings of Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux [1890] LR 25 QBD 399.

16. *See generally* Rubin v. Eurofinance SA, [2012] UKSC 46 (Eng.) (discussing whether an order of a foreign court in procedings to adjust or set aside prior transactions will be reorganized and enforced in England).

17. *See generally* Fibria Celulose SA v. Pan Ocean Co., [2014] EWHC 2124 [1] (Ch) (Eng.) (discussing "the interpretation and application of the Cross-Border Insolvency Regulations 2006 ("the (CBIR")").

18. Judge Ramesh has made a powerful argument that English/Commonwealth law should abolish the Gibbs rule. *See* Kannan Ramesh, *The Gibbs Principle*, 29 SAcLJ 42, 49 (2017) (making the case for abolishing Gibbs in English and Commonwealth jurisprudence). He has applied those arguments in *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210 [24] (Sing.).

temporarily prevented the enforcement of the contract obligations at issue in the case, could not be extended beyond the close of the reorganization in Azerbaijan. The decision was affirmed by the English Court of Appeal.[19] As a result, the Model Law in the UK offers nothing beyond a temporary reprieve in collections pending negotiations and thus rewards with preferential treatment those who refuse to participate in achieving reasonable restructurings in foreign proceedings.[20]

After these two cases, a judge in New York must assume that a Chapter 11 confirmed at Battery Park will fail to discharge any English-law contract obligations in England, while a judge on Fetter Lane in London would logically expect a substantial risk of the same in the United States as to a contract governed by New York law.[21] That is pure territorialism, sometimes flying a false flag of "modified universalism." The effect of decisions like these may be to destroy the unity of bankruptcy law and render global management of a global insolvency nearly impossible.

A. Questions Discussed

These unfortunate results reflect a failure to make two key distinctions: choice of law versus comity and choice of bankruptcy law versus choice of contract law. This paper addresses these distinctions in the context of the modern law of international bankruptcy.

II. BACKGROUND

In recent years, a vast literature has emerged about multinational insolvency. A recent student note does an excellent job of reflecting that literature.[22] In general, insolvency proceedings for multinational enterprises—medium-sized as well as large—have become almost routine, with dozens of foreign cases filed each year in the US alone, along with many more filings by companies based in the US but with subsidiaries and operations all over the world.

19. IBA v. Sberbank of Russia, [2018] EWCA (Civ) 2802 at [85-86] (Eng.) [hereinafter IBA Appeal]. The court used a two-part test to determine whether the CBIR confers power to grant the foreign representative's request for an indefinite stay contrary to the *Gibbs* rule: 1) whether the stay would be necessary to protect the interests of IBA's creditors; and 2) whether the stay would be an appropriate way of achieving such protection. *Id.* at ¶ 86. The court answered both inquiries negatively. *Id.*

20. Paragraph 166 left me a bit puzzled in its discussion of lifting the court's injunction to permit one of the creditors to go forward. The court left that possibility unsettled in some sense, but I think its denial of enforcement of the foreign judgment is clear. *See* IBA, supra note 12, at [166].

21. *See* IBA Appeal, *supra* note 19, at [35] for the English court's concern with such negative reciprocity.

22. *See generally* Varoon Sachdev, *Recognizing Discharge In Foreign Bankruptcies: How English Courts' Continued Reliance on the Gibbs Principle Challenges Universalism* (student note on file with author). *See also* Jay Lawrence Westbrook, *Interpretation Internationale*, 87 TEMPLE L. REV. 739 (2015); Allan W. Gropper, *The Payment of Priority Claims in Cross-Border Insolvency Cases*, 46 TEX. INT'L L.J. 559 (2011); John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT'L L.J. 579 (2011); Jay Lawrence Westbrook, *Breaking Away: Local Priorities and Global Assets*, 46 TEX. INT'L L.J. 601 (2011); Gropper, *Curious Disappearance*, *supra* note 1; Christoph G. Paulus, *Global Insolvency Law and the Role of Multinational Institutions*, 32 BROOK. J. INT'L L. 755 (2007); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 457 (1991); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991).

Over forty jurisdictions have adopted the UNCITRAL Model Law on Cross-Border Insolvency.[23] The Model Law is based on the principle of modified universalism first suggested in the American Law Institute Transnational Insolvency Project.

> Universalism [is] a system where one central court administers the bankruptcy of a debtor on a worldwide basis. Modified universalism is universalism tempered by a sense of what is practical at the current stage of international legal development.[24]

That principle has been widely adopted around the world. The previous approach was territorialism—the grab rule—in which each country seized the local assets of a multinational company and distributed their value under a local bankruptcy law.[25] That old approach has been largely rejected.[26] Nonetheless, there remain a host of questions surrounding the proper management of the financial distress of a multinational enterprise, including the problem of differing procedures and policy priorities among the nations of the world.[27]

Modified universalism rests on the idea that bankruptcy proceedings cannot fulfill their function of an orderly and fair resolution of financial distress unless they reach across an entire market.[28] Given a global economy, that means a global bankruptcy system, tempered by the reality that the system must be administered by nation states with varying policies and priorities.[29] A bankruptcy case changes rights in property, which is the reason it has always been considered an *in rem* proceeding. Modern bankruptcy theory in reorganization also considers that it must be considered as acting *in rem* (good against the world) as to contracts.[30]

III. CONFUSION BETWEEN CHOICE OF FORUM AND CHOICE OF LAW

Some time ago the present author published an article arguing that analysis of financial distress of multinational enterprises routinely confused two key issues: choice of forum and choice of law ("COF-COL").[31] The confusion persists. The reason for the confusion is that

23. *See generally* JAY L. WESTBROOK, TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES: PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES (A.L.I., 2003); U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, arts. 25, 26 (2014).

24. TRANSNATIONAL INSOLVENCY, supra note 23, at Section II, Overview, Topic A, Key Concepts in International Bankruptcy 8 (2003). I had the privilege of being the US reporter for that project.

25. Jay Lawrence Westbrook, *Multinational Financial Distress: The Last Hurrah of Territorialism*, 41 TEX. INT'L L.J. 321 (2006).

26. *See Id*. at 322-23 (stating that "despite a recent vigorous defense of territorialism, modern academic and professional opinion has come down overwhelmingly on the side of universalism"); *See also* U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW (2005) (promoting universalism).

27. *See* Gropper, *Payment of Priority Claims*, *supra* note 22, at 560 (stating that "the problem… is that each court with jurisdiction over the insolvency procedings must decide what system of priority to apply as to specific assets and creditors found in the various countries involved*"); see also* Westbrook, *Breaking Away*, *supra* note 22, at 602 (stating that "the great variation in the distribution rules from one nation to another means that the application of local priorities creates a serious obstacle to multinational cooperation").

28. *See* Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2284–86 (2000) (describing the theoretical background behind a universalist approach to multinational insolvency).

29. *Id.*

30. Westbrook, *Interpretation Internationale*, *supra* note 22, at 747.

31. Westbrook, *Theory and Pragmatism*, *supra* note 22, at 457–58.

the two are closely related, even though importantly distinct. The two cases under discussion reflect the importance of the distinction.

A related confusion exists between choice of law and the ubiquitous doctrine of "comity." The two confusions are related because comity should be understood in this context as an aspect of choice of forum: deference to the ruling of another court as to a particular matter. Comity and choice of law are interactive yet importantly different concepts under emerging international bankruptcy law. Comity addresses judicial deference/cooperation in light of a foreign proceeding,[32] while choice of law determines whether a foreign law of general application should control resolution of a legal issue, apart from any foreign ruling or the pendency of a parallel proceeding involving the same issue. The confusion between comity and choice of law may explain in part why so little has been written about comity in the academic literature despite its constant use in the courts.[33]

Despite this confusion, it is necessary to draw the distinction between comity and choice of law. Traditional comity relates to deference to other courts in the same case. "Cooperation" is the larger and more complex version of comity within an international cooperative system among courts under the Model Law on Cross-Border Insolvency or other versions of a system similar to the Model Law.[34] Under the Model Law, cooperation is a statutory command to the courts as well as the parties and their lawyers.[35] By contrast, choice of law refers to the application of a specified body of law to one or more legal issues, such as priority in distribution from a bankruptcy proceeding. The distinction can be illustrated by contrasting recognition of an order in a foreign bankruptcy proceeding, which arises from systemic cooperation (comity), with determining whether a contract is of a sort enforceable in bankruptcy, which depends on the choice of a given law under the applicable bankruptcy law.

Dodge rightly includes choice of law as one of the many compartments of the comity toolbox as it is used in the courts.[36] I will go further to argue that choice of law should be put in a different (nearby) box, because it is ill-fitting crammed in with the comity components. I do not have the space here to spin out that argument as much as I would like, but I will limit myself to the hope that the present discussion is persuasive that, in bankruptcy matters at least, separating choice of law from comity greatly clarifies the analysis, precisely because choice of law and choice of forum are so closely related in bankruptcy.

The importance of the distinction is reflected in the powerful arguments Judge Gropper has made showing the power of a true choice of law analysis as applied to many contemporary

32. *See e.g.,* Dodge, *supra* note 10, at 2078 (adopting the functional definition of international comity in American law); *see also* Christine Sandez, *The Extension of Comity to Foreign Bankruptcy Proceedings: Philadelphia Gear Corp. v. Philadelphia Gear De Mexico, S.A.*, 20 N.C. J. INT'L L. & COM. REG. 629, 634–35 (1995) (explaining that comity is a practice of "courtesy and accommodation" arising out of international duty and convenience).

33. *See e.g.,* Dodge, *supra* note 10, at 2072–74 (discussing the confusion surrounding the meaning of comity in the US); *see also* Thomas Schultz & Jason Mitchenson, *Rediscovering the Principle of Comity in English Private International Law*, 26 EUR. REV. PRIVATE L. 311, 312 (discussing lack of scholarship on comity). These authors document the confusion and lack of academic attention regarding this important doctrine in American and English law respectively.

34. Westbrook, *Interpretation Internationale*, *supra* note 22, at 754.

35. U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, arts. 25, 26; 11 U.S.C.A. §§ 1525, 1526 (2005).

36. Dodge, *supra* note 10, at 2100. Schultz and Mitchenson largely ignore choice of law as an aspect of the use of comity in the English courts, so that usage may be less prevalent in England. *See generally* Schultz & Mitchenson, *supra* note 33.

issues in multinational cases.[37] Too often those issues have been misanalyzed through the murky doctrine of comity as if comity was a choice of law doctrine rather than a decision about deferring to a foreign ruling or a foreign proceeding. Deferring to a specific foreign proceeding is quite different from saying that a certain type of foreign law should apply to a category of legal issue under defined circumstances. Specific deference to a particular foreign proceeding necessarily involves a discretionary, case-by-case approach. Judge Gropper shows that many cases would be more accurately and usefully understood as presenting more general choice of law questions.[38] Choice of law questions are usually more defined and structured, while comity involves discretion and precedent is of less value in guiding results.[39]

Comity turns on the facts of each case and on the state of play in each related proceeding as part of managing an international insolvency case efficiently and fairly, especially a reorganization. For example, under the Model Law, the administrator is required to disclose fully other pending proceedings and to maintain that disclosure currently.[40] If the statute is enforced, both courts will know of the other proceeding and its status and can arrange, or direct the administrators to arrange, direct contact to resolve any potential conflict.[41]

IV. BANKRUPTCY AND CONTRACTS[42]

In the great majority of jurisdictions that have laws relating to insolvency, the treatment of contracts is a central subject. The most common result is that the nonbankrupt counterparty loses its contract rights except to the extent of a claim that will likely be paid in tiny Bankruptcy Dollars.

On occasion performance of a contract will actually benefit the bankruptcy corpus (and in turn the creditors),[43] and many systems enforce performance of such contracts under specified circumstances.[44] In addition, bankruptcy laws often have special rules that change nonbankruptcy results under contracts in various other ways or exempt certain kinds of contracts from any effects of bankruptcy. The various special rules reflect the commercial policies of each country and the power of various interest groups, but the overall principles in the treatment of contracts are similar. It is fair to say that bankruptcy laws routinely alter or diminish contract rights and that doing so is one of the necessary functions of bankruptcy laws.[45] The most obvious instance is the great reduction in the value of an unsecured creditor's

37. *See generally* Gropper, *Curious Disappearance*, supra note 1, and Ramesh, *supra* note 18.

38. *See generally* Gropper, *Curious Disappearance*, *supra* note 1.

39. I am sympathetic to Dodge's argument that there is more doctrine and less unlimited discretion in comity law than is often asserted, but I think that there is always more discretion involved in the aspect of comity involving deference to a parallel proceeding or a specific foreign ruling. In some of the other areas he finds included in the comity aggregation, like sovereign immunity, many of the rules are quite clear.

40. U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, art. 15 (2005).

41. *See* Flightlease (Ireland) Ltd. (In Voluntary Liquidation) v. Companies Act [2006] IEHC 193 [1.4] (Ir.) (Irish court acknowledging that an application was currently before the Swiss courts).

42. I speak here of unsecured contract obligations. To include secured obligations would enlarge the discussion dramatically.

43. The term "estate" is used in the United States and other common law countries to refer to the corpus of the debtor's pre-bankruptcy assets subject to distribution in a bankruptcy proceeding. 11 U.S.C. § 541(a) (2018). That is the sense in which I use it here.

44. *See generally* 11 U.S.C. § 365 (2018).

45. *E.g.*, 11 U.S.C. §§ 365(b), 507(a)(2) (2018). Among other things, the equality principle of bankruptcy

debt as represented by the distribution in a liquidation or under the terms of a reorganization going forward. Another example, if the US Bankruptcy Code applies, is that an *ipso facto* clause cannot be used by the nondebtor party to terminate the contract.[46] The same is true under the Korean bankruptcy law.[47]

Bankruptcy and nonbankruptcy contract law frequently interact. For contract issues, the court must determine if the applicable bankruptcy law changes the contract rules in some relevant way. One illustration is when the nonbankrupt party seeks to enforce a contract by specific performance (not merely by collecting damages). Nonbankruptcy law must first be consulted to see if contract law would grant such a right under the circumstances presented. If so, the court will then determine if bankruptcy law will permit such relief against a bankrupt debtor or estate. It follows that in an international case, the court will often find itself required to make two choices of law as to a given issue: applicable contract law and applicable bankruptcy law.

Under modern choice of law doctrine for contract cases, the parties enjoy very broad freedom to select the law applicable to their contracts.[48] If that choice determines the bankruptcy law governing each contract, which is the effect of the ruling in IBA, then the contracts of multinational enterprises will be governed by many different bankruptcy laws and the unified, orderly, and coherent resolution offered by modern bankruptcy laws will be impossible to achieve.[49] Given broad party autonomy in contract choice of law, two American parties doing a transaction that touches to some extent several other countries could have nearly complete freedom to choose a law that makes their contract effectively nondischargeable. The bad consequences include varying and conflicting results enforceable in only some jurisdictions as to issues such as title to property (both movable and immovable), ownership of corporate stock, discharge, and the finality of corporate reorganizations.[50] Most important is finality as to prior debts and other obligations. Reorganization is not realistically possible if the result of a judicially approved restructuring of debt is not enforced in every relevant jurisdiction.[51] Absent enforcement, holdouts win and in consequence others will refuse to play.[52] A choice of a single bankruptcy law is essential.

A key distinction is that the choice of contract law may determine a contract's validity and its interpretation, but only a bankruptcy law can determine the effect of bankruptcy on that contract. Consider a contract between X and Y, where Y is a US debtor now in

requires that contract parties be treated like all the other unfortunate unsecured creditors. The discharge, which is essential in one form or another in every reorganization case, obviously eliminates enforcement of all contract obligations except as otherwise specified in the law or a plan of reorganization.

46. 11 U.S.C.A. § 365(e)(1) (2018).

47. SunEdison, *supra* note 2 (noting that a Korean debtor "appear[ed] to have the stronger argument concerning Korean insolvency law" in a dispute about whether *ipso facto* clauses are automatically unenforceable under Korean bankruptcy law).

48. *See, e.g.*, Milanovich v. Costa Crociere, S.p.A., 954 F.2d 763, 767 (D.C. Cir. 1992) ("Under American law, contractual choice-of-law provisions are usually honored.").

49. *See* Westbrook, *supra* note 28, at 2277 (discussing the advantages that universalism provides to multinational insolvencies).

50. *See* Westbrook, *Interpretation Internationale*, *supra* note 22, at 747–48 (noting the importance of the insolvency proceeding in determining title to property for the entire market, to include globally).

51. In the *IBA* case, the debtors acknowledged that allowing the English contract parties to enforce their debts would not impede confirmation of the Azerbaijan plan. IBA, *supra* note 12, at [22]. The court, however, sidestepped the question of the impact on the company's future ability to meet the obligations to creditors under the plan as no more than "theoretical." *Id.* at [87].

52. Lamentably, the English court in *IBA* actually endorsed this strategy as an appropriate alternative, making the foreign representative's request not "necessary" or "appropriate." IBA, *supra* note 12, at [88].

bankruptcy in its home jurisdiction with an administrator[53] appointed, while X is a non-US party not in bankruptcy. Whether the law chosen by the parties (e.g. New York law) will support the validity of the contract depends upon the chosen contract law (e.g., any requirement of "consideration" under article 2 of the Uniform Commercial Code as adopted in New York). If the contract is valid under contract law, US bankruptcy law will then determine if it can be assumed or rejected by a US debtor. If another court is asked to resolve those issues, it should ordinarily apply the chosen contract and the debtor's home-country bankruptcy law.[54]

V. INTERNATIONAL DOUBLE DEBTORS

The *SunEdison* case highlights the difficulties in choosing what bankruptcy law applies to a transaction or commercial relationship when there is a pair of International Double Debtors ("IDD"). Those questions are just emerging. We were already in deep legal waters with multiple proceedings involving the same debtor. For example, we wrestle with arguments over COMI, the "center of main interests" of a debtor under the Model Law.[55] But that sort of problem is not nearly as challenging as the issue that may arise under an IDD case: which bankruptcy law should be chosen as to a contract in which the two parties to a contract are in insolvency proceedings in two countries under two different bankruptcy laws. *SunEdison* introduces this very difficult question.

Unlike other choice of law questions, an international case where both parties are bankrupt requires a whole new level of analysis. A bankruptcy contract issue in such a case means a different bankruptcy system may apply to each end of the contract, unlike the usual problem of two different proceedings for one debtor. A contract has two parties by definition; if both are in bankruptcy in different countries, either bankruptcy law might be relevant. The question of dueling *ipso facto* clauses could not come up domestically in the US or Korea because both bankruptcy laws void such clauses *as against* an administrator.[56] In other words, if both debtors had filed in the US, then US bankruptcy law would have prevented one debtor from enforcing an *ipso facto* clause against the other debtor, and vice versa. But in neither country[57] does its bankruptcy law explicitly prevent the administrator from enforcing such a clause against a counterparty also in bankruptcy, probably for the precise reason that the case cannot arise domestically and no one had thought about it.

53. Throughout I use "administrator" to include a trustee in bankruptcy or debtor in possession legally acting in a similar role.

54. Judge Gropper cites the EU insolvency regulation for a more "nuanced" approach that recognizes many exceptions to the home country rule, but it is clear that a policy analysis should start with the home country law before deciding if application of the local rule is compelled. Gropper, *Curious Disappearance*, *supra* note 1, at 66–67. *See also* Westbrook, *Theory and Pragmatism*, *supra* note 22, at 459 (describing the analysis as one of choice-of-law and choice-of-forum); Westbrook, *Choice of Avoidance Law*, *supra* note 22, at 499 (an analysis must start by examining the home-country law).

55. *Compare* In re China Fishery Gp. (Cayman), No. 16-11895, 2017 WL 3084397, at [2] (Bankr. S.D.N.Y. 2017) (granting the administrator's motion for Rule 2004 discovery over creditor's objection, allowing debtor to substantiate claims of creditor misconduct), *with* Re China Fishery Group Ltd, [2019] 1 H.K.L.R.D. 875, 876–77 (C.F.I.) (rejecting administrator's request for recognition of the US proceeding, allowing that same creditor to proceed with enforcement of deed of undertaking in Hong Kong).

56. *See* 11 U.S.C.A. § 365(e) (2018) (stating that the applicable law excuses all parties who are not debtors).

57. I am assuming this point as to Korean law. *See* Chul Man Kim et al., *The Asia-Pacific Restructuring Review 2018: Korea*, GLOB. RESTRUCTURING REV. (Sept. 2017) (noting that while numerous scholars have argued that the *ipso facto* clause should be invalid in such a situation, a court could deem otherwise).

Thus to fully resolve IDD cases it would be necessary to develop an approach to determining choice of bankruptcy law. Fortunately, that is a task that I feel able to evade in this article (although it will arise again, and we should be thinking about it), because I think it is unlikely that the result in *SunEdison* would have been correct even if US bankruptcy law had been applied.

VI. SUNEDISON CASE

Turning to the issues in *SunEdison*, the proper analysis should have considered the effect of *some* bankruptcy law, the only sort of law that would permit modification of the license contract. It appears that the Korean administrator wanted to reorganize since it fought to keep the IP contract. The application of Korean bankruptcy law would presumably have permitted it to assume and enforce. Enforcement could have been avoided by the US administrator by rejection, but section 365(n) would have ensured that it could not have gotten back the patent license by rejection under US law, so it would not have been able to deliver a full unencumbered license to its buyer.[58] Thus, the US administrator's only option to prevent the Korean debtor's continued use of the IP was to somehow terminate the contract.[59]

As far as it appears, the only ground for termination under the contract/license was the *ipso facto* clause. Nothing in US bankruptcy law speaks to whether the US party could use the contractual *ipso facto* clause of the license to terminate on account of the Korean party's filing for bankruptcy. It is clear, however, that it could do so only if it first assumed the whole contract, with all its rights and burdens.[60] But once assumed, the contract would become the estate's contract and enforceable against the US administrator as to both damages and specific performance.[61] As noted above, the text of US bankruptcy law does not explicitly forbid a debtor's use of the *ipso facto* clause, but the question can only arise internationally, because all US debtors are protected against use of such a clause, and the clause is only operative if the other party is in bankruptcy.

Under Korean law, it seems that the *ipso facto* clause would not be enforceable against the Korean debtor in Korea or in any jurisdiction applying Korean bankruptcy law. And had the Korean debtor filed in the United States,[62] it would have been clear the US debtor could not have used the *ipso facto* clause against the Korean debtor. Given this context, to permit the US debtor to take an action that defeats the rights of an IP licensee in defiance of the

58. 11 U.S.C.A. § 365(n); 3 COLLIER ON BANKRUPTCY 365.15 (16th ed. 2018); *but see* Mission Prod. Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC), 879 F.3d 389 (1st Cir. 2018) *cert. granted*, (No. 17-1657). *See* infra note 63.

59. The parties apparently conceded this point. SunEdison, *supra* note 2, at 125.

60. 3 COLLIER ON BANKRUPTCY 365.03 (16th ed. 2018) ("The trustee must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits."); *See also* Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996) (noting the general rule that executory contracts must be assumed or rejected in their entirety); City of Covington v. Covington Landing Ltd., 71 F.3d 1221, 1226 (6th Cir. 1995) (stating if a debtor assumes an executory contract, it must assume both the benefits and burdens).

61. 4 COLLIER ON BANKRUPTCY 503.06 (16th ed. 2018).

62. At least in the Second Circuit, the jurisdictional requirement of having property in the United States is satisfied by the fiction of a deposit of money in the debtor's US counsel's bank account, so it is very easy for any debtor to file in New York. *See, e.g.*, In re Octaviar Administration Pty Ltd., 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014) (granting debtor's second-filed petition for Chapter 15 recognition following In re Barnet, 737 F.3d 238 (2d Cir. 2013)).

executory contract policies of both countries must be wrong.[63] In addition, a rule that operates only against foreign debtors seems inconsistent with fundamental US policy.

A. Adjudication/Comity

The final question to be addressed in light of *SunEdison* is one that the court tells us did not arise in that case: what would have been the effect of a Korean order declaring the license contract still in effect according to its terms? If the US court had reached the same conclusion, there would have been no need to consider comity. If not, and the Korean order was final before the US consideration of the matter, the US court could consider deferring to the order on the ground of comity. Assuming adjudicatory fairness in Korea, the result should be the same: it is nearly always held in the US that a foreign judgment properly obtained will be enforced without examination of the merits of the foreign ruling as to fact or law, absent some manifest violation of public policy.[64] The *SunEdison* court should have enforced a Korean order voiding the *ipso facto* clause and leaving the IP grant in place even if it thought the Korean judgment was wrongly decided. The basis would be comity under Chapter 15 and the Model Law.

If the matter were still pending in both courts, the stage would have been set for communication and consultation between the two courts with full notice and an opportunity to be heard all around as discussed above.[65] In my view, the fact that application of American law to the contract was highly questionable under US law would make this matter an easy case for deference to a ruling by the Korean court[66] as a matter of comity.

VII. IBA CASE

The decision in *IBA* explains some major elements of the existing British rules,[67] although I am unclear about the conceptual underpinnings. Of course, I am not qualified to interpret or critique UK law as such, but I can offer some observations and some questions about its effects on the international bankruptcy system.

63. I suspect the US Supreme Court will strongly reaffirm the rights of a licensee vis-a-vis a licensor in bankruptcy under US law. *See* Mission Prod. Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC), 879 F.3d 389 (1st Cir. 2018) cert. granted, (No. 17-1657) (favoring "the categorical approach of leaving trademark licenses unprotected from court-approved rejection").

64. Restatement (Third) of Foreign Relations Law § 481 (Am. Law Inst. 1987); *See e.g.*, Society of Lloyd's v. Turner, 303 F.3d 325, 333 (5th Cir. 2002) (recognizing judgment of English court).

65. *See* discussion *supra* p. 5.

66. *See* SunEdison, *supra* note 2, at [9] (noting that deference to foreign courts is appropriate when such rulings are fair and do not contravene US laws or public policy). .Once again, I do not fully know the record in *SunEdison* and I am conscious that various factors, including the positions of the parties and lack of action in the Korean court, may have influenced the outcome.

67. *See* IBA Appeal, *supra* note 19, at [29] (citing Goldman Sachs Int'l v. Novo Banco SA [2018] UKSC 34, [2018] 1 WLR 3683 and noting that the highest court recently affirmed the *Gibbs* rule, subject to further appeal).

A. Choice of Forum and Choice of Law

I start with choice of bankruptcy law. As I understand it, if a party to an English law contract is in a reorganization proceeding, the *Gibbs* rule[68] as applied in *IBA* chooses English insolvency law based on the parties' choice of English law for the contract. That must be true, because discharge of the prior obligation is central to reorganization. If a contract is modified involuntarily, it must be by the application of a bankruptcy rule; surely no contract rule could have that effect without consent. Thus, English insolvency law must determine whether the obligations of the contract could be altered and presumably what alterations might be permitted.[69] And the enforcement of the modified contract depends on the old obligations being replaced by the new, modified obligations in the reorganization. It is in this sense that I speak of the "discharge" of the old version of the contract.

There are two distinct possibilities at that point. The less-restrictive reading of *Gibbs* would be that it is only a choice of law rule and thus could be applied by another insolvency court following English rules. The strictest version of the rule would be that only an English insolvency court can apply the rule and therefore only an English insolvency court can approve a proceeding in which the obligations of the contract can be altered. In that case, it is both a choice of law rule and a choice of forum rule.

It is uncertain how far the Gibbs rule goes. Professor Fletcher, who remains our best guide in these matters, told us the rule in England is in the strict form. The consequence of a strict interpretation of the Gibbs rule is that a foreign reorganization or liquidation that altered the rights in an English law contract would be applying a choice of bankruptcy forum that is incorrect under English law. That seems to the holding in *IBA*: any bankruptcy proceeding seeking to alter an English law contract must take place in England.

In effect, IBA adopts a COF-COL rule. By purporting to choose the bankruptcy law and the forum, it creates the basic anomalies discussed earlier in connection with *SunEdison*:[70] multiple bankruptcy laws and multiple results for a proceeding inherently universal. Greater incoherence might arise under the strict version of Gibbs, even in an English reorganization. If the debtor had entered into an important contract under Ruritanian law, the English courts might feel compelled to honor a Ruritanian version of the Gibbs rule,[71] refusing to permit a modification of the contract in the English plan or scheme without a parallel bankruptcy proceeding in Ruritania. That result would mean that the multinational's financial restructuring could not be achieved without a bankruptcy proceeding in each of those countries.

68. The rule simply stated: English choice of law in a contract makes the obligations of that contract nondischargeable in a foreign insolvency case. See Ramesh, *supra* note 18, at 42 (arguing against the *Gibbs* rule).

69. It is important to note that these rules would presumably apply whenever English law is the law governing the contract regardless of any choice by the parties. On the other hand, in modern commercial practice the parties will usually have chosen an applicable contract law and their choice is almost always accepted. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (A.L.I. 1971) (stating that the law of the state chosen by the parties will be applied). *See e.g.*, In re Manuel Mediavilla, Inc., 568 B.R. 551, 568 (B.A.P. 1st Cir. 2017); USEC, Inc. v. United States, 31 Lt. Int'l Trade 1049, 1065 (2007); Hionis Intern. Enterprises, Inc. v. Tandy Corp., 867 F. Supp. 268, 271 (D. Del. 1994), aff'd, 61 F.3d 895 (3d Cir. 1995); In re PSINet Inc., 268 B.R. 358, 376 (Bankr. S.D.N.Y. 2001).

70. *See generally* discussion of SunEdison starting *infra* VI.

71. *See* IBA Appeal, *supra* note 19, at [31] (noting that there is a strong case for enforcing a single law closely associated with the parties). Whether they would do so is unclear in light of the statement of Lord Collins rejecting a notion of unfairness in a refusal of the English courts to grant enforcement of foreign judgments even where they would expect enforcement by other jurisdictions in similar circumstances.

To an extreme, if the Gibbs rule and its foreign counterparts is a COF-COL rule that governs all choices of bankruptcy law as to contract rights, consider that a multinational company might choose the laws of twenty different countries to govern each of its major contracts. If any of these countries adopted the Gibbs rule as to Ruritanian-law contracts, the English reorganization plan could not be enforced even in England as to all those contracts absent proceedings in each of those countries. While those other countries might or might not harbor assets of importance to the reorganization effort, England will often have control of some of the debtor's assets, so its refusal to enforce the reorganization results as to all those contracts could be of profound importance. That result would require parallel proceedings in every contract-chosen country, a consequence so completely inconsistent with the Model Law that would render it nearly useless. This huge impact could be avoided by limiting the Gibbs rule to English law contracts, but then it would be simply a haven rule for English-law contracts and a device to force insolvency cases to be filed in the English courts.

That would not follow automatically from applying a particular English bankruptcy rule as a matter of choice of law. (That possibility exemplifies why it is necessary to distinguish choice of law from choice of forum/comity.) As a choice of law rule, it could be applied by a foreign court.[72] One example of the choice of law approach is found in the area of labor rules and employee distributional priorities. Issues of that sort might be governed in the COMI court by the laws of the country of employment.[73] Similarly, if the English rules were to permit some sorts of alterations of contract obligations but not others, a COMI court in an insolvency proceeding elsewhere could apply those rules to an English law contract in a reorganization over which it presides. A COF-COL rule would not. As solely a choice of law rule, the Gibbs rule would remain conceptually flawed and undesirable but at least would permit resolution in a single proceeding in cooperation with other courts (comity) as contemplated by the Model Law.

B. Comity

The *Rubin* case is the leading English case involving enforcement of foreign judgments in insolvency cases.[74] As I understand it, it did not address proper bankruptcy law. It refused to enforce the US judgment because of a lack of personal jurisdiction over the defendant under the rules that English law applies to enforcement of foreign judgments. It did not rule out enforcement if the defendant had been subject to the US court's jurisdiction. Thus, assuming the Azerbaijan proceeding had personal jurisdiction over the English creditors, comity would seem to provide a basis for the English court in the IBA case to enforce a contract modification in the IBA reorganization plan without being obliged to look behind the reorganization judgment to re-litigate its merits.

However, the strong statement of the Gibbs rule—that an English law contract can be modified in an insolvency case only under English insolvency law applied by an English court—seems to preclude enforcement of an alteration of English law contract rights even as

72. *See e.g.*, In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) (holding a US bankruptcy court could apply the avoidance law of the island nation of Nevis to recover fraudulent conveyances as against assets located in the US.)

73. *See* Jay Lawrence Westbrook, *Breaking Away,* supra note 22, at 613 ("[C]ourts may be concerned that the local statute requires by implication that local assets be distributed in accordance with local priorities.").

74. Rubin v. Eurofinance SA [2012] UKSC 46; *see also* In re Pan Ocean [2014] EWHC 2124 (Ch) (interpreting and applying the Cross-Border Insolvency Regulations).

a matter of comity. By contrast, as we have seen, enforcement would be the predictable and proper result in the US courts and a number of others for any foreign judgment fairly obtained.[75]

CONCLUSION

If the Gibbs rule is retained in England, one solution for a distressed company might be to relocate all of its assets from England to other jurisdictions with less parochial rules. However, the US would not be a safe new home if many of the company's contracts were governed by New York law and *SunEdison* were to represent the controlling law in the United States.

If these two cases accurately represent the law in these two jurisdictions, the leading ones for reorganizations, the prospects for efficient and fair resolution of international cases may be seriously damaged. The aggregate value to be lost as a direct result would be staggering. And the lost value in providing predictable financial results to guide international lending, though hard to calculate, would no doubt exceed the direct losses.

There is an emerging competition for large international reorganizations. "Case filers"[76] will seek jurisdictions with less parochial views of these issues if the results in these cases become settled law.[77] Those of us in either of these jurisdictions must hope for better results in the future.

75. *See* IBA Appeal, supra note 19, at [31] (criticizing the Gibbs rule as anachronistic and difficult to reconcile with established principles of English law).

76. Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 998 (2015) (arguing that "case filers have been able to reach agreement with their creditors because they are more likely to survive.").

77. *See generally* Ramesh, *supra* note 18.