

CONFLICT OF LAWS IN INSOLVENCY TRANSACTION AVOIDANCE

The proliferation of rules aimed at the management of cross-border insolvencies has not been coupled with sufficient attention to the choice of law rules relating to the avoidance of antecedent transactions as legal acts detrimental to all the creditors. This article is the first of its kind in considering the current state of play under English choice of law rules in insolvency transaction avoidance and proposes the path forward. The proposals seek to reorient the jurisprudence on extraterritorial application of domestic statutes, reflect the philosophical underpinnings of universalism and draw on the US conflicts experience.

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I. Introduction

1 A key feature of insolvency law is its ability to unwind antecedent transactions, namely transactions entered into by the debtor in the twilight period prior to the commencement of insolvency proceedings. Where the transactions contain one or more foreign elements, a choice of law issue surfaces. For example, what law determines the voidability of an alleged fraudulent conveyance by the debtor of a foreign property? Choice of law issues can become acute in cross-border insolvencies which may involve multiple proceedings, subsidiaries, affiliated entities, assets, operations and creditors in dozens of nations. However, English choice of law rules in insolvency transaction avoidance are primitive.² Judicial authorities are scarce and not exactly on point,³ while academic analysis is almost non-existent.⁴

1 I am grateful to Professor Gerard McCormack, Nick Segal and Nicole Wu for their helpful comments. All views expressed and any errors committed are my sole responsibility.

2 Unless the matter falls within Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("EU Insolvency Regulation").

3 The nearest case is *Re Paramount Airways* [1993] Ch 223 (CA).

4 All major English textbooks on conflict of laws do not deal with the subject at all, with the exception of some introductory discussion in Ian F Fletcher, *Insolvency in Private International Law* (2nd Ed, 2005) at pp 91–95. For an American perspective, see Jay Lawrence Westbrook, "Choice of Avoidance Law in Global
(cont'd on the next page)

2 This article reviews the contexts in which such choice of law issues are most likely to arise, suggests how existing cases on extraterritoriality should be rationalised, and proposes the proper choice of law approach going forward.

II. Overview of English insolvency avoidance rules and the conflicts perspectives of insolvency

3 The *corpus* of insolvency law concerns in essence how an asset deficit is to be managed in a way fair to all participants. An essential limb of that *corpus* is the distribution of assets among the claimants, while respecting as much as possible the claimants' pre-insolvency entitlements. As the US Supreme Court has repeatedly held, "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code".⁵ Once the pre-insolvency entitlements are established, the claimants' rights to payment from the insolvent estate are solely a matter of insolvency law, primarily a matter of legislative policy informed by such normative standards as equality, fairness, liberty and efficiency. As Mummery LJ pointed out in *Re Polly Peck International (No 2)*,⁶ Parliament has sanctioned a scheme for distribution of assets designed to achieve a fair distribution of the insolvent company's property among the unsecured creditors. The essential characteristic of the statutory scheme is that the insolvency officeholder is bound to deal with the assets of the company as directed by statute for the benefit of all creditors.

4 The statutory insolvency scheme is buttressed by provisions allowing reversal of antecedent transactions that are deemed to violate the policies underlying the statutory scheme. Chief among these avoidance provisions are s 238 of the Insolvency Act 1986⁷ ("IA 1986")

Insolvencies" (1991) 17 Brook J Int'l L 499; Jay Lawrence Westbrook, "Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases" (2007) 42 Tex Int'l LJ 899. Even in the US, choice of law analysis has been neglected in international insolvency cases; see Hannah L Buxbaum, "Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory" (2000) 36 Stan J Int'l L 23.

5 *Raleigh v Illinois Dept of Revenue* 530 US 15, 20 (2000); *Travelers Casualty & Surety Co of America v Pacific Gas & Electric Co* 127 S Ct 1199 (2007).

6 [1998] 3 All ER 812 (CA) at 826–827.

7 Section 238 of the IA 1986 provides, broadly, that a liquidator or administrator may apply to the court to avoid a transaction entered into at the relevant time by a company for no consideration or "a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company", *ie*, a transaction at an undervalue. For the equivalent provisions in Singapore, see s 98 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) and s 329 of the Companies Act.

aimed at conserving the debtor's estate and s 239 of IA 1986⁸ aimed at preventing distortions of the distribution regime enshrined in insolvency law.⁹

5 Such avoidance rules are not unique in English insolvency law, but are ubiquitous in all bankruptcy systems. While the precise elements of each avoidance provision differ from jurisdiction to jurisdiction, the differences merely reflect the local insolvency and commercial policies. For example, local sensitivities to commercial uncertainty shape the defences to avoidance actions, such as the requirements of good faith, contemporaneous exchanges for new value, and payments made in the ordinary course of business.¹⁰

6 The conflicts perspectives of insolvency have traditionally tracked the above understanding of insolvency law. Savigny made the following timeless remarks:¹¹

[B]ankruptcy appears to be in substance a mere process in execution as to a determinate mass of property, the function of the judge consisting in adjusting the claims of the individual creditors to this mass ...

As the bankruptcy has in view an adjustment of the claims of a number of creditors, it is possible only at one place, namely, at the domicile of the debtor, so that the special forum of the obligation is here displaced by the general personal forum.

The functions of the judge in bankruptcy (Concurs) consists of two distinct portions – preparatory acts, and the division of the estate (competition, Concurs).

Among the preparatory acts are the determination of claims themselves (liquidation), then the formation and determination of the estate in bankruptcy (common fund, Concursmasse) by elimination of all portions not belonging to the estate of the debtor (Vindicanten, Separatisten), by collection of all portions really belonging to the estate, and by converting them into cash by sale.

8 Section 239 of the IA 1986 provides, broadly, that a liquidator or administrator may apply to the court to avoid a preference given at the relevant time to a company's creditor or a surety for any of the company's debts, which has the effect of putting that person in a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done. For the equivalent provisions in Singapore, see s 99 of the Bankruptcy Act and s 329 of the Companies Act.

9 L C Ho & R J Mokal, "Barber v CI – Preference equals undervalue?" (2006) 22 IL&P 183.

10 For an international survey of avoidance provisions, see Philip R Wood, *Principles of International Insolvency* (2nd Ed, 2007) ch 17.

11 Friedrich Carl von Savigny, *Private International Law: A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time* (William Guthrie trans) (1869) at pp 209–210.

7 Accordingly, even on the 19th-century conflicts understanding, each phase in the bankruptcy process (such as the ranking of creditors) could raise separate choice of law issues:

Bankruptcy concerns ... not the rights themselves, but execution against a determinate estate existing at a particular time; for the purposes of this execution the priorities of the individual creditors have to be determined. What law is to be applied to these priorities? Here creditors who have hypothecs are to be distinguished from the other creditors.¹²

The matter will become clearer by being applied to the common law of bankruptcy founded on the rules of the latest Roman law, as it has been developed in the theory and practice of modern times.

The whole creditors are arranged in five classes: 1. absolutely privileged; 2. privileged hypothecs; 3. common hypothecs; 4. personally privileged; 5. all others ... Among these five classes, the first, fourth, and fifth contain pure obligations, and are subject to the law in force at the place of the court of bankruptcy exclusively, without respect to the possibly different law of the place where the obligation has arisen or the place of its fulfilment. There remain ... the second and third classes, comprising the creditors holding hypothecs [who] are to be judged according to the law which existed at the time of the constitution of their real right ...¹³

III. Cross-border insolvency and choice of law in transaction avoidance

8 English cross-border insolvency rules condition the context in which choice of law issues relating to transaction avoidance may arise. They are mainly as follows.

A. *English insolvency proceedings within the EU Insolvency Regulation*

9 The EU Insolvency Regulation establishes a common framework for co-operation in cross-border insolvency among the member states of the EU (other than Denmark), based on the principles of mutual recognition and co-operation. Its general aim is to make cross-border insolvency proceedings operate efficiently and effectively throughout the Community, thereby promoting the proper functioning of the internal market. Certain types of entity are specifically excluded from its operation (for example credit institutions, investment undertakings which provide services involving the holding of funds or

¹² *Id.*, at p 321.

¹³ *Id.*, at pp 210–211, 321.

securities for third parties and collective investment undertakings (Art 1(2)).

10 Broadly, the EU Insolvency Regulation grants the courts of the member state within the territory of which the centre of main interests (“COMI”) of a debtor is located jurisdiction to open insolvency proceedings in respect of such debtor.¹⁴ These proceedings are, with regard to other member states, international in scope, are to be governed by the law of the member state where proceedings are opened and are to be effective in all member states, unless secondary proceedings are opened in another member state.

11 In short, if the debtor has its COMI in a member state other than Denmark,¹⁵ the EU Insolvency Regulation prescribes the jurisdiction in which insolvency proceedings may be opened and the applicable *lex concursus*.

12 Consider the following scenario. A debtor incorporated in Slovakia (with its COMI in England) has placed a deposit with the London branch of a French bank in order to secure the debtor’s guarantee in respect of a loan facility granted by the bank to the debtor’s parent in France. The guarantee is governed by French law and provides that if the debtor defaults under the guarantee, the bank could set off the deposit against the debtor’s guarantee obligations. Both the debtor and its parent become insolvent. The debtor goes to English liquidation and the liquidator argues that the bank is not entitled to set off the deposit because the upstream guarantee is a transaction at an undervalue pursuant to s 238 of IA 1986. An immediate choice of law question arises as to what law should determine the voidability of a French law-governed guarantee between a Slovak debtor and a French bank.

13 Article 4(2) of the EU Insolvency Regulation would appear to supply the answer in the following way. It provides that the law of the State of the opening of proceedings shall be the *lex concursus*,

14 Even if the COMI of a debtor is in a member state, the courts of another member state may open secondary winding-up proceedings in the event that such debtor possesses an “establishment” (being any place of operations where the debtor carries out a non-transitory economic activity with human means and goods) in the territory of such other member state (Art 3(2)). The applicable law will be the law of that other member state. However, secondary proceedings are territorial in scope and so will not extend beyond the member state where they are opened, save in respect of creditors who have given their consent.

15 Assuming the debtor is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking (within the meaning of such terms in the EU Insolvency Regulation).

determining, *inter alia*, the scope of the estate's assets and the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors (Art 4(2)(m)).¹⁶

B. *English insolvency proceedings outside the EU Insolvency Regulation*

14 Consider the following scenario. A debtor incorporated in Jersey (with its COMI in Jersey)¹⁷ has placed a deposit with the London branch of a French bank in order to secure the debtor's guarantee in respect of a loan facility granted by the bank to the debtor's parent in France. The guarantee is governed by French law and provides that if the debtor defaults under the guarantee, the bank could set off the deposit against the debtor's guarantee obligations. Both the debtor and its parent become insolvent. The debtor goes to English liquidation¹⁸ and the liquidator argues that the bank is not entitled to set off the deposit because the upstream guarantee is a transaction at an undervalue pursuant to s 238 of IA 1986. An immediate choice of law question arises as to what law should determine the voidability of a French law-governed guarantee between a Jersey debtor and a French bank. As a matter of English private international law, this question seems to remain unanswered.

C. *Section 426 of IA 1986*

15 Section 426(4) provides that "[t]he courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory".

16 Consider the following scenario. A debtor incorporated in Jersey¹⁹ (with its COMI in Jersey) has placed a deposit with the London branch of a French bank in order to secure the debtor's guarantee in respect of a loan facility granted by the bank to the debtor's parent in France. The guarantee is governed by French law and provides that if the debtor defaults under the guarantee, the bank could set off the deposit against the debtor's guarantee obligations. Both the debtor and its parent become insolvent. The debtor goes to Jersey liquidation and the

16 The EU Insolvency Regulation excludes *renvoi*. See the Virgós/Schmit Report 6500/96 on the Convention on Insolvency Proceedings, para 87. Note that Art 4(2)(m) is subject to Art 13. The interpretation of Art 13 is not discussed here as it does not alter the initial choice of law analysis prescribed by Art 4.

17 As Jersey is not part of the EU, the EU Insolvency Regulation does not apply.

18 On the basis of sufficient connection with England. See *Re Drax Holdings* [2003] EWHC 2743 (Ch); [2004] 1 WLR 1049.

19 Jersey is a relevant territory within s 426.

liquidator applies for assistance under s 426 of IA 1986 in order to avoid the guarantee.

17 The liquidator argues as follows. By s 426(5), the request by a foreign court is authority for the English court “to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction”. Accordingly, the English court could apply s 238 of IA 1986 to invalidate the guarantee.

18 The liquidator’s argument thus raises a choice of law issue. Section 426(5) provides that “[i]n exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law”. Although judicially described as an “obscure and ill-thought out provision”, “[t]he structure of s 426(5) suggests that this provision is meant to operate when the court is considering whether to apply its insolvency law or that of the requesting court. To the extent that there are rules of private international law in the area ... what is meant is that the court should take into account the foreign elements in deciding what law to apply, such as the connections of the parties with England and with the foreign country”.²⁰

D. *The Cross-Border Insolvency Regulations 2006*²¹ (“*Model Law Regulations*”)

19 On 30 May 1997, the United Nations Commission on International Trade Law (“UNCITRAL”) adopted the Model Law on Cross-Border Insolvency with a view to assisting states to manage transnational insolvency cases in an efficient, fair and cost-effective manner. The Model Law does not attempt to harmonise local insolvency law. The main issues addressed by the Model Law include the recognition of foreign proceedings, co-ordination of proceedings concerning the same debtor, rights of foreign creditors, rights and duties of foreign insolvency representatives and co-operation between authorities in different states. In the present context, of note is that the Model Law does not address choice of law issues in relation to transaction avoidance. In other words, the Model Law is conflicts neutral.

²⁰ *Re Television Trade Rentals* [2002] BPIR 859 at [17].

²¹ Implementing the UNCITRAL Model Law on Cross-Border Insolvency. See L C Ho (ed), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (2006).

20 The Model Law Regulations give effect to the Model Law in Great Britain.²² In enacting the Model Law Regulations, the Government's policy was, to the extent possible, to adopt the Model Law verbatim. In relation to transaction avoidance rules, the Model Law Regulations are, like the Model Law, conflicts neutral.

21 Consider the following scenario. A debtor incorporated in Barbados (with its COMI in Barbados) has placed a deposit with the London branch of a UK bank in order to secure the debtor's guarantee in respect of a loan facility granted by the bank to the debtor's parent in the US. The guarantee is governed by New York law and provides that if the debtor defaults under the guarantee, the bank could set off the deposit against the debtor's guarantee obligations. Both the debtor and its parent become insolvent. The debtor goes into Barbados liquidation and the liquidator applies to the English court for recognition and relief under the Model Law Regulations in order to avoid the guarantee. The liquidator attempts to seek relief on two alternative grounds.

22 First, under Art 23 of Sched 1 to the Model Law Regulations, the liquidator has standing to make an application to the court for an order under s 238 of IA 1986 in relation to the guarantee. Second, under Art 21(1)(g) of Sched 1 to the Model Law Regulations, the court may grant any relief that may be available to a British insolvency officeholder under "the law of Great Britain". Article 2(q) of Sched 1 to the Model Law Regulations states that "references to the law of Great Britain include a reference to the law of either part of Great Britain (including its rules of private international law)". Accordingly, the liquidator argues that pursuant to English private international law rules, the English court could apply Barbados avoidance provisions to avoid the US-law governed guarantee.

23 These choice of law questions have to be confronted, but as yet there appears to be no comfortable answer.

IV. Extraterritorial application of English transaction avoidance rules

24 As mentioned above, English courts have never explicitly developed the choice of law rules applicable to insolvency transaction avoidance. This is because, generally speaking, English courts only apply English law to English insolvency proceedings.²³ *Lex fori* is automatically

22 The Cross-Border Insolvency Regulations (Northern Ireland) 2007 give effect to the Model Law in Northern Ireland.

23 *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins ed) (14th Ed, 2006) at p 1374.

the *lex concursus*, though a question may arise whether specific provisions of insolvency law apply extraterritorially.²⁴ Judicial utterances and academic commentaries merely stop at the shores of extraterritorial application of English transaction avoidance rules.

25 The classic authority on the circumstances in which English transaction avoidance rules have extraterritorial effect is *Re Paramount Airways*.²⁵ It held that s 238 of IA 1986 applies without territorial restriction to *any* person with whom the insolvent company has entered into a transaction at an undervalue, subject to two limitations. First, before the substantive trial, the court would consider the foreign defendant's connection with England in deciding whether permission should be granted to serve the proceedings on the defendant. Second, even after the claim is made out in the substantive trial, the court may nevertheless exercise its discretion not to make an order in certain circumstances. For instance, if a foreign element is involved, the court would consider if the defendant is sufficiently connected with England. Nicholls VC explained the concept of "sufficient connection" thus:²⁶

[I]f a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would by itself be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not by itself normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.

Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being

24 Extraterritoriality generally means regulating acts occurring outside the forum state.

25 [1993] Ch 223 (CA).

26 [1993] Ch 223 at 239–240 (CA).

impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections.

26 *Re Paramount Airways* finds a recent US parallel in *In re French*.²⁷ There a US-resident insolvent debtor gifted her US-resident children with a house in the Bahamas shortly before she went into Chapter 7 bankruptcy. The bankruptcy trustee sought to avoid the transfer of the Bahamian property as fraudulent transfer under § 548 of the Bankruptcy Code. The transferees filed a motion to dismiss on the basis of the presumption against extraterritoriality and international comity. The court held that the presumption against extraterritoriality did not prevent the application of § 548 because there was an affirmative Congressional intention to allow avoidance of transfers of foreign property and this interpretation of § 548 accorded with the purpose of the Bankruptcy Code's avoidance provisions, namely to prevent debtors from illegitimately disposing of property that should be available to their creditors.

27 Further, the court referred to the comity factors listed in § 403 of the Restatement (Third) of Foreign Relations Law (1987) and held that the doctrine of international comity did not require it to refrain from applying § 548:²⁸

[T]he doctrine of international comity does not require that we forego application of the United States Bankruptcy Code in favor of Bahamian bankruptcy law. The strongest argument in favor of applying Bahamian law is that this case involves real property, which ... should be governed by the law of the *situs*. When a case involves the definition of property interests, principles of international comity may, in some cases, counsel courts to employ the property law of the *situs* to resolve those interests, notwithstanding other comity factors ... But analogous modern choice-of-law principles recognize that the law of the *situs* does not necessarily govern 'the allocation of interests in land [between] ... debtor and creditor' if 'regulation of the relationship is of greater concern to a state other than the *situs*.' Restatement (Second) of Conflict of Laws ch. 9, topic 2, introductory note. This is 'particularly' true 'when the land is part of an aggregate of

27 440 F3d 145 (4th Cir 2006).

28 440 F3d 145, 153–154 (4th Cir 2006).

property which it is desirable to deal with as a unit' ... Both of these factors are present in this case. The real property at issue is part of an aggregate – the bankruptcy debtor's estate – that is most desirably dealt with as a whole ... Furthermore, the United States has a stronger interest than the Bahamas in regulating this transaction. The purpose of the United States Bankruptcy Code is to protect the rights of both debtors and creditors during insolvency ... The United States has a strong interest in extending these personal protections to its residents – including the vast majority of the interested parties here. The Bahamas, by contrast, has comparatively little interest in protecting non-residents.

28 In addition to promoting the legislative purpose of the Bankruptcy Code, the court concluded that many contacts between the fraudulent transfer and the US justified the application of US rather than Bahamian law. Those contacts included the fact that most of the activity surrounding the transfer took place in the US and almost all of the parties with an interest in the litigation – the debtor, the transferees, and all but one of the creditors – were based in the US. Moreover, as there were no parallel insolvency proceedings taking place in the Bahamas, the court rightly concluded that there was no danger that the US avoidance law would in fact conflict with Bahamian avoidance law.

29 We shall return to consider how these cases may be analysed in choice of law terms.

V. Extraterritoriality and choice of law theories

A. Choice of law theories

30 Before we consider the choice of law rules applicable to English transaction avoidance rules, it is necessary to consider the connection between choice of law rules and the extraterritorial application of domestic legislation.

31 Choice of law rules may be parsed into being unilateral and multilateral.²⁹ Unilateral rules determine the applicable law by asking if a state's substantive law applies to the case at hand. The most prominent unilateral approach is Brainerd Currie's "governmental interest analysis".³⁰ Its *modus operandi* has been described thus:³¹

29 For a general discussion of the multilateral-unilateral distinction in conflict-of-laws theory, see William S Dodge, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism" (1998) 39 Harv Int'l LJ 101 at 106–121.

30 Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963) at p 189.

31 Symeon C Symeonides, "American Conflicts Law at the Dawn of the 21st Century" (2000) 37 Willamette L Rev 1 at 20–21 (footnotes omitted). See also Symeon
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Currie postulated that conflicts of laws should be resolved by first ascertaining whether the states involved in the dispute actually have an 'interest' in having their law applied. The existence of such an interest is to be determined by examining the content of the conflicting substantive laws and then determining whether their underlying purposes or policies would be effectuated by their application to the particular case – determining, in other words, through the process of statutory interpretation, whether the involved states have expressed a wish to apply their law to the particular case. When such an analysis is undertaken, the possibilities are that: (a) only one of the involved states would be interested in applying its law (the 'false conflict' pattern); (b) more than one state might be so interested (the 'true conflict' pattern); or (c) none of the states would be so interested (the no-interest pattern or 'unprovided-for case'). Currie argued that, subject to certain mild constitutional restraints, the forum is entitled to and should apply its law to all three of the above patterns, except those relatively rare cases of the first pattern in which the forum is not an interested state.

32 The unilateral choice of law rule is frequently found in statutes. An example is the USA Patriot Act, Pub L No 107-56, § 319(a), 115 Stat 272, 311-12 (2001) adding 18 USC § 981(k)(1)(A), a civil forfeiture provision concerned with interbank accounts of foreign banks.³²

33 While unilateralism focuses on the spatial reach of a particular rule, multilateralism focuses on the connection between the legal relationship in question and the relevant jurisdictions. A multilateralist theory assigns the legal relationship to a particular jurisdiction whose law will govern the legal relationship. The principles of the multilateralist school may be traced back to the writings of Savigny.³³ The *modus operandi* of Savigny's multilateralist theory may be described thus:³⁴

C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at pp 13–22.

32 It provides that "[f]or the purpose of a forfeiture under this section or under the Controlled Substances Act ..., if funds are deposited into an account at a foreign financial institution ... and that foreign financial institution ... has an interbank account in the United States with a covered financial institution ..., the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant *in rem* regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution ..., may be restrained, seized, or arrested."

33 Friedrich Carl von Savigny, *Private International Law: A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time* (William Guthrie trans) (1869).

34 Symeon C Symeonides, "American Conflicts Law at the Dawn of the 21st Century" (2000) 37 Willamette L Rev 1 at 20–21 (footnotes omitted). See also Symeon
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Rather than focusing on the conflicting laws and trying to ascertain their intended spatial reach, Savigny focused on categories of disputes or 'legal relationships', and then sought to identify the state in which each relationship had its 'seat', or in whose legislative jurisdiction it 'belonged'. He divided the field into broad categories corresponding to the major divisions of domestic private law and then, through connecting factors, identified those inherent characteristics of each legal relationship that place its seat in one state rather than another. The result of this classificatory approach was a network of neutral, evenhanded, multilateral choice-of-law rules that placed foreign law on a parity with forum law and assigned each legal relationship to one particular state, regardless of whether that state had expressed a 'wish' to apply its law and regardless of the content of that law."

34 English choice of law rules adopt a multilateral bent:³⁵

The rules of the conflict of laws are, traditionally, expressed in terms of juridical concepts or categories and localising elements or connecting factors. Typical rules of the conflict of laws state that succession to immovables is governed by the law of the *situs*; that the formal validity of a marriage is governed by the law of the place of celebration ... In these examples, succession to immovables [and] formal validity of marriage ... are the categories, while *situs* [and] place of celebration ... are the connecting factors.

B. Extraterritoriality

35 There is a presumption of territorial limitation when interpreting domestic legislation. The House of Lords decision in *Clark (Inspector of Taxes) v Oceanic Contractors* is almost always taken as the starting point:³⁶

It is well settled law that English legislation is primarily territorial ... [T]he general principle ... is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction ...

[The] territorial principle ... is really a rule of construction of statutes expressed in general terms, and which ... requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within

C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at pp 368-369.

35 *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins ed) (14th Ed, 2006) at p 33.

36 [1983] 2 AC 130 (HL) at 144-145, 152.

the legislative grasp, or intendment, of the statute under consideration?

36 Relying in part on comity, Lord Hoffmann recently explained the canon of statutory interpretation in similar terms:³⁷

The general principle of construction is, of course, that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world. Some international crimes, like torture, are an exception. But usually such an exorbitant exercise of legislative power would be both ineffectual and contrary to the *comity of nations*. This is why all the parties are agreed that the scope of s 94(1) [of the Employment Rights Act 1996] must have implied territorial limits. More difficult is to say exactly what they are. Where legislation regulates the conduct of an individual, it may be easy to construe it as limited to conduct within the area of applicability of the law, or sometimes by United Kingdom citizens anywhere: see *Ex parte Blain; In re Sawers* (1879) 12 Ch D 522 ... So the question of territorial scope is not straightforward. In principle, however, the question is always one of ... construction ... [emphasis added]

37 The territoriality principle is sometimes said to be grounded in the principle of comity:³⁸

An Act is taken to be for the governance of the territory to which it extends, that is the territory throughout which it is law. Other territories are governed by their own laws. The principle of *comity between nations* requires that each sovereign state should be left to govern its own territory. So an Act does not usually apply to acts or omissions taking place outside its territory, whether they involve foreigners or Britons. [emphasis added]

38 This English territoriality principle has an exact US parallel. Justice Holmes in *American Banana Co v United Fruit Co* famously remarked as follows:³⁹

[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v Mexican National RR Co* 194 US 120, 126. This principle was carried to an extreme in *Milliken v Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only

37 *Lawson v Serco* [2006] UKHL 3; [2006] 1 All ER 823 at [6]. See also *Arab Bank v Merchantile* [1994] 1 Ch 71 at 82, per Millett J: "There is a presumption that, in the absence of a contrary intention express or implied, United Kingdom legislation does not apply to foreign persons or corporations outside the United Kingdom whose acts are performed outside the United Kingdom."

38 F A R Bennion, *Bennion on Statutory Interpretation* (5th Ed, 2008) at p 361 (footnote omitted).

39 213 US 347 (1909) at 356–357.

would be unjust, but would be an interference with the authority of another sovereign, contrary to the *comity of nations*, which the other state concerned justly might resent. *Phillips v Eyre*, LR 4 QB 225, 239; LR 6 QB 1, 28; Dicey, *Conflict of Laws* (2d ed.), 647 ...

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is *prima facie* territorial.' *Ex parte Blain, In re Sawers*, 12 Ch Div 522, 528 ... Words having universal scope, such as 'Every contract in restraint of trade', 'Every person who shall monopolize', *etc.*, will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch.

[emphasis added]

39 However, legislation without express provisions for its territorial reach may be given extraterritorial effect where the legislative object so requires. It has been said "there must be an obvious United Kingdom interest".⁴⁰ In the context of insolvency legislation, the court has relied on the legislative policy to overcome the territoriality principle.⁴¹

C. *Extraterritoriality as choice of law*

(1) *Territoriality as vested rights – Multilateralism*

40 Although termed as a canon of statutory interpretation, it is important to appreciate that the presumption against extraterritoriality echoes a multilateralist choice-of-law voice steeped in the now discredited "vested rights" theory once championed by Dicey and Beale. Beale's view of the conflict of laws, which underpinned the first Restatement of Conflicts,⁴² was premised on the twin principles of territoriality and vested rights. Territoriality identified the state whose law created a substantive right, and the vested rights principle explained why other states were mandated to enforce that right.

41 Beale explained territoriality in these terms:⁴³

Law operates by extending its power over acts done throughout the territory within its jurisdiction and creating out of those acts new rights and obligations ... It follows ... that not only must the law extend over the whole territory subject to it and apply to every act

40 F A R Bennion, *Bennion on Statutory Interpretation* (5th Ed, 2008) at p 376.

41 *Re Seagull Manufacturing* [1993] Ch 345 (CA) at 354–355.

42 American Law Institute, *Restatement of the Law: Conflict of Laws* (1934). Symeon C Symeonides, "The First Conflict Restatement Through the Eyes of Old: As Bad as Its Reputation?" (2007) 32 S Ill U LJ 39.

43 Joseph H Beale, *A Treatise on the Conflict of Laws* (1935) at pp 45–46, 308.

done there, but only one law can so apply... By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction ... The law of a state prevails throughout its boundaries and, generally speaking, not outside them.

42 Beale adopted Dicey's "vested rights" theory and put the matter thus:⁴⁴

The [territorial] law annexes to the event a certain consequence, namely, the creation of a legal right ... When a right has been created by law, this right itself becomes a fact; ... [A] right may be changed by the law that created it, or by any other law having power over it. If no law having power to do so has changed a right, the existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact. A right having been created by the appropriate [territorial] law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.

43 It has been pointed out that the presumption against extraterritoriality in statutory interpretation is a conflicts rule based on the "vested rights" theory:⁴⁵

Holmes' analysis in *American Banana* was pure conflict of laws and the conflicts theory that Holmes adopted is "vested rights". For the proposition that the lawfulness of an act is determined by the law of the country where it is done, Holmes cited his own opinion in *Slater*, the leading judicial statement of the "vested rights" theory. He then cited *Milliken v Pratt*, a contracts case in which the Supreme Judicial Court of Massachusetts had applied "the general rule ... that the validity of a contract is to be determined by the law of the state in which it is made". For the proposition that extraterritorial application of law would be an interference with another nation's sovereignty, Holmes relied on a leading English case, *Phillips v Eyre*, which held it a valid defense in tort that an act was justified under the law of the place where it occurred. He added a citation to the section of A V Dicey's treatise on conflicts adopting the rule of *Phillips*. Dicey, of course, was the chief proponent of the "vested rights" theory in England and the inspiration for Joseph Beale's work in the United States.

44 Indeed, Judge Learned Hand in *United States v Aluminum Co of America* cited *American Banana* for the following proposition regarding

44 Joseph H Beale, *A Treatise on the Conflict of Laws* (1935). For a concise summary of the reasons why the "vested rights" theory has been wholly rejected, see David McClean & Kisch Beevers, *Morris: The Conflict of Laws* (6th Ed, 2005) at pp 526-529.

45 William S Dodge, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism" (1998) 39 Harv Int'l LJ 101 at 122-123 (footnotes omitted) (citing Larry Kramer, "Vestiges of Beale: Extraterritorial Application of American Law" (1992) 1991 Sup Ct Rev 179).

the presumption against extraterritoriality: “it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the ‘*Conflict of Laws*.’”⁴⁶

45 But territoriality resurrects the discredited doctrine of vested rights and is a bad doctrine of conflicts resolution.

A conflict exists whenever the facts in a particular case affect the policies of more than one nation, and these policies are inconsistent. There are cases in which the [forum state] has an interest in applying its laws to acts abroad and cases in which foreign nations have an interest in applying their laws to acts that occur [in the forum state]. A territorial approach does not avoid such conflicts. It simply resolves them a particular way: by preferring the law of the place where the acts occurred.⁴⁷

46 That territoriality is a flawed ideology is evidenced by the medieval English courts’ reliance on fictions to deem foreign elements English in order to maintain jurisdiction and apply English law:⁴⁸

England traditionally viewed its courts as lacking jurisdiction unless the dispute called for the application of English law ... The traditional English doctrine proved awkward for cases involving substantial foreign elements, but the English courts allowed litigants to dodge doctrinal requirements with absurdly fictional, but non-traversable, allegations that all elements of the case took place in England.⁴⁹

Early principles of venue kept international conflicts cases out of the courts, largely because trial required a jury of the vicinage. In time, English courts developed an interesting form of *lex fori*. It applied its own law to foreign disputes by adopting legal fictions. Courts simply would assume that foreign acts occurred in England. See Friedrich Juenger, *Choice of Law and Multistate Justice* (1993) at 22 (citing *Ward’s Case*, 82 ER 245, 246 (KB 1625) (“We shall take it that Hamburg is in London in order to maintain the action which otherwise would be outside our jurisdiction. And while we know the date to be at Hamburg beyond the sea, as judges we do not take notice that it is beyond the sea.”)).

46 148 F2d 416, 443 (2d Cir 1945) (original emphasis).

47 Larry Kramer, “Vestiges of Beale: Extraterritorial Application of American Law” (1992) 1991 Sup Ct Rev 179 at 211.

48 *Simon v Philip Morris* 124 F Supp 2d 46 at 64 (EDNY 2000). See also *Mostyn v Fabrigas* (1775) 1 Cowp 161 where a plaintiff in a false imprisonment claim had to “take notice of the real place where the cause of action arose: therefore he has stated it to be in Minorca [Spain]; with a *videlicet*, at London, in the pariah of St Mary le Bow, the ward of Cheap”.

49 Patrick J Borchers, “The Internationalization of Contractual Conflicts Law” (1995) 28 Vand J Transnat’l L 421 at 426 (footnotes omitted).

47 This leads to the interest analysis to which we now turn.

(2) *Extraterritoriality as interest analysis – Unilateralism*

48 To overcome the English presumption against extraterritoriality, it has been said “there must be an obvious United Kingdom interest”.⁵⁰ This is yet another choice of law rule, *ie*, unilateralism based on Currie’s governmental interest analysis. The extraterritorial application of s 133 of IA 1986 in *Re Seagull Manufacturing* appears to be based precisely on such interest analysis.⁵¹

Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company’s state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction ... When Parliament enacted section 133 it is very likely that it did so against the background of what Dillon LJ in *Bishopsgate Investment Management v Maxwell* [1993] Ch 1, 24, described as the ‘public worry and concern over company failures on a large scale, and the need to safeguard the public against such failures’.

(3) *Extraterritoriality as sufficient connection – Eclecticism*⁵²

49 It is first necessary to consider the Restatement (Second) of Conflict of Laws⁵³ which embodies a combination of unilateralism and multilateralism. Section 6 of the Restatement contains a non-exhaustive, non-hierarchical list of factors⁵⁴ relevant to the choice of the applicable rule of law, with a view to selecting the local law of the state of “most significant relationship”. Knowledgeable commentators have described the theoretical foundation of the Restatement in the following manner:

50 F A R Bennion, *Bennion on Statutory Interpretation* (5th Ed, 2008) at p 376. This is analogous to the “effects test” propounded by Judge Learned Hand in *United States v Aluminum Co. of America* 148 F2d 416 (2d Cir 1945) (“[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends” (148 F2d 416, 443 (2d Cir 1945))).

51 [1993] Ch 345 (CA) at 354–355.

52 “When methodological equivocation is intentional and appears in the same precedent, it can be described as eclecticism”: Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at p 67.

53 American Law Institute, *Restatement of the Law Second: Conflict of Laws* (1971).

54 Namely, (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

[D]espite a Savignian-sounding exhortation to apply the law of the state of the 'most significant relationship' and despite other elaborate appearances of a multilateral approach, the Restatement (Second) is a conscious or unconscious combination of the multilateral and unilateral approaches. This is so because an essential part of the process of identifying the all-important state of the 'most significant relationship' under the Restatement (Second) is the examination of the 'the relevant policies of the forum ... [and] of other interested states ... in the determination of the particular issue'.⁵⁵

The prevailing methodology in the United States, emerging from the conflicts revolution in the form of the Second Restatement and the eclectic view taken by many American courts, is a curious amalgam of the unilateral and multilateral methods. The presumptive rules of the Second Restatement are essentially multilateral, referring categories of disputes to those legal systems to which they bear the 'most significant relationship' as determined by the connecting factor identified in the particular rule. One of the central principles of 6, however, under which presumption of such a rule can be rebutted, is consideration of 'the relevant policies of the forum'. This invites a unilateral approach to choice of law, by defining the spatial reach of domestic law through interpretation of underlying policy. An observer examining the cases decided under the Second Restatement will be struck by the frequency with which courts refer to this principle for guidance, and by the extent to which controlling effect is given to it when important domestic policies are found to be implicated in the case. This may indeed be an indication of the influence of interest analysis in American law, even where a court purports to follow the Second Restatement.⁵⁶

50 The Restatement (Third) of the Foreign Relations Law of the US (1987) § 403 provides that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable", having regard to a non-exhaustive, non-hierarchical list of factors, including the link of the activity to the territory of the regulating state, the connections between the regulating state and the person principally responsible for the activity to be regulated or between that state and those whom the regulation is designed to protect, the importance of regulation to the regulating state, and the extent to which another state may have an interest in regulating the activity.

51 Now the approach in *Re Paramount Airways* strongly resembles an eclectic combination of the above conflicts approaches. The court referred to insolvency policies to overcome the presumption of

55 Symeon C Symeonides, "American Conflicts Law at the Dawn of the 21st Century" (2000) 37 *Willamette L Rev* 1 at 27 (footnotes omitted).

56 Courtland H Peterson, "Private International Law at the End of the Twentieth Century: Progress or Regress?" (Supp 1998) 46 *Am J Comp L* 197 at 214–215.

territoriality (*cf* multilateralism), attempted to locate the connection between the forum and the transaction in question (*cf* the Restatement (Second) of Conflicts' "most significant relationship" test), and listed a number of comity-sounding factors in the process so that the court would not "exercise oppressively or unreasonably the very wide jurisdiction conferred by the [transaction avoidance provisions]" (*cf* § 403 of the Restatement (Third) of the US Foreign Relations Law).

52 The conflicts approach in *Re Paramount Airways* is thus precisely the same as that in its US doppelganger (*In re French*), except that the latter was more explicit in its reliance on § 403 of the Restatement (Third) of the US Foreign Relations Law.⁵⁷

VI. Proper choice of law rules in transaction avoidance

53 Although the insolvency legislation expressly refer to private international law rules⁵⁸ and case law such as *Re Paramount Airways* has implicitly adopted a conflicts approach to cross-border insolvency, there is no legislative or judicial guidance on the proper choice of law analysis.

54 It is suggested that choice of law rules in cross-border insolvency should be expressly acknowledged and developed in order to guide future cross-border insolvency decisions in a meaningful manner.⁵⁹ Such choice of law rules should take into account the following matters.

55 First, the choice of law rules should be generally in service of the theory of universalism – that all bankruptcy assets and claims should be administered in the debtor's "home country" under the laws of that country.⁶⁰ This is consistent with the philosophical underpinnings of the Model Law Regulations and English common law on cross-border insolvency.⁶¹

57 See para 27 above.

58 Article 2(q) of Sched 1 to the Model Law Regulations and s 426(5) of the IA 1986.

59 The approach suggested in this article is of course subject to the mandatory application of the choice of law rules contained in the EU Insolvency Regulation.

60 "The emerging international rule in multinational bankruptcy cases focuses on the center of the debtor's main interests. Up to now, that standard has been adopted primarily as a choice-of-forum rule rather than a choice-of-law rule, but it is necessary to use it for both purposes to achieve the goals of universalism": Jay Lawrence Westbrook, "Universalism and Choice of Law" (2005) 23 Penn St Int'l L Rev 625 at 634.

61 *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2006] 3 WLR 689. See also L C Ho, "Navigating the common law approach to cross-border insolvency" (2006) 22 IL&P 217.

56 Second, as uniformity of result and predictability of outcome are of utmost importance in commercial and insolvency law, the aim should lean more towards “conflicts justice”⁶² than “material justice”,⁶³ and more towards jurisdiction-selecting rules⁶⁴ than rule-selecting rules.⁶⁵

57 Third, an eclectic hybrid of multilateralism and unilateralism is to be welcomed.⁶⁶ Methodological purity may too often be the conflicts ideal but often not the conflicts reality. In the search for conflicts resolution, multilateralism and unilateralism are complementary constituents rather than competing elements. In conflicts reality, they are not “either/or”, they are “both-and”. The US conflicts experience offers instructive lessons:⁶⁷

The fact is that virtually no contemporary conflicts system can claim methodological purity, and that very few systems aspire to it. Perhaps the modern legal mind has come to realize that no single method is perfect, that no single method can solve all conflicts problems, and that, if properly coordinated with each other, the two methods together can produce a much better system than either method alone.

After more than a century of domination in the United States, Story’s multilateral method ran into an impasse, particularly in the hands of one of his successors, Joseph Beale. Currie’s unilateral method was proposed as a complete substitute but it too ran into its own impasse, especially in the true-conflict and unprovided-for paradigms. What emerged out of the clash of these two methods was a mutual

62 Namely, selecting the proper law of a legal system to govern the issue in question without regard to the quality of the result it produces. Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at pp 405–406.

63 Namely, selecting the fairest possible result in the individual case. Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at p 406.

64 Namely, selecting the jurisdiction whose law governs the issue in question without regard to the substantive content of that law. Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at pp 394–395.

65 Namely, selecting the proper law based on the criteria of the content of competing laws, their underlying policies, and how they affect the outcome of the case at hand. Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at pp 394–395.

66 Rather than merely serving up a grab bag of conflicts measures, “eclecticism can be a sign of maturity if it is the result of considered and principled choices. Methodological or philosophical purity should not be an end in itself when dealing with complex multistate problems that by definition implicate conflicting national and societal values”: Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) at p 437.

67 Symeon C Symeonides, “American Conflicts Law at the Dawn of the 21st Century” (2000) 37 *Willamette L Rev* 1 at 39–40, 82. For a judicial treatise on US choice-of-law developments coupled with valuable historical insights and comparative observations, see *Simon v Philip Morris* 124 F Supp 2d 46 (EDNY 2000). See also Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006).

accommodation that can prove more workable than either multilateralism or unilateralism alone.

In this new accommodation, multilateralism will continue to provide the basic and outer frame-work of any approach to conflicts resolution. However, this approach can benefit from the essential core of unilateralism, namely the notion that in selecting the applicable law one should consider the purposes, policies, or interests underlying the laws from which the selection is to be made. This is a useful notion, if only because it helps identify and rationally resolve false conflicts. This notion, however, is not a panacea because ... it runs into considerable difficulty in the true-conflict and unprovided-for paradigms. While one may continue to search for principled solutions to these conflicts within the confines of interest analysis, the exercise will be difficult and not likely to be productive. Thus, even proponents of interest analysis may find themselves in the position of having to go beyond unilateralism and reach out to factors and values first espoused by multilateralism ...

While most of the rules should be phrased in multilateral terms delineating the reach of both forum and foreign law, the use of unilateral rules delineating the reach of forum law should not be ruled out. When surrounded by multilateral rules, unilateral rules can serve judicial economy without promoting unchecked parochialism. They help to quickly dispose of some cases without a judicial choice-of-law analysis but also without precluding such analysis for other cases. Furthermore, the careful selective use of unilateral rules has the advantage of collectively delineating the precise circumstances under which the forum's policies should prevail over those of other states, rather than leaving that delineation to an ad hoc judicial decision."

58 Fourth, choice of law rules "should be narrow and issue-specific, sometimes regulating only a single issue"⁶⁸ such as fraudulent preference.

59 At a lower level of generality, the above guidelines should lead to the following lower-level general rules in relation to transaction avoidance. Firstly, where there are only insolvency proceedings in England (thus being the only jurisdiction having a strong interest in applying its insolvency law), the reverence shown towards the presumption against extraterritoriality should be retired.⁶⁹ The *lex fori* should march forward as the *lex concursus*. English transaction

68 Symeon C Symeonides, "American Conflicts Law at the Dawn of the 21st Century" 37 *Willamette L Rev* 1 at 81–82 (2000). See also Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (2006).

69 Cases like *Re Vocalion (Foreign)* [1932] 2 Ch 196 concerning the territorial scope of s 130 of IA 1986 should be revisited. For a well-reasoned view that the world in which a presumption against extraterritoriality made sense is gone, see Larry Kramer, "Vestiges of Beale: Extraterritorial Application of American Law" 1991 *Sup Ct Rev* 179 (1992).

avoidance rules should march with pride and confidence, leaving behind *Re Paramount Airways*' "sufficient connection" baggage. In a single-forum case, the "sufficient connection" baggage could let down the legislative purpose of the avoidance provisions, rather than lift up the legislative policy.⁷⁰

60 Secondly, where there are concurrent insolvency proceedings, priority should be given to the law of the jurisdiction where the main proceedings are opened.⁷¹ If the English proceedings are the main proceedings, English transaction avoidance rules should apply as though it were a single-forum case. If the English proceedings are not the main proceedings, they should be ancillary proceedings with a view to assisting the main proceedings.⁷² The English court may then apply English or foreign transaction avoidance rules, depending on which system has more connection with the transaction in question, using the *Re Paramount Airways* "sufficient connection" test.

61 Thirdly, where the English court's assistance is sought under the Model Law Regulations and s 426 of IA 1986 in the absence of English insolvency proceedings, the English court should approach the choice of law issue as if there were concurrent English insolvency proceedings in the manner discussed above. If the putative English proceedings were the main proceedings, English transaction avoidance rules should apply as though it were a single-forum case. If the putative English proceedings were not the main proceedings, they should be ancillary proceedings with a view to assisting the main proceedings.⁷³ In this case, the English court could apply either English or foreign transaction avoidance rules, depending on which jurisdiction has more connection with the transaction in question, using the *Re Paramount Airways* "sufficient connection" test. Accordingly, the English court could decline to hear a case brought under Art 23 of Sched 1 to the Model Law Regulations if the transaction in question does not have sufficient connection with England.⁷⁴

70 Cf *In re Midland Euro Exchange* 347 BR 708 (Bankr CD Cal 2006). See the discussion in the text to nn 75 to 78 below.

71 Namely the jurisdiction in which the debtor has its COMI. See Art 2(g) of Sched 1 to the Model Law Regulations.

72 *Morris (Liquidator of Bank of Credit & Commerce International), Re Petition of The Bank of England* [2007] CSOH 165. See L C Ho, "Demystifying ancillary winding-up – Disapplying local substantive and procedural rules" (2007) 23 IL&P 174.

73 *Morris (Liquidator of Bank of Credit & Commerce International), Re Petition of The Bank of England* [2007] CSOH 165. See L C Ho, "Demystifying ancillary winding-up – Disapplying local substantive and procedural rules" (2007) 23 IL&P 174.

74 L C Ho (ed), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (2006) at p 89.

62 On the approach suggested above, the outcome in *In re French* was eminently correct. Standing as a stark contrast is *In re Midland Euro Exchange*.⁷⁵ There the debtor, a Barbados corporation, ran a Ponzi scheme and then went into Chapter 7 bankruptcy under the US Bankruptcy Code. The Chapter 7 trustee sought to recover under § 548 of the Bankruptcy Code an allegedly fraudulent transfer of some \$897,000 paid by the debtor in fees and commissions to Swiss Financial Corporation, Ltd (“SFC”), an English company headquartered in London. The allegedly fraudulent transfer concerned a wire transfer of \$1m made by the debtor from a bank account in London to SFC’s bank account in New York. From New York, the deposit was transferred by SFC to another bank account in England. The court dismissed the trustee’s claim because the court found no congressional intent to apply § 548 extraterritorially, disagreeing with *In re French*. Although the court accepted that policy considerations favour the extraterritorial application of § 548 because the efficacy of the bankruptcy proceeding depends on the court’s ability to marshal the assets of the debtor wherever located and failure to extend application of § 548 to transfers outside the territorial borders of the US would create a loophole for unscrupulous debtors to freely transfer their assets to shell entities abroad and avoid the reach of the Bankruptcy Code, the court concluded that such policy considerations could not overcome the presumption against extraterritoriality.

63 If the US bankruptcy court in *In re Midland Euro Exchange* adopted the English approach of “sufficient connection” pronounced in *Re Paramount Airways*, it would probably still reach the same conclusion because the defendant was not incorporated in the forum state and the transaction’s only link to the forum state was a bank account through which electronic funds transfer transiently passed. It follows that adopting the *Re Paramount Airways* approach would suppress the Bankruptcy Code’s policy. The “sufficient connection” test, though intended to keep from heavy-handed application of insolvency law, becomes a millstone on insolvency policy.

64 As *In re Midland Euro Exchange* was a single-forum case,⁷⁶ the approach suggested in this article would see the decision as wrongly decided. It is hard to see what purpose the presumption against extraterritoriality serves in a case like *In re Midland Euro Exchange*. No jurisdiction’s legislative policy would be offended by the extraterritorial application of § 548, whereas the failure to lend extraterritorial application to § 548 offends the legislative policy of the forum.⁷⁷ One

75 347 BR 708 (Bankr CD Cal 2006).

76 There were no other insolvency proceedings.

77 See also Jay Lawrence Westbrook, “Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases” (2007) 42 Tex Int’l LJ 899.

has to bear in mind that transaction avoidance rules exist solely to subserve the insolvency policy of the forum. Had the court in *In re Midland Euro Exchange* appreciated the conflicts component to the presumption against extraterritoriality⁷⁸ and liberated itself from the distraction of territoriality, the outcome of the case might well have been different.

VII. Conclusion

65 Leaving aside the EU Insolvency Regulation, the management of cross-border insolvency has been preoccupied with jurisdiction over insolvency proceedings and their recognition abroad. Little attention has been paid to choice of law issues. However, granted that a contemporary court conducts insolvency proceedings according to the *lex fori*,⁷⁹ the choice of jurisdiction becomes disguised choice of law. In these circumstances, it becomes imperative that courts explicitly recognise the implicit choice of law analysis involved in cross-border insolvency cases so that future cases can be better reasoned and resolved. “A good understanding of reality is the first precondition of success in addressing the problem at hand.”⁸⁰

66 In point of English transaction avoidance law, the lack of appreciation of the conflicts analysis is palpable. One merely finds in the case law a tired incantation of the presumption against extraterritoriality rebuttable by contrary legislative intent – that is both unhelpful and question-begging. Unhelpful because, if there are not already express words delineating the spatial reach of particular provisions, chances are that staring at the statute harder still will not help divine the legislative intent. Question-begging because a legislation’s extraterritorial reach is of course a question of legislative intent, but as one commentator asked:⁸¹ “what kind of question?” Justice Holmes⁸² treated it as a straightforward choice of law question, as did Judge Learned Hand⁸³ and Justices Jackson⁸⁴ and Frankfurter.⁸⁵

78 “[T]he so-called presumption is really code for a choice-of-law analysis”: Jay Lawrence Westbrook, “Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases” (2007) 42 Tex Int’l LJ 899 at 910.

79 Though from a conflicts perspective this is not a logical necessity and the law could do better to recognise that each step of the bankruptcy process (including priority ranking of creditors) may raise a separate choice of law question. See para 7 above.

80 Symeon C Symeonides, “American Conflicts Law at the Dawn of the 21st Century” (2000) 37 Willamette L Rev 1 at 45.

81 Larry Kramer, “Vestiges of Beale: Extraterritorial Application of American Law” (1992) 1991 Sup Ct Rev 179 at 203.

82 In *American Banana Co. v United Fruit Co* 213 US 347 (1909).

83 In *United States v Aluminum Co. of America* 148 F2d 416 (2d Cir 1945).

84 In *Lauritzen v Larsen* 345 US 571 (1953).

85 In *Romero v International Terminal Operating Co* 358 US 354 (1959).

67 Conflicts analysis in such extraterritoriality cases is pivotal. Upon deeper analysis, *Re Paramount Airways* is pure conflict of laws. A proper conflicts analysis will in turn expose the flaws of *Re Paramount Airways*. In a single-forum case like *In re Midland Euro Exchange*, *Re Paramount Airways*' approach capsulises a bad choice of law rule and needlessly subordinates the law and policy of the forum state.

68 It is past time for English law to stop settling for the extraterritoriality jurisprudence as it is and start reorienting the conflicts jurisprudence as it should be. The *modus operandi* of extraterritoriality is not a *modus vivendi* of conflicts we can accept. This article has ventured to lay out the proper choice of law considerations and the proper choice of law rules applicable to insolvency transaction avoidance, inspired by the common law approach to cross-border insolvency, faithful to the theoretical underpinnings of the Model Law Regulations, and enlightened by the continuum of US conflicts experience that transcends borders. While the rules proposed here may be as fallible as their proponent, they will at least ensure that we are with clarity and confidence asking the right questions even though we may not have all the right answers. Only a clear-eyed conflicts exegesis can make this possible.
