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Cover Page Footnote

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I. Introduction

One purpose of United States bankruptcy law is to ensure that creditors receive an equal distribution of a debtor's assets.¹ When a debtor files for bankruptcy under United States law, this purpose is furthered by an automatic stay prohibiting creditors from pursuing their claims independent of the bankruptcy proceeding.² A problem arises, however, when a multinational debtor with assets in the United States commences a foreign bankruptcy proceeding; any United States creditors of the debtor will want to attach the American assets in satisfaction of their claims, but the foreign representative of the bankruptcy estate will want control of the assets so that they may become part of the bankruptcy estate to be distributed among creditors in accordance with the law of the bankruptcy tribunal. Because there is no automatic stay in effect with respect to these assets, the foreign representative must³ petition a United States court for ancillary relief in the form of an injunction under section 304 of the Bankruptcy Reform Act of 1978.⁴

When applying the criteria delineated in section 304(c)⁵ to determine whether to grant injunctive relief, a court must reconcile the conflict between its interests in protecting domestic creditors and its interest in promoting international comity. Traditionally protectionist, American courts have recently begun to stress comity as the determinative factor in granting relief to foreign representatives under section 304. While the United States Bankruptcy Court for the District of Columbia in *In re Gercke*⁶ followed this trend by emphasizing comity as the significant factor in its grant of relief, the court gave

¹ Huber, *Creditor Equality in Transnational Bankruptcies: The United States Position*, 19 VAND. J. TRANSNAT'L L. 741, 742 (1986).

² 11 U.S.C. § 362 (1988).

³ There are other options available to the foreign representative: the use of state law remedies and the commencement of a full bankruptcy proceeding under United States law. Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729, 730 (1987).

⁴ The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330) [hereinafter "Bankruptcy Code" or "Code"].

⁵ For a discussion of the criteria listed in section 304, see *infra* note 44 and accompanying text.

⁶ 122 Bankr. 621 (Bankr. D.C. 1991).

more than perfunctory consideration to all relevant section 304 criteria in striking a balance between protection of United States creditors and recognition of foreign bankruptcy proceedings.

This Note examines the *Gercke* court's application of the section 304(c) criteria in light of the particular facts before the court, the legislative intent behind the enactment of section 304, and prior judicial interpretations of section 304. The Note recognizes that although judicial applications of the section have been inconsistent at best, courts today are likely to grant relief to a foreign representative based principally, if not solely, upon the comity factor of section 304. This Note concludes that the *Gercke* decision represents a reasonable retreat from the modern court's tendency to rely solely on the comity considerations of section 304(c)(5) in deciding section 304 issues. With the exception of its determination of the choice of forum clause issue, *Gercke* is a sound interpretation of section 304 of the Bankruptcy Code.

II. The Facts of *Gercke* and the Court's Decision

In re Gercke involved an ancillary proceeding brought pursuant to 11 U.S.C. section 304 by the administrator of Dominion International Group, PIC ("Dominion"), a multinational corporation engaged in insolvency proceedings in a United Kingdom Companies Court under the United Kingdom's Insolvency Act of 1986.⁷ The administrator sought to enjoin York Associates ("York"), an American creditor of Dominion, from pursuing its civil breach of contract action against Dominion in the Superior Court of the District of Columbia.⁸ The contract between York and Dominion contained a choice of forum clause providing for the exclusive jurisdiction and venue of the District of Columbia courts.⁹ The Bankruptcy Court for the District of Columbia granted an injunction against the continuation of York's superior court action pending the Companies Court's determination in the United Kingdom insolvency proceeding as to when and where the superior court action should be litigated.¹⁰ However, the bankruptcy court refused to enjoin enforcement of the superior court's discovery order for the production of various documents, therefore Dominion had to comply with discovery.¹¹

⁷ *Id.* at 622.

⁸ *Id.* The claim arose from a contract whereby Dominion agreed to purchase substantially all of York's assets for \$45,000,000. *Id.* at 624.

⁹ *Id.*

¹⁰ *Id.* at 622.

¹¹ *Id.* York's civil action was commenced in August 1989. Discovery began soon thereafter. A stay in the proceeding was granted while Dominion negotiated with its creditors. Unsuccessful in these negotiations, Dominion entered into U.K. insolvency proceedings, and its subsequent motion to extend the stay was denied. In April 1990 York filed a motion to compel production of documents. Dominion responded, and in a superior court hearing, the motion to compel was granted. *Id.* at 624-25.

The bankruptcy court first established that irreparable harm to Dominion's estate must be shown before injunctive relief could be granted.¹² The court then found that, although litigation expenses alone are insufficient to constitute irreparable harm, if the cost of defending the action "threatens the assets of a bankrupt estate as opposed to merely diminishing them," then the injunction would be warranted.¹³ In this case, defense of the civil action was estimated to cost \$200,000 to \$300,000.¹⁴ The high cost of litigation would result in the disruption of "an orderly determination of claims" and a "fair distribution of assets," which would constitute harm to the estate.¹⁵ Furthermore, the court found that due to the Companies Court's familiarity with Dominion's insolvency case, it was in a better position than the superior court to make decisions about the case as questions arose.¹⁶ Thus, litigation in superior court would not be the most cost effective.¹⁷

After finding irreparable harm sufficient to support an injunction against "full-blown" litigation, the court concluded that Dominion would suffer little harm in complying with the superior court's discovery order.¹⁸ Dominion's expenses would be insubstantial because the discovery request was narrow, and investigating the claim early would be to the estate's advantage.¹⁹

Although section 304 does not specifically address the necessity of irreparable harm, and Dominion did not argue that an injunction would be appropriate absent irreparable harm, the court concluded that its section 304 analysis would yield the same result even if irreparable harm had not been a requirement.²⁰ Applying the section 304(c) criteria²¹ to the facts, the *Gercke* court noted that the factor in the preamble relating to "economic and expeditious administration of [the] estate" was addressed sufficiently by the court's irreparable harm analysis.²² Based on that analysis, the expeditious and economical administration of Dominion's estate under the United Kingdom insolvency proceeding warranted an injunction against further litigation of York's claim in superior court.²³

¹² *Id.* at 626.

¹³ *Id.* Irreparable harm is clear if Dominion is forced to default on this \$30 million claim. Furthermore, if Dominion must spend every available fund to defend this claim, then this also is irreparable harm sufficient to justify an injunction. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 626-27.

¹⁷ *Id.*

¹⁸ *Id.* at 627-28.

¹⁹ *Id.*

²⁰ *Id.* at 628-29.

²¹ See *infra* note 44 and accompanying text.

²² *Gercke*, 122 Bankr. at 629. For a discussion of the court's irreparable harm analysis, see *supra* notes 11-19 and accompanying text.

²³ *Gercke*, 122 Bankr. at 629.

The court then determined that enjoining superior court litigation was necessary to ensure the just treatment of claimholders of the estate²⁴ and to prevent preferential dispositions of the estate's property.²⁵ Under the United Kingdom Insolvency Act, York could petition the Companies Court to lift its stay so York could litigate elsewhere.²⁶ Again, if Dominion had to default on York's claim because of expenses, the just treatment of claimholders would be threatened if York were allowed to continue its litigation against Dominion. However, requiring Dominion to comply with discovery would not be prejudicial to the goals of ensuring just treatment of claimholders and preventing preferential dispositions of the estate's property.²⁷

In considering the protection of York against prejudice and inconvenience in processing its claim in the Companies Court, (section 304(c)(2)) the court addressed delay, cost, and the contract's forum selection clause.²⁸ The court found that denying York the benefit of the forum selection clause would be prejudicial to York, but such prejudice was simply an issue of cost.²⁹ Since York could not show that litigation in the Companies Court would be substantially delayed and costly, prejudice to York alone did not justify denying the injunction.³⁰ On the other hand, enjoining the discovery order would prejudice York's efforts to prepare for future litigation and could result in York having to litigate the discovery issue again in front of the Companies Court.³¹

Finally, the *Gercke* court addressed the comity criteria of section 304(c).³² The court recognized the importance of comity to the orderly and systematic distribution of assets in an international bankruptcy proceeding.³³ In a lengthy discussion, the court concluded that the choice of forum clause in the York-Dominion contract must be subordinated to considerations of comity due to the intervening

²⁴ *Id.*

²⁵ *Id.* at 630. The court noted that continuing the superior court litigation would not affect preferential transfers of estate property as contemplated by section 304(c). The court addressed Dominion's argument that a default judgment would give York a larger claim than it is entitled under its discussion of the just treatment of all claim-holders. *Id.*

²⁶ *Id.* at 629. Section 11(3)(d) of the Insolvency Act gives the Companies Court the discretion to lift its stay. This is similar to the discretionary provision provided for the United States courts in section 362(d) of the Bankruptcy Code.

²⁷ *Id.*

²⁸ *Id.* at 629-30.

²⁹ *Id.* at 630.

³⁰ *Id.* at 629-30.

³¹ *Id.* at 630. Furthermore, sustaining the discovery order may help defray further cost to York. *Id.*

³² *Id.* at 631. The fresh start criterion in section 304(c)(4) is inapplicable to a corporate debtor, and thus was irrelevant. *Id.* at 634. The court also ignored section 304(c)(4), since the parties stipulated that the U.K. Insolvency Act is substantially in accord with the Bankruptcy Code. *Id.* at 630-31.

³³ *Id.* at 631.

bankruptcy proceeding.³⁴ The court found the arguments asserting lack of reciprocity insufficient to justify denying comity.³⁵ With respect to the superior court's discovery order, however, the court held that Dominion's delay in filing a section 304 petition until after it litigated the issue in superior court and received an adverse ruling was "fundamentally at odds with the strong public policy of the United States." Therefore, the denial of comity was justified.³⁶

III. Section 304 of the Bankruptcy Code

Until section 304 was enacted in 1978, a foreign representative of a bankrupt estate could not commence proceedings in a United States Bankruptcy Court;³⁷ any deference granted by a United States court to a foreign bankruptcy administration was based purely on principles of comity.³⁸ The 1974 insolvency of Bankhaus I.D. Herstatt, one of West Germany's largest commercial banks, drew the United States' attention to the inadequacies of its bankruptcy laws.³⁹ In the Bankhaus I.D. Herstatt case, United States creditors and the foreign trustee competed for control of the Bank's American assets worth \$150 million in what was called a "transatlantic juridical calamity."⁴⁰ This situation, combined with the subsequent insolvencies of two other large multinational banks,⁴¹ emphasized the problems with U.S. bankruptcy laws and led to Congressional review and the eventual enactment of the Bankruptcy Code and section 304.⁴²

Section 304(a) and (b) authorize a foreign representative of a bankrupt estate to commence a case in a United States Bankruptcy Court ancillary to a foreign insolvency proceeding in order "to administer assets located in this country, to prevent dismemberment by

³⁴ *Id.* at 632. The court stated that the Companies Court, which is better suited to decide when and where the claim should be litigated, could determine whether to respect the choice of forum clause. *Id.* Furthermore, the Companies Court is certainly competent to construe the contract under District of Columbia law, as the contract provided, should the need arise. *Id.*

³⁵ *Id.* at 633.

³⁶ *Id.* at 633-34 (citations omitted). The administrators showed a "callous disregard to the U.S. court system" that could not be ignored. *Id.* at 634.

³⁷ Comment, *1988 Developments and the Conflicts Arising Under Section 304*, 6 BANKR. DEV. J. 345, 346-47 (1989)[hereinafter "Comment, *Developments and Conflicts*"].

³⁸ Comment, *Section 304 of the Bankruptcy Code: Has It Fostered the Development of an "International Bankruptcy System?"*, 22 COLUM. J. TRANSNAT'L L. 541, 546 (1984)[hereinafter "Comment, *Section 304 of the Code*"].

³⁹ Comment, *Developments and Conflicts*, *supra* note 37, at 345-46; Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153, 1163-67 (1985).

⁴⁰ Comment, *Developments and Conflicts*, *supra* note 37, at 345-46 (quoting Morale & Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1574 (1984)).

⁴¹ See *In re Banque de Financement, S.A.*, 568 F.2d 911 (2d Cir. 1977); *In re Israel-British Bank Ltd.*, 536 F.2d 509 (2d Cir.), *cert. denied*, 429 U.S. 978 (1976).

⁴² Comment, *Developments and Conflicts*, *supra* note 37, at 346. See also Unger, *supra* note 39, at 1163-67.

local creditors of assets located here, or for other appropriate relief."⁴³ Section 304(c) provides that in deciding whether to grant relief, the court "shall be guided by what will best assure an economical and expeditious administration" of the estate and is consistent with the following criteria:

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.⁴⁴

The legislative history following the section notes that 304(c) is modified to include considerations of comity "in addition to the other factors" listed.⁴⁵ Congress intended these criteria to be guidelines so that the court would have "maximum flexibility" to consider "all of the circumstances of each case."⁴⁶

IV. Judicial Interpretation of Comity and Section 304

The United States Supreme Court decision of *Hilton v. Guyot*⁴⁷ set forth the basic principle of international comity⁴⁸ relied upon by courts in deciding section 304 issues.⁴⁹ *Hilton* has been interpreted to create a presumption of comity;⁵⁰ if a foreign court has jurisdiction, and if it is consistent with the law and public policy of the forum state to do so, then a domestic court should grant comity to the decisions of the foreign court.⁵¹ Moreover, the *Hilton* Court indicated that reciprocity is a necessary prerequisite to the granting of comity.⁵²

Early decisions interpreting the section 304(c) criteria were usu-

⁴³ S. REP. No. 989, 95th Cong., 2d Sess. 35 (1978).

⁴⁴ 11 U.S.C. § 304(c) (1988).

⁴⁵ 11 U.S.C. § 304 (1988) (legislative statement).

⁴⁶ S. REP. No. 989, 95th Cong., 2d Sess. 35 (1978). Principles of comity and respect for the laws of other nations necessitate this flexibility. *Id.*

⁴⁷ 159 U.S. 113 (1895).

⁴⁸ The *Hilton* Court stated that comity is neither an "absolute obligation" nor a "mere courtesy." It is recognition by one nation of the "legislative, executive or judicial acts of another nation" after considering both "international duty and convenience" and "the rights of its own citizens." *Id.* at 163-64.

⁴⁹ See, e.g., *Cornfeld v. Investors Overseas Servs. Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y.), *aff'd*, 614 F.2d 1286 (2d Cir. 1979); *In re Culmer*, 25 Bankr. 621, 629 (Bankr. S.D.N.Y. 1982).

⁵⁰ See Comment, *Section 304 of the Code*, *supra* note 38, at 557-58.

⁵¹ *Hilton*, 159 U.S. at 202.

⁵² *Id.* at 288.

ally consistent with the doctrine of pluralism, or territoriality, whereby foreign bankruptcy proceedings would not be recognized, and American assets would be distributed by United States laws without regard to the foreign adjudication.⁵³ *In re Toga Mfg.*⁵⁴ illustrates this extreme position of concern for the rights and claims of U.S. creditors. The *Toga* court emphasized one section 304(c) factor in its denial of a Canadian representative's petition for the turnover of assets that had been garnished by a U.S. creditor.⁵⁵ Because the creditor would not have received secured status under Canadian law, and thus would not be treated "substantially in accordance" with the order provided under United States law, the *Toga* court determined that section 304(c)(4) was not satisfied.⁵⁶ Although the court asserted that litigation in Canada would not inconvenience the creditor, it qualified this assertion by stating that U.S. creditors' claims "must be protected against foreign judgments inconsistent with this country's well-defined and accepted policies."⁵⁷ In addressing comity, the court concluded from two nineteenth-century cases that United States courts traditionally are adverse to claims of foreign representatives.⁵⁸

Even those early decisions granting relief to a foreign representative were laden with conditions of protection for United States creditors such that, though relief was technically granted, for all practical purposes it was denied. The court in *In re Lineas Areas de Nicaragua, S.A.*⁵⁹ granted such conditional relief to a foreign representative seeking the transfer of the debtor's American assets and an injunction against suits brought by U.S. creditors.⁶⁰ In granting the foreign representative's section 304 request, the court imposed the conditions that none of the American assets could be taken from the country, and that these assets had to be applied to satisfy U.S. creditors' claims first.⁶¹ United States creditors were enjoined from enforcing any judgments received against the debtor without the bankruptcy court's assent; however, creditors were not enjoined

⁵³ Wolonicki, *Co-operation between National Courts in International Insolvencies: Recent United Kingdom Legislation*, 35 INT'L & COMP. L.Q. 644, 644 (1986). In other words, protection of the United States creditor is paramount. For thorough explanations of this doctrine, see Huber, *supra* note 1, at 744-46, and Comment, *Cunard Steamship Co. Ltd. v Salen Reefer Serv. A.B.*, 19 VAND. J. TRANSNAT'L L. 911, 912-13 (1986).

⁵⁴ 28 Bankr. 165 (Bankr. E.D. Mich. 1983).

⁵⁵ See *id.* at 168-69.

⁵⁶ *Toga*, 28 Bankr. at 168-69.

⁵⁷ *Id.* at 170.

⁵⁸ *Id.* at 167 (citing *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809) and *Ogden v. Saunders*, 25 U.S. (12 Wheat) 213 (1827)).

⁵⁹ 10 Bankr. 790 (Bankr. S.D. Fla. 1981).

⁶⁰ *Id.* at 791.

⁶¹ *Id.* This relief was of little value to the foreign representative since the claims of U.S. creditors were greater than the value of the U.S. assets. In *re Lineas Areas de Nicaragua, S.A.*, 13 Bankr. 779, 780 (Bankr. S.D. Fla. 1981).

from proceeding with pending litigation against the debtor to receive a judgment.⁶² In a later action by the foreign representative, the bankruptcy court denied relief based primarily on section 304(c)(2), the inconvenience factor.⁶³ The court found that forcing a United States creditor to litigate its claim abroad was "to be avoided if possible under section 304(c)(2)."⁶⁴

The restrictions imposed in *Cornfeld v. Investors Overseas Serv.*,⁶⁵ similarly undermined the court's grant of relief to the foreign representative. *Cornfeld* was a pre-Code decision, but it was based on section 304, which was enacted but not yet effective, and on three of the section 304(c) criteria in particular: international comity, the similarities between Canadian and U.S. bankruptcy law, and the fair and efficient distribution of assets.⁶⁶ The court emphasized the importance of comity, but deferred to the foreign proceeding only if the foreign representative waived any procedural defenses that would bar the U.S. creditor from bringing a later action in a United States court to remedy any inequities in the foreign proceeding.⁶⁷ The court deferred to the foreign proceeding under the guise of comity, but only after retaining jurisdiction to enable better protection of U.S. creditors' claims.

While the above-discussed cases manifest a territorial application of the section 304(c) criteria where the court's primary concern is for the protection of United States creditors, *In re Culmer*⁶⁸ is one of the first decisions to emphasize comity in a move toward the universality principle, whereby one bankruptcy proceeding is held in the jurisdiction where the debtor is domiciled, and all other jurisdictions defer to its decisions.⁶⁹ In granting the request of foreign representatives to transfer American assets to the Bahamas, the *Culmer* court completed a thorough application of the section 304(c) criteria to the facts at issue.⁷⁰ Although all factors were considered in addressing United States creditors' objections, the court clearly stressed comity as the overriding basis for its decision.⁷¹ The court first suggested that section 304 was a codification of prior common

⁶² *Lineas*, 10 Bankr. at 791.

⁶³ *Lineas*, 13 Bankr. at 780.

⁶⁴ *Id.* This decision has been criticized. Since an American creditor will always experience some inconvenience when forced to participate in a foreign proceeding, courts could never grant relief under this holding. Huber, *supra* note 1, at 751.

⁶⁵ 471 F. Supp. 1255 (S.D.N.Y. 1979).

⁶⁶ *Id.* at 1258-60.

⁶⁷ *Id.* at 1262.

⁶⁸ 25 Bankr. 621 (Bankr. S.D.N.Y. 1982).

⁶⁹ For thorough discussions of the universality theory, see James, *International Bankruptcy: Limited Recognition in the New U.S. Bankruptcy Code*, 3 Hous. J. INT'L L. 241, 242 n.9 (1981); Woloniecki, *supra* note 53, at 644; Huber, *supra* note 1 at 744-46; Comment, *supra* note 53, at 915-18.

⁷⁰ *Culmer*, 25 Bankr. at 628-31.

⁷¹ See *id.* at 629-30.

law principles of comity because all of the section 304(c) factors were traditionally "within a court's determination whether to afford comity to a [foreign proceeding]."72 The court then narrowed the exceptions to the recognition of comity to only those cases where the judicial enforcement of such claims would approve a transaction "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."73

In a 1988 decision deferring to the request of a foreign representative, the court in *In re Axona International Credit*⁷⁴ also viewed section 304 as a codification of common law principles of comity.⁷⁵ The *Axona* court adopted the narrow exceptions to comity set forth in *Culmer*.⁷⁶ Directly adverse to the protectionist *Toga* decision, the *Axona* court found that the loss of a United States creditor's secured status when forced to participate in a foreign proceeding is a minor difference in the laws of the two jurisdictions, and thus, did not justify the denial of comity.⁷⁷ The *Axona* court stated that *Toga* was inconsistent with "the modern need for flexibility in the construction of comity."⁷⁸ Other than the court's finding that section 304(c)(4) was not violated, *Axona* focused primarily on the comity factor.⁷⁹

V. The Gercke Analysis: Relation to Prior Section 304 Decisions

At first glance, the relative quantity of the *Gercke* court's discussion of the comity element of section 304(c)⁸⁰ suggests that the decision is consistent with the extremist trend furthered by *Culmer* and *Axona*.⁸¹ However, the *Gercke* court's deliberate analysis of all relevant section 304(c) factors and the protection that the court does afford the United States creditor indicate that it is rather a cautious retreat from these decisions. First of all, the *Gercke* court does not adopt the narrow standard created in *Axona* for determining exceptions to the granting of comity.⁸² *Gercke* recognizes only the traditional and more conservative principle set forth in *Hilton* that comity

⁷² *Culmer*, 25 Bankr. at 629.

⁷³ *Id.*(quoting *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 13, 254 N.Y.S.2d 527, 529, 203 N.E.2d 210, 212 (1964)).

⁷⁴ 88 Bankr. 597 (Bankr. S.D.N.Y. 1988). Relief was granted in *Axona* pursuant to section 305(b), but this section incorporates the same criterion as section 304(c).

⁷⁵ *Id.* at 608.

⁷⁶ *Id.* at 609.

⁷⁷ *See id.* at 610.

⁷⁸ *Axona*, 88 Bankr. at 611. *But see In re Papeleras Reunidas, S.A.*, 92 Bankr. 584 (Bankr. E.D.N.Y. 1988)(holding that all section 304(c) factors should be given equal consideration).

⁷⁹ *Axona*, 88 Bankr. at 611.

⁸⁰ *Gercke*, 122 Bankr. at 628-34. The court devotes approximately four pages to its discussion of section 304(c)(5), whereas the other factors received no more than one page each. *Id.*

⁸¹ *See supra* notes 68-79 and accompanying text.

⁸² *See Gercke*, 122 Bankr. at 631-32.

is generally granted unless the foreign court is not of competent jurisdiction or unless to do so would prejudice the rights of U.S. creditors or violate domestic public policy.⁸³ Of course, since under the facts the *Gercke* court found no exception to the comity doctrine as delineated by *Hilton*, it had no reason to even consider the new standard, since it reached the same result as had it adopted the *Culmer* approach.

Secondly, the *Gercke* decision does not assert, nor even imply, its acceptance of the *Culmer* and *Axona* interpretation of section 304(c) as the codification of comity.⁸⁴ Although the court's analysis of the relevant section 304(c) factors other than comity is included in the prior irreparable harm discussion,⁸⁵ these factors are not treated as components of comity. Instead, the court addresses the merits of each factor distinct from its relationship to the issue of comity.

The mistaken impression that *Gercke* interprets section 304 as comity codified could be the result of the court's inappropriate reliance on *Cunard Steamship Co. Ltd. v. Salen Reefer Serv. A.B.*⁸⁶ in its examination of the comity criterion. In *Cunard*, an English creditor attempted to attach a Scandinavian debtor's assets in the possession of an American garnishee of the debtor.⁸⁷ The foreign representative's request to vacate the order of attachment was granted.⁸⁸ Although the *Gercke* court cited to *Cunard* only with respect to general definitions of comity and public policy violations sufficient to constitute an exception to comity,⁸⁹ *Cunard* remains of little relevance because it can be distinguished on several points. First, *Cunard* was not an ancillary proceeding in a bankruptcy court under section 304; the district court in *Cunard*, which did not need to address the section 304(c) criteria, based its decision on general principles of comity.⁹⁰ The Court of Appeals for the Second Circuit affirmed that section 304 was not an exclusive remedy.⁹¹ Second, unlike *Gercke*, the *Cunard* court did not need to consider the protection of United States creditors because there were none.⁹² Finally, as *Gercke* conceded, the *Cunard* court vacated an order for the attachment of the debtor's assets, an act "clearly threatening the policy of equality of treatment of

⁸³ *Gercke*, 122 Bankr. at 631.

⁸⁴ See *infra* notes 94-112 and accompanying text.

⁸⁵ *Gercke*, 122 Bankr. at 629. The question of economic and expeditious administration of the estate is "answered by the analysis of irreparable harm." *Id.*

⁸⁶ 773 F.2d 452 (2d Cir. 1985).

⁸⁷ *Cunard S.S. Co. v. Salen Reefer Serv., A.B.*, 49 Bankr. 614, 614-15 (S.D.N.Y. 1985).

⁸⁸ *Id.* at 619.

⁸⁹ *Gercke*, 122 Bankr. at 631.

⁹⁰ *Cunard*, 773 F.2d at 456.

⁹¹ *Id.*

⁹² *Id.* at 454-56. The court of appeals asserted that Congress did not intend section 304 to replace the use of general principles of comity as a remedy in international bankruptcies. *Id.* at 456.

creditors”;⁹³ whereas, *Gercke* enjoined an action that would result merely in an entry of judgment against the debtor, but would not necessarily affect the equal treatment of creditors.

VI. The *Gercke* Analysis of the Section 304(c) Comity Factor

In its analysis of section 304(c)(5), the *Gercke* court appropriately rejected York’s argument that the lack of reciprocity should justify the denial of comity.⁹⁴ *Gercke* reasoned that since the evidence presented by the parties was “less than conclusive that a United Kingdom court would refuse to accord comity to United States bankruptcy proceedings in equivalent circumstances,” relief would not be withheld on this basis.⁹⁵

Although the *Gercke* court’s conclusion is consistent with precedent, its method of reasoning may be flawed. When the United States Supreme Court in *Hilton* set forth the general principle of comity and when it should be afforded, the Court made application of the doctrine specifically conditioned on the presence of reciprocity.⁹⁶ Now, however, it is clear that using reciprocity in this restrictive manner is adverse to the purpose behind the enactment of section 304.⁹⁷ If Congress intended to promote the fair and orderly distribution of assets, conditioning relief on reciprocity would undermine the utility of a section 304 ancillary proceeding to a foreign representative.⁹⁸ The *Cunard* holding that “proof of reciprocity is not essential for the granting of comity”⁹⁹ is representative of the modern approach.¹⁰⁰ Since it is well established that reciprocity is no longer a requirement for granting comity in international bankruptcies, whether or not the *Gercke* parties’ proof of reciprocity is conclusive is irrelevant for purposes of section 304(c)(5). Even if it was clear that the United Kingdom would not reciprocate, the *Gercke* court still could have found the comity factor of section 304 to be in Dominion’s favor. Since the court need not consider reciprocity under section 304(c)(5), York’s argument may have been stronger had it been framed in the context of section 304(c)(2) protection of the U.S. creditors from prejudice in the foreign proceeding or section 304(c)(4) distribution of assets in accordance with the order pre-

⁹³ *Gercke*, 122 Bankr. at 632 n.6.

⁹⁴ *Id.* at 633.

⁹⁵ *Id.*

⁹⁶ *Hilton*, 159 U.S. at 210. In fact, the Court denied recognition of the foreign judgment at issue under the principle of comity because of the “want of reciprocity” on the part of the foreign country to give effect to U.S. judgments. *Id.*

⁹⁷ See *infra* note 114 and accompanying text.

⁹⁸ See also Huber, *supra* note 1, at 759-60; Comment, *Section 304 of the Code, supra* note 38, at 556-57.

⁹⁹ *Cunard*, 773 F.2d at 460.

¹⁰⁰ See Morales & Deutsch, *supra* note 40, at 1576 n.10.

scribed by the Code.¹⁰¹

The second issue the court addressed in its analysis of section 304(c)(5), York's claim that comity should not be granted due to the choice of forum clause in the Dominion-York contract providing for the settlement of all disputes under the courts of the District of Columbia, could also have been addressed (and to a limited extent it was) under section 304(c)(2) to protect York from prejudice.¹⁰² The characterization of this as a comity issue follows from the *Gercke* court's reliance upon the *Cornfeld* decision.¹⁰³ However, it can be argued that the distinctions between the two cases render this reliance inappropriate.

First of all, the *Cornfeld* court had an equitable motive for requiring the creditor to seek relief in Canada rather than in the United States: the creditor in *Cornfeld* was a founder and director of the Canadian debtor corporation, had allegedly committed wrongful acts thereby breaching his corporate duties to the debtor, and was trying to sue the corporation for indemnity.¹⁰⁴ Secondly, in granting comity despite a forum selection clause in the director's contract designating New York as the appropriate jurisdiction, the *Cornfeld* court emphasized that Canada's proximity and procedural safeguards similar to those of the U.S. entitled it to special treatment.¹⁰⁵ Finally, the *Cornfeld* court clearly adopted *Culmer's* narrow definition of exceptions to the extension of comity,¹⁰⁶ while *Gercke* seems to have retained *Hilton's* more expansive view.¹⁰⁷

In light of these distinctions, it is unfortunate that the *Gercke* court gave little attention to the arguments in favor of enforcing forum selection clauses.¹⁰⁸ Although it is true that anyone who deals with a foreign corporation "impliedly subjects himself to such laws of the foreign government, affecting the . . . corporation with which he voluntarily contracts, as the . . . policy of that government authorizes,"¹⁰⁹ there are valid reasons to recognize the contractual choice of forum.¹¹⁰ By consistently preserving the integrity of such clauses, U.S. courts will further predictability and efficiency in international commercial business and can more adequately protect the interests of both creditors and debtors.¹¹¹ Furthermore, U.S. creditors who

¹⁰¹ However, in *Gercke*, York stipulated to section 304(c)(4), that the U.K. Insolvency Act is substantially in accord with the Code on the order of distribution of assets.

¹⁰² *Gercke*, 122 Bankr. at 629-33.

¹⁰³ *Id.* at 631.

¹⁰⁴ *Cornfeld*, 471 F. Supp. at 1255-57.

¹⁰⁵ *Id.* at 1259.

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* note 83 and accompanying text.

¹⁰⁸ See *Gercke*, 122 Bankr. at 632.

¹⁰⁹ *Gercke*, 122 Bankr. 631 (citing *Canada Southern R. Co. v. Gebhard*, 109 U.S. 527, 537 (1883)).

¹¹⁰ See *Morales & Deutchsh*, *supra* note 40, at 1573, 1583, 1596-97.

¹¹¹ *Id.*

are assured of the protection of a choice of forum clause can extend such credit to foreign debtors at lower costs and with fewer restrictions.¹¹²

VII. Conclusion: Status of the Section 304(c) Comity Factor after *Gercke*

The *Gercke* decision is a conservative retreat from cases such as *Culmer* and *Axona*, which exemplify the trend toward interpreting section 304(c) as the codification of comity.¹¹³ Despite inconsistencies within the court's reasoning, the *Gercke* decision's careful treatment of the relevant section 304(c) factors indicates that it is perhaps more in line with legislative intent than are *Culmer* and *Axona*. In modifying section 304(c) to include the comity factor, Congress noted that it should be considered "in addition to the other factors specified therein."¹¹⁴ The fact that comity was added as a separate criterion indicates that section 304(c) could not logically be considered the codification of comity that *Culmer* and *Axona* suggest.

The *Gercke* court deferred to the foreign proceeding in enjoining York's further litigation, but unlike *Culmer* and *Axona*, the *Gercke* court did not do so without affording the creditor some protection. *Gercke*'s enforcement of the discovery order is an improvement on the protection provided to the U.S. creditors in *Cornfeld* and *Lineas*.¹¹⁵ Requiring Dominion to comply with the discovery order adequately protected York's interests but did not undermine the court's extension of comity with respect to further litigation of the claim.

However, *Gercke*'s misguided reliance on *Cunard* and *Cornfeld*, distinguishable cases with limited relevance, resulted in the court's disregard for the choice of forum clause in the Dominion-York contract.¹¹⁶ The court gave little consideration to the impact that subordinating the integrity of these clauses to principles of comity will have on the American business sector's desire and ability to enter into international commercial agreements.

By using the section 304 factors as guidelines to balance the interest of the foreign representative in achieving a fair and efficient administration of the estate against the interest of the domestic creditor in protecting his rights and claims against prejudice in the for-

¹¹² *Id.* Credit is especially important to third world nations which could not build a "stable industrial economic base" without the "increased influx of American money and technology." Morales & Deutsch, *supra* note 40, at 1595. Of course, York did not extend credit to Dominion. Rather, it asserted a breach of contract claim against the debtor corporation. Since this "cost of credit" argument is inapplicable to the situation in *Gercke*, future courts should limit the relevance of this decision to its facts.

¹¹³ See *supra* notes 68-79 and accompanying text.

¹¹⁴ 11 U.S.C. § 304 (1988) (legislative statement).

¹¹⁵ See *supra* notes 59-67 and accompanying text.

¹¹⁶ See *supra* notes 102-13 and accompanying text.

eign proceeding,¹¹⁷ *Gercke* has taken a correct, middle-of-the-road approach to applying section 304(c) consistent with legislative intent.¹¹⁸ With the exception of its determination of the choice of forum clause issue, *Gercke* is a fair and accurate application of section 304(c). Future cases consistent with *Gercke* will further the achievement of a realistic and practical blend of universality and territoriality in United States bankruptcy law.

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¹¹⁷ See *supra* notes 20-36 and accompanying text.

¹¹⁸ For a detailed analysis of the legislative history behind the enactment of section 304, see Morales & Deutsch, *supra* note 40, at 1586-88. See also Given & Vilaplana, *Comity Revisited: Multinational Bankruptcy Cases under Section 304 of the Bankruptcy Code*, 1983 ARIZ. ST. L.J. 325, 328-29. The language of section 304 is meant to represent a "shift from a parochial view of bankruptcy" to greater recognition of the bankruptcy laws of other nations. Given & Vilaplana, 1983 ARIZ. ST. L.J. at 328. Section 304 is a "middle path" between the concepts of territoriality and universality. *Id.* at 329.