BANKRUPTCY TREATIES

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INTRODUCTION

In 1302, when the Ammanati Bank of Pistoja in Italy became insolvent and its branch in Rome was suddenly closed, there was a panic among the victims. Special concern was felt at the Holy See, as members of the Papal Court and the clergy in general had been important clients of the Roman branch and were greatly affected. The bank, with its seat in the Republic of Pistoja, had branches all over Europe, and hence its assets were widely dispersed. Local assets were removed from Rome to Pistoja. In desperation the creditors in Rome turned to Pope Boniface VIII and sought his intervention. The papal registers show that Pope Boniface found it necessary, in the interest of the Curia, to take an active part in the solution of the difficult problems raised.

The owners of the bank were forbidden to dispose of their property by papal order, and at the same time the debtors of the bank were enjoined from making payments without an authorization of the Holy See. These measures conformed with provisions in bankruptcy statutes then in force in many of the Italian commercial cities, but proved inadequate to meet the particular problems of the case. The owners of the bank of Pistoja were out of reach as the coercive power of the Holy See did not extend beyond the frontiers of that city-state. The principal debtors of the bank resided in Spain, England, Portugal, Germany, and France. Local creditors in these countries tried to


1. The data are taken from an article by Fliniaux, La Faillite des Ammanati de Pistoie et le Saint-Siège, Nouvelle Revue Historique de Droit Français et Etranger, 1924, 436.

2. Register of Boniface VIII (publication of the French School of Rome), No. 5000.

appropriate the local assets. Many debtors were unwilling to pay at all. It was impossible, without the co-operation of the owners of the bank, to collect the foreign debts. To obtain that help, Pope Boniface offered the owners a safe conduct for their return to Rome, and finally secured their promise to co-operate. The Holy See received the necessary information and papers and engaged actively in collecting these debts. Letters rogatory were sent to the clergy in various countries with detailed instructions regarding debtors who were unwilling to pay. The world-wide financial system of the mediaeval papacy was used for the transfer of the incoming money to Rome. While an ordinary trustee in bankruptcy would certainly have failed, the Holy See succeeded in collecting at least part of the foreign assets for distribution among all creditors because its powers transcended state borders.

Today when a commercial enterprise like the Ammanati Bank becomes bankrupt having creditors and assets in various countries, the creditors are usually not as fortunate as were the clergy in 1302. No institution exists with powers transcending state borders for the collection of foreign debts. If co-operation between courts of various countries is not secured by express agreement, one can rely only upon the comity of nations. In the matter of international bankruptcy, as in other fields, this comity has proved wholly inadequate.

A survey made of the present status of international bankruptcy law shows that a trustee in bankruptcy, even if appointed by the court of the debtor’s commercial domicile, has but a slight chance to recover by legal proceedings assets that are located abroad. Only a few countries recognize the foreign trustee’s title to property of the debtor. Often the trustee is not admitted at all by the courts as the creditors’ or the estate’s legal representative with power to claim the assets. If admitted, his rights are rarely sustained against local creditors attaching local assets. In some countries the trustee can qualify as

4. Register of Boniface VIII, No. 5002; Register of Benedict XI, Nos. 1109, 1151 (renewals). Grant of letters of safe conduct in the Middle Ages was a means of enabling compositions between fugitive debtors and their creditors. See Rocco, Il concordato nel fallimento e prima del fallimento (1902) 36; Huvelin, Droit des marchés et des foires (1897) 494 (for the medieval fairs in France); Pauli, Abhandlungen aus dem Lübschem Recette (1865), Urkundenbuch, No. 42 (for a Lübeck safe conduct of 1375: securiatem . . . veniendi ad curiam S. Georgii ad placitandum cum suis creditoribus). Cf. Treiman, Escaping the Creditor in the Middle Ages (1927) 43 Q. J. Econ. 230.

5. Register of Boniface VIII, No. 5331 (letter to Bishop of Lisbon); Register of Benedict XI, Nos. 882 to 887; Register of Clement V (publication of the Benedictins), Nos. 737 to 745.


7. For the following, reference is made to Nadelmann, International Bankruptcy Law: Its Present Status (1944) 5 U. of Toronto L. J. 324, 18 J. N. A. Refernees Banke 104.
the legal representative of the foreign bankruptcy in submitting himself to an exequatur proceeding, but liens secured by attachment before his qualification are sustained. Almost nowhere does a foreign bankruptcy, even when declared by the court of the commercial domicile of the debtor, preclude another bankruptcy declaration by a local court having bankruptcy jurisdiction. No collaboration is guaranteed between the several administrations in the case of concurrent bankruptcies. As each bankruptcy court follows its own law, the same claim can be void in one proceeding and valid in another. In the case of concurrent bankruptcies some countries in South America even grant a priority on local assets to local creditors. When a bankruptcy has been terminated by a composition or an arrangement concluded in an arrangement proceeding, recognition abroad of this composition or arrangement is as uncertain as the recognition of extraterritorial effects of bankruptcy. Some courts hold that even a vote for the composition or arrangement does not preclude creditors from suing elsewhere for the balance by attachment proceedings against local assets.

As a result of this confusing and obscure status even creditors subject to the jurisdiction of the court which declared bankruptcy try to obtain payments or securities abroad. Rights acquired abroad may be valid and not voidable under the foreign law. Not all legal systems provide that creditors must refund what they received abroad. If a bankruptcy case be international, that is enough to make observance of all principles of bankruptcy, even equality among creditors, hazardous. This has concerned international commerce for a long time. The problems yet unsolved in international bankruptcy

11. Cf. In re Pollmann, 156 Fed. 221 (D. C. N. Y. 1907) (attachment in Germany by German creditor valid there, but void under American bankruptcy law).
cases are considered a continual threat to and a source of disturbance in the development of international commercial relations.13

A solution of the difficulties is the conclusion of treaties on bankruptcy which give extraterritorial effect to a bankruptcy declared by the court having jurisdiction under the treaty. Many such treaties have been concluded, particularly between neighboring states, and there are at present at least a score in force covering large parts of Europe and Latin-America. A study of the history of bankruptcy treaties is therefore of more than historical interest.

EARLY TREATIES

The history of bankruptcy treaties has not as yet been fully explored. While there were treaties between mediaeval Italian city-states which provided for the extradition of fugitive debtors,14 other early international agreements probably were limited to the purpose of excluding discrimination in the distribution of the assets between local and foreign creditors.15 Some bankruptcy statutes in mediaeval Italian cities16 gave preference to citizen creditors over foreigners.17 Such practices were abandoned on a reciprocity basis.18 Tendencies to give priority to domestic creditors over foreigners, still strong in many countries in the 17th and 18th centuries,19 have never fully disappeared.20 They are a latent menace for commercial intercourse.


15. See, however, 3 Verri, Storia degli Eclini (1779) 568, n. 302, for a treaty between Verona and Trent of 1204 providing for the transfer of assets to the place where the insolvency had occurred.

16. See Fuchs, Das Konkursverfahren (1863) 21 (referring to a statute of Perugia); Lattes, op. cit. supra note 3, at 339, n. 10; 6 (2) Pertile, Storia del diritto italiano (2d ed. 1902) 403.

17. In the 11th century a Russian Code, on the contrary, had decreed that foreign creditors must be paid first: Codex Yaroslav, § 23. See 2 Karamsin, Histoire de l'Empire de Russie (1819) 60.


19. Cf. Heusler, Die Bildung des Konkursprozesses nach Schweizerischen Rech- ten (1858) 7 Zeitschrift für Schweizerisches Recht 117, 200; Rechtsquellen von Basel, Stadt und Land (1856) 318, 326, 412, 811 (statutes of Basel of 1515, 1539, 1557, 1719); Rössler, Das Altrömer Stadtrecht (1845) 37 (Prague statute of 1360); Stobbe, Zur Geschichte des älteren deutschen Konkursprozesses (1888) 90; Vaessen, La jurisdiction commerciale à Lyon sous l'ancien régime (1879) 155 (Lyons regulation of June 2, 1667, § 12).

20. Cf. Nadelmann, loc. cit. supra note 8; Tennessee Code (Michie, 1938, § 4134); New York Civil Practice Act, § 977-b, subd. 16 (priority in receivership of foreign corporation for United States residents over non-residents suing on causes of action which did not arise or accrue in the state of New York).
Therefore, treaties of friendship, commercial treaties, treaties on judicial assistance, and bankruptcy treaties, often expressly state that citizens of the contracting states shall enjoy equal rights in bankruptcy proceedings.

The earliest known treaty designed to prevent concurrent bankruptcies was a compact on bankruptcy jurisdiction entered into at the end of the 17th century by the governing authorities of Holland and Utrecht. This compact of 1679 is still worthy of attention. In the matter of insolvent decedents' estates and of bankruptcy, the administrator or trustee appointed by the court of the last domicile of the deceased or the bankrupt was given power to collect assets located in the other state. A single administration and distribution was to take place where the administrator or trustee was appointed, and the assets were to be sold there in accord with the local law. In case of a dispute regarding the location of the domicile of the deceased or bankrupt the judge of the last residence of the debtor was competent to settle that question.

Less detailed than this Dutch Convention of 1689 was a reciprocal agreement made about a hundred years later between France and one of its small neighbors, the State of Neuchâtel. The Sovereign Council of Neuchâtel declared in 1785 that assets located in the state would be delivered, on the basis of reciprocity, to the bankruptcy court in France if the debtor had his domicile there. Judgments rendered by that court would be recognized and executed.

At the beginning of the 19th century, in 1804 and 1810, Swiss Cantons concluded among themselves compacts, or "concordats," to secure a single bankruptcy administration by the court of the domicile of the debtor. These compacts, which did not extend their effect to immovable property nor cover the case of a debtor with several establishments, remained in force until a federal bankruptcy statute was passed in Switzerland in 1889.


22. Cf. the contract of 1676 between Scotland and the Dutch city of Campvere regarding the Scottish staple in that city. The contract provided (§ 15) that in bankruptcies involving a Scottish debtor with Dutch creditors, or a Dutch debtor with Scottish creditors, the Scottish authority and the Dutch court shall each appoint trustees "who shall jointly dispose and manage the whole estate of the partie insolvent." DAVIDSON AND GRAY, THE SCOTTISH STAPLE AT VEERE (1909) 434.

23. MARTENS, NOUVEAUX SUPPLÉMENTS AU RECUEIL DE TRAÎTÉS 45. Cf. MERLIN, RÉPERTOIRE, "Jugement", § VIII.

24. MERLI, MODERNE STAATSVERTRÄGE ÜBER DAS INTERNATIONALE KONKURSRECHT (1907) 21-22.

The Swiss Cantons settled the question of bankruptcy jurisdiction not only among themselves but also with neighboring states. In 1808 an agreement was made with Baden. Treaties followed with Wurttemberg in 1825–26 and with Bavaria in 1834 which are still in force. While the agreement with Bavaria is rather primitive, that with Wurttemberg is more elaborate. It provides for a single bankruptcy administration for movable and immovable property at the domicile of the debtor. Satisfaction from liens can be sought, however, before the court and under the law of the location of the property subject to the lien.

After the dissolution in 1806 of the Holy Roman Empire, the German States which had been part of it were confronted with great jurisdictional difficulties. In bankruptcy matters the exclusive jurisdiction of the court of the domicile of the debtor formerly secured by rulings of the Imperial Supreme Council could not be maintained without express agreements between the states. There were a considerable number of agreements on jurisdiction concluded in the years that followed. The first was a treaty between Bavaria and Wurttemberg in 1808, replaced by another in 1821. A treaty between Wurttemberg and Baden followed in 1825. Beginning in 1824, Prussia concluded at least ten treaties with other states, the last being with Austria in 1844. Saxony had at least six treaties.

26. MEILL, op. cit. supra note 24, at 27.
27. 6 MARTENS, NOUVEAU RECUEIL DE TRAITÉS 1020; MEILL, LEHRBUCH DES INTERNATIONALEN KONKURSRECHTS (1909) 248; WÜRTTEMBERG. REGIERUNGSBLATT, 1826, 290.
28. MEILL, op. cit. supra note 27, at 252; BAYER. REGIERUNGSBLATT, 1934, 929, 1095.
30. Applicable to movables only it forbids attachments after bankruptcy was declared in either country.
31. See FEUERBACH, THEMIS ODER BEITRÄGE ZUR GESETZGEBUNG (1812), especially at 305, draft of a treaty on jurisdiction.
32. REICHSHOFRAITS-CONCLUSUM of May 23, 1789, cited by 2 GÖNNER, JURISTISCHE ABHANDLUNGEN (1799) No. 43, 274.
34. Text in REINHARDT, VOM GANTZ (1819) 188. Bankruptcy jurisdiction is given to the court of the domicile of the debtor. The priority of claims is to be governed by the law of that court, except that if the debtor has another domicile in the other country, a priority there in existence is recognized for creditors having contracted in that country.
35. SUPPLEMENT TO 5 MARTENS, NOUVEAU RECUEIL DE TRAITÉS 289.
36. 6 MARTENS, NOUVEAU RECUEIL DE TRAITÉS 854.
including one with Austria signed in 1854. These treaties on jurisdiction provided for a single bankruptcy administration by the court of the domicile of the debtor. On questions of detail they differed. One type admitted separate administrations when a debtor had separate establishments in both countries. Another type had a provision to the effect that creditors from the country other than the debtor’s domicile were to be classified with respect to assets in their own country following the priority rules in force in that country. The treaties with Austria did not extend to immovable property located in the state in which the debtor was not domiciled. The treaties in Northern Germany became obsolete in 1867 with the formation of the North German Federation which solved the question of bankruptcy jurisdiction within the Federation by statute. The treaties in Southern Germany disappeared in 1871 when the German Reich was founded and a bankruptcy statute introduced for the whole Reich. Treaty negotiations between Germany and Austria started, but were abandoned in 1879. The treaties of Prussia and Saxony with Austria remained in force for several years more.

**CENTRAL EUROPE**

In Central Europe, Austria concluded in 1881 a treaty on judicial assistance with its neighbor Serbia. With respect to bankruptcy the treaty provided for the delivery of movables to the court of the domicile of the debtor. This is in accord with a principle embodied in the Austrian bankruptcy law. The treaty with Serbia was replaced by another in 1911, and in the same year a treaty was made by Austria-Hungary with Bulgaria. These treaties furnished the pat-
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tern for the numerous treaties now in force in the Danubian Basin. They apply only to movable property and provide for delivery upon request by the court of the domicile. Liens acquired before the filing of the request must be satisfied before the property is to be delivered.

The treaties in force at present in the Danubian Basin were concluded after World War I in consequence of the dismemberment of Austria-Hungary. In 1922, Austria renewed its treaty with Bulgaria. In 1928, it concluded a treaty with Yugoslavia. The following year, Hungary signed a treaty with Yugoslavia. As early as 1923, Yugoslavia signed treaties with Czechoslovakia and Bulgaria. In 1925 and 1926 respectively, Czechoslovakia concluded treaties with Rumania and Bulgaria. All these treaties are similar. Nothing is provided regarding the recognition of arrangements.

In the years before the Anschluss new efforts were made by Germany and Austria to reach an agreement on the subject of bankruptcy. Finally at the end of 1932 a draft was approved and signed. The draft covered bankruptcy and arrangement proceedings, and the extraterritorial effect was not limited to movable property only. The treaty was not ratified at the time of the Anschluss, and changes were expected to be made before ratification.

WESTERN EUROPE AND SCANDINAVIA

In Western Europe the first modern treaty dealing with bankruptcy was concluded in 1869 when France and Switzerland replaced

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57. Treaties concluded by Czechoslovakia with Lithuania (April 24, 1931, 126 League of Nations Treaty Series 279, 293) and Poland (Feb. 10, 1934, 178 League of Nations Treaty Series 173) do not extend the effects of bankruptcy, but give rules for mutual notification of bankruptcy proceedings involving creditors from both countries.
59. Uniform arrangement laws introduced in both countries (before the Anschluss) in 1934-35 have made superfluous some provisions in the Draft-Convention of 1932.
earlier agreements on the recognition of judgments \(^{60}\) by a new treaty which dealt specifically with the reciprocal recognition of bankruptcy judgments. The provisions on bankruptcy in this treaty of 1869,\(^{61}\) which is still in force, are in part vague and inadequate.\(^{62}\) The treaty provides for a single bankruptcy administration by the court of the commercial domicile of the debtor. The trustee is empowered to collect assets in the other country after the bankruptcy judgment has been provided with an exequatur by the local court.

At the close of the last century bankruptcy treaties became a subject of discussion at meetings of the International Law Association,\(^{63}\) at an international Congress in Turin,\(^{64}\) at the sessions of the Institut de Droit International,\(^{65}\) and at the Hague Conferences on Private International Law.\(^{66}\) The result was greater familiarity with the problems involved. This proved advantageous in drafting the treaty signed in 1899 by France and Belgium.\(^{67}\) This treaty on jurisdiction and the recognition of judgments provides clear rules on bankruptcy jurisdiction and the extraterritorial powers of the trustee. An exequatur is required only for acts of execution. No choice of law rules are embodied in the treaty.

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60. Treaties of 1803 and 1828. Before, a treaty of May 9, 1715, § 31, had provided for the extradition of fugitive debtors: 8 Dumont, Corps Universel Diplomatique du Droit des Gens 448, 451.
62. Leading authors of both countries, supra, have suggested a revision.
63. At the 7th Conference, London, 1879, of the International Law Association, a resolution was adopted suggesting conclusion of treaties based on the following principles: (1) unity and universality of bankruptcy; (2) unity of jurisdiction and administration in the country of the domicile of the bankrupt; (3) sufficiency of one bankruptcy adjudication; (4) inquiry only into the extrinsic validity of the judgment by the courts of the country in which execution is sought to be enforced. 7th Report 293, 37th Report (Oxford 1932) 293.
A quarter of a century passed before further progress was made. In 1921 the Government of the Netherlands decided to resume the Conferences on Private International Law, and the subject of bankruptcy was included in the agenda of the 5th Conference at the Hague in 1925. Shortly before the Conference convened, the Netherlands and Belgium signed a treaty on jurisdiction, bankruptcy, and the recognition of judgments. This Belgo-Dutch treaty of 1925 provides for a single bankruptcy administration by the court of the commercial domicile of the debtor on a basis similar to that provided in the treaty between Belgium and France of 1899. Some choice of law rules are included in the treaty. The treaty had some bearing on the results of the 5th Conference on Private International Law. However, the model-treaty drafted by that Conference, a much more elaborate work than the draft of the preceding 4th Conference held in 1904, differs in important points from the Belgo-Dutch treaty.

The model-treaty of 1925 amended in 1928 by the 6th Conference on Private International Law, has had considerable influence.
on the treaties subsequently concluded. These are the treaty of 1930 between France and Italy on the enforcement of judgments in civil and commercial matters,\textsuperscript{74} the treaty of 1935 between France and Monaco on the recognition of bankruptcy judgments,\textsuperscript{75} and the Bankruptcy Convention concluded in 1933 between the Scandinavian countries, Denmark, Finland, Iceland, Norway, and Sweden.\textsuperscript{76} This last convention, the result of efforts dating back to 1881,\textsuperscript{77} differs in important points from the Hague Draft. Like the Germano-Austrian draft of 1932, the Scandinavian Convention contains a considerable number of choice of law rules. The contents of the treaties in force at present will be discussed in the section on Present Treaty Law.

**Latin-America**

Latin-America has been the seat of important developments in the field of bankruptcy treaties. The South American Congress of Juris-Consults which met in Lima in 1877-78,\textsuperscript{78} included in its draft of a Convention on Commercial Law rules dealing with bankruptcy. This draft,\textsuperscript{79} based largely on the writings of the Italian jurist Fiore,\textsuperscript{80} provided for a single bankruptcy administration by the court of the commercial domicile of the debtor, admitting, however, concurrent bankruptcies in the case of debtors with two or more separate and distinct commercial enterprises in different countries. An exequatur was required for acts of execution. The Lima draft was never ratified and had but little influence on subsequent developments in South America.


\textsuperscript{79} See report Arenas, 2 *Congresos Americanos de Lima*, 391, 402 et seq.

In 1888, the first South American Congress of Private International Law convened in Montevideo. Several treaties were signed in 1889, among them the treaty on International Commercial Law,\(^8\) which has been ratified by Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay. This treaty deals with the subject of bankruptcy.\(^8\) In order to understand the treaty system, one must keep in mind that the bankruptcy law of the original signatories, Argentina, Uruguay, Paraguay, and Peru, differentiates between domestic and other creditors in the case of concurrent bankruptcies and grants domestic creditors a priority on the assets to be distributed in the domestic bankruptcy.\(^8\) The treaty of Montevideo, drafted by Gonzalo Ramírez of Uruguay,\(^4\) gives bankruptcy jurisdiction to the court of the commercial domicile of the debtor, but foresees the possibility of multiple bankruptcies in the case of a debtor with two or more independent commercial houses in different countries. In such a case local creditors, i.e., those to be paid in the country, can request a separate bankruptcy declaration. The several bankruptcies, then, are conducted entirely separate from each other.\(^8\) A surplus remaining in one bankruptcy, however, must be turned over to the other and the “rehabilitation” of the bankrupt\(^8\) becomes effective only when granted in all bankruptcies.

In commemoration of the Congress of 1888-89 another congress met in Montevideo in 1939. This congress, the Second South American Congress of Private International Law, undertook a revision of the old treaties.\(^8\) Rules regarding the bankruptcy of nonmerchants, not covered by the treaty on Commercial Law of 1889,
were included in the new treaty on International Procedural Law.\textsuperscript{88} These rules provide that if a debtor has assets located outside the country of his domicile, local proceedings can be instituted there. A priority is given on local assets to local creditors even if only one proceeding takes place at the domicile of the debtor.\textsuperscript{89} "The Congress established the principle of unity of liquidation, but, at the same time, admitted so many exceptions that it amounts practically to a derogation of the principle."\textsuperscript{90} The new treaty of 1940 on International Commercial Law\textsuperscript{91} maintains the structure of the old treaty with some minor changes. Application of the local priority rule has been extended. A new provision states that local creditors are to enjoy priority in payment out of local assets even in the case of only one bankruptcy, i.e., when the debtor does not have independent commercial houses in several countries or when the local creditors did not request a separate bankruptcy of the independent house.\textsuperscript{92}

In contrast, the other great bankruptcy treaty now in force\textsuperscript{93} in Latin-America, the Bustamante Code of Private International Law,\textsuperscript{94} is free from such tendencies of local protectionism. The Bustamante Code was adopted at Havana in 1928 by the Sixth Conference of American States,\textsuperscript{95} and has been ratified to date by 15 Latin-American


\textsuperscript{90} Videla Aranguren, \textit{loc. cit. supra} note 88, at 200.


\textsuperscript{92} This provision was opposed by the delegates from Argentina. Minutes, Commission on Commercial Law, March 15, 1940. Cf. Videla Aranguren and Thamis, Note (a) sub Nadelmann, \textit{El reconocimiento de los arreglos americanos en el exterior} (1943) 29 Revista Jurídica Argentina La Ley 888, 902.

\textsuperscript{93} The Central-American Treaty of Commercial Law of 1897, §§ 22-35, in force, only for a short time, between Costa Rica, Guatemala, Honduras, Nicaragua, El Salvador, contained rules on bankruptcy similar to those in the Montevideo Treaty of 1889. See Congreso Jurídico Centroamericano, \textit{Acías, Documentos y Tratados} (Guatemala, 1897); 3 Colección de Tratados de Guatemala (1919) 397, 399 et seq.

\textsuperscript{94} The Commission of Jurisconsults which prepared the Code, had before it, besides the Montevideo Treaty, a draft presented in 1912 at Rio de Janeiro by Rodríguez Pereira, based on the principle of ubiquity of bankruptcy. This principle was accepted for the Code. See Bustamante y Sirven, \textit{La Comisión de Jurisconsultos de Río de Janeiro y el Derecho Internacional} (1927), No. 187 (trans. in Nadelmann, \textit{loc. cit. supra} note 8, at 618, n. 106).

States: Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. It contains in the part on International Procedural Law conflict rules regarding bankruptcy. The Code distinguishes between the case of a debtor with "one domicile" and a debtor with several separate establishments in different countries. Only if a debtor has "diverse economically entirely separate commercial establishments," may there be as many bankruptcies as establishments. Otherwise a single bankruptcy is declared by the court of the domicile with effect in all countries that have adopted the Code. The powers of the trustee in bankruptcy are extended to these countries. Only for acts of execution is an exequatur prescribed. Except for the rule which admits several bankruptcies in the case of separate establishments, the Bustamante Code does not fundamentally differ from the type of treaty which has developed in Europe.

**Present Treaty Law**

At first glance the treaties on bankruptcy now in force seem to differ greatly. However, a close study shows that, except for the Montevideo Treaties, the differences are not so much in the solution of basic problems as in the extent to which questions of detail are covered. The older treaties especially give barely more than the fundamental rule on jurisdiction, leaving the courts to solve the questions of substance and procedure created by the extension of the effects of bankruptcy to another country. Other treaties excel in detailed regulation of questions of procedure and some contain a considerable number of choice of law rules. The treaty provisions and the court decisions, together, furnish a fairly complete code of bankruptcy treaty law.

The bankruptcy treaties recognize the effects of bankruptcy declared by the competent court; they give extraterritorial effect to that bankruptcy. The competent court is designated in the treaty. This can be done in two ways. Either the treaty can establish its own rules

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97. According to Bustamante y Sirven, op. cit. supra note 95, sec. 415 of the Code becomes applicable only if the separate establishment constitutes a distinct personality from the legal viewpoint. Nothing is said in the Code regarding a local priority right for claims in that case. Such a priority may, however, become effective by virtue of municipal bankruptcy law having such a rule. The Bankruptcy Law of Brazil, e. g., provides that if a debtor domiciled abroad has two distinct and separate establishments, one abroad and one in Brazil, and is declared bankrupt in Brazil, local creditors, i. e., those to be paid in Brazil, can require the bankruptcy of the establishment in Brazil and payment prior to creditors of the other establishment (Bankruptcy Law No. 5746 of 1929, § 161).
of jurisdiction regarding bankruptcy, which can then be declared in either country only by the court given bankruptcy jurisdiction by the treaty; or, without interfering with the municipal rules as to bankruptcy jurisdiction, the treaty can provide extraterritorial effect only for the bankruptcy declared by the court specified in the treaty. Bankruptcy declared by any other than the specified court has no extraterritorial effect. Both methods have been applied. For the Hague Draft of 1925 the second system was chosen.

With almost no exception the court of the domicile of the debtor is the court which is given exclusive bankruptcy jurisdiction, or, under the second system, jurisdiction with extraterritorial effect. Although definitions of "domicile" may vary, it always means commercial domicile. In some treaties "place of the commercial establishment" is substituted for "domicile," and sometimes primary jurisdiction is given to the "place of the commercial establishment" and secondary jurisdiction to the "domicile," or vice-versa. These differences result from the various meanings of "domicile" in the legal systems. Some treaties specify with respect to corporations that domicile means "seat" (séïge social, Sitz), i.e., the administrative center of the corporation.

A few treaties deal with the conflicts which can arise when courts disagree on the location of the domicile and contradictory decisions are rendered on the question of jurisdiction. In one treaty arbitra-

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98. First method: all treaties signed by France, the Germano-Austrian draft. Second method: e.g., the Belgo-Dutch treaty, §§ 20, 25, the Scandinavian Convention, § 13.
100. Exception: the Bustamante Code, § 329, which, for involuntary proceedings, provides that any place with bankruptcy jurisdiction is competent, but that preference shall be given to the court of the domicile, if the domicile is among the places and the debtor or the majority of his creditors so desire.
101. Domicile has been defined as the "center of affairs:" France-Italy, §§ 20, 28 (1); as the "principal seat of affairs:" Montevideo Commercial Treaty of 1940, § 3 (1).
102. E. g., in the Hague Draft, § 2.
103. E. g., France-Belgium, § 8, Belgium-Netherlands, § 20.
104. E. g., Germano-Austrian Draft, § 1 (1).
105. In French law, e. g., the domicile is at the place of the principal establishment: Civil Code, § 102; under German law one may have more than one domicile: Civil Code, § 7; under Swiss law nobody can have his domicile at the same time at several places: Civil Code, § 23 (2).
106. E. g., France-Italy, Belgium-Netherlands, Scandinavian Convention. The Hague Draft, § 2, refers to the location of the chartered seat, provided that it be neither fraudulent nor fictitious.
107. Compare the taxation cases Wheeling Steel Corporation v. Fox, 298 U. S. 193, 211, 56 Sup. Ct. 773, 778, 80 L. Ed. 1143, 1148 (1936), First Bank Stock Corporation v. Minnesota, 301 U. S. 234, 236, 57 Sup. Ct. 677, 678, 81 L. Ed. 1061, 1062 (1937), in which the United States Supreme Court characterized the principal place of business as the commercial domicile of the corporation.
108. France-Italy, § 37.
tion is provided, but only when there is a doubt as to the construction of the treaty. Another treaty provides that if the court first contacted declares itself competent, that court shall hear the case. A recent draft, on the contrary, gives preference to the court which first declared bankruptcy by final judgment. Bankruptcy declared by the court competent under the treaty extends its effects to the other country. This extension in some treaties is qualified as to persons, in others as to property. If under the municipal law of one country only merchants can be declared bankrupt, as is still the case in several countries, the treaty may be limited to the bankruptcy of merchants. The Hague Draft specifies that in this case the judge of the country in which effect is claimed for the foreign bankruptcy decides in applying his own law whether the debtor is a merchant.

The treaties in the Danubian Basin limit the extraterritorial effect of bankruptcy to movable property of the debtor. With respect to real property only a surplus after sale of the property and payment of the mortgages is available. Practically the same result is obtained in the treaties which do not exclude real property from their effects, by a provision submitting questions regarding real property to the jurisdiction and the law of the situs.

Latin-American treaties do not unconditionally extend the effects of the bankruptcy declaration to a country in which the debtor has a separate independent commercial enterprise. In such a case concurrent bankruptcies are admitted and conducted independently of

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110. Belgium-Netherlands, § 20 (3).
111. Germano-Austrian Draft, § 3.
112. E. g., France, Belgium, Italy, Greece, Rumania, Spain, the Latin-American countries, except Chile and Peru. See Castro, Unidad de la legislaci6n de la quiebra y del concurso, in CINCUENTENARIO DE LA REFORMA AL CODIGO DE COMERCIO DE LA REPUBLICA ARGENTINA (1941) 423, 449. In most of these countries abolition of the distinction between bankruptcy of merchants and non-merchants has been envisaged. Cf. Levy-Bruhl, La faillite dans notre ancien droit s'appliquait-elle aux non-commerсанts? Revue Historique du Droit Francais et Etrangers, 1939, 80.
113. E. g., Belgium-Netherlands, § 20, providing, however, extension of the effects of the treaty to non-merchants, should Belgium extend its bankruptcy legislation to non-merchants.
114. Hague Draft, § 1 (2) and (3).
115. E. g., Austria-Bulgaria, § 27; Czechoslovakia-Yugoslavia, § 35 (3).
116. E. g., Austria-Yugoslavia, § 55 (2); Yugoslavia-Hungary, § 35 (2).
117. See note 151, infra. However, El Salvador signed the Bustamante Code with a reservation excluding immovable property from the extraterritorial effect of the bankruptcy: 86 League of Nations Treaty Series 376.
A surplus in one bankruptcy must be turned over, however, to the other.\textsuperscript{120}

When the effects of bankruptcy are extended to another country, the question may be raised whether all these effects shall be determined by the law of the forum. \textsuperscript{121}\textsuperscript{122} A recent draft\textsuperscript{122} dogmatically provides that, except for the questions specified in the draft, the law of the forum shall always govern. The treaties now in force do not attempt to cover all the problems which may arise in this connection but furnish solutions for a number of specific questions.

When does bankruptcy declared by the competent court become effective in the other country? One draft specifically states that the law of the forum determines for both countries when the bankruptcy declaration has effect.\textsuperscript{123} The Danubian treaties do not recognize any effect before a request for delivery of the foreign assets has been filed with the local court.\textsuperscript{124} Another treaty establishes a connection between the publicity to be given to the bankruptcy judgment and the extraterritorial effect. The bankruptcy has extraterritorial effect only after compliance with the formalities of publication and registration required by the law in the other country.\textsuperscript{125}

Whether the bankruptcy judgment rendered by the competent court must also be published in the other country and, if so, when, is frequently settled by special provision. In some treaties this publication is prescribed whenever a debtor has creditors in the other country or countries.\textsuperscript{126} In others, publication is required when assets are located in the other country.\textsuperscript{127} Still others prescribe publication in both cases.\textsuperscript{128} Another group of treaties requires publication only in case of the existence of a branch or an establishment of the bankrupt in the other country.\textsuperscript{129} As a compromise, the Hague Draft provides publication in another country first in the case of existence of a branch and secondly when the trustee intends to invoke the extraterritorial effect of the bankruptcy there.\textsuperscript{130} According to this Draft the local law determines the form of publication as well as the legal consequences of non-publication.\textsuperscript{131}

\textsuperscript{120} Montevideo Treaty, 1889, § 39 (2); Montevideo Commercial Treaty, 1940, § 45; Montevideo Procedural Treaty, 1940, § 24 (2), as to "rehabilitation."
\textsuperscript{121} Montevideo Treaty, 1889, § 41; Montevideo Commercial Treaty, 1940, § 47.
\textsuperscript{123} Germano-Austrian Draft, § 7.
\textsuperscript{124} Germano-Austrian Draft, § 5 (1).
\textsuperscript{125} E. g., Austria-Yugoslavia, § 54 (2).
\textsuperscript{126} Bustamante Code, § 416.
\textsuperscript{127} The Danubian treaties, e. g., Austria-Yugoslavia, § 56 (2).
\textsuperscript{128} Scandinavian Convention, § 2.
\textsuperscript{129} Cf. Germano-Austrian Draft, § 5.
\textsuperscript{130} The treaties signed by France; Belgium-Netherlands, § 22; Montevideo Commercial Treaty, 1940, § 42.
\textsuperscript{131} Hague Draft, § 8 (2).
A consequence of the extraterritorial extension of the effects of bankruptcy declared by the competent court is that the trustee in bankruptcy is to be recognized in the other country. The treaties state that the trustee can maintain actions as the representative of the bankrupt or the bankrupt estate.\textsuperscript{132} No treaty requires as a prerequisite that in any case the appointment be sanctioned by the local court. All treaties allow administrative measures and measures of a provisional character to be taken by the trustee without any formality.\textsuperscript{133} This generally applies also to the sale of movable property.\textsuperscript{134}

For all measures of forced execution most treaties require that the bankruptcy judgment be declared executory by a court of the country in which the execution takes place.\textsuperscript{135} The same is prescribed in several treaties for the sale of immovable property.\textsuperscript{136} The conditions required for the grant of the exequatur are most often those adopted in the Hague Draft:\textsuperscript{137} the court which declared bankruptcy must be competent under the treaty, the debtor must have received notice to appear before that court, the judgment must be enforceable by execution in the country of the bankruptcy court, and the judgment must not contain anything contrary to public policy in the country in which the exequatur is requested.\textsuperscript{138} For the exequatur proceeding many treaties refer to the rules of execution of foreign judgments embodied in the same or another treaty.\textsuperscript{139}

The whole procedure before the bankruptcy court itself is governed by the law of the forum.\textsuperscript{140} Among other matters, the law of the forum controls the appointment and powers of the trustee, the administration of the estate, the proof of claims, the distribution of assets, the formation of a composition, the closing of the estate,\textsuperscript{141} but not the technicalities of sales for which the law of the situs of the sales.

\begin{itemize}
\item \textsuperscript{132} France-Italy, § 21; Belgium-Netherlands, § 21 (2); Scandinavian Convention, § 3; Hague Draft, § 4 (2); Germano-Austrian Draft, § 7 (2); Bustamante Code, § 418; Montevideo Commercial Treaty, 1940, § 49 (1); Montevideo Procedural Treaty, 1940, § 23.
\item \textsuperscript{133} Ibid.
\item \textsuperscript{134} E. g., Belgium-Netherlands, § 21 (2); Hague Draft, § 4 (2).
\item \textsuperscript{135} E. g., the treaties signed by France; Belgium-Netherlands, § 21 (2); Hague Draft, § 4 (2); Bustamante Code, § 417.
\item \textsuperscript{136} E. g., Belgium-Netherlands, § 21 (2); Hague Draft, § 4 (2).
\item \textsuperscript{137} Hague Draft, § 5.
\item \textsuperscript{138} Some consider this last condition to be unjustified between two specific countries which have signed their treaty only after careful study of their respective laws. Cf. Travers, \textit{Le projet de traite concernant la faillite (5e conférence de droit international privé de la Haye)}, \textit{Revue de Droit International Privé}, 1926, 220, 232.
\item \textsuperscript{139} France-Switzerland, § 6; France Belgium, § 8 (2); France-Italy, § 21; Belgium-Netherlands, § 21 (2); Bustamante Code, § 417; Scandinavian Convention, § 10; Germano-Austrian Draft, § 20.
\item \textsuperscript{140} France-Italy, § 24 (4); Montevideo Procedural Treaty, 1940, § 16.
\item \textsuperscript{141} Scandinavian Convention, § 1 (2); France-Italy, § 24.
\end{itemize}
property must be observed. The bankrupt’s rights and duties during the proceeding are also determined by the law of the forum. As to the effects of bankruptcy on the bankrupt’s right to dispose of his property, the law of the situs governs the question whether entry in a register is necessary to bar effects of his acts.

Some treaties deal especially with the question of exemptions and provide that the law of the situs shall govern. Property exempt from execution or seizure by the law of the country of the location is not included in the bankrupt estate.

Voidable preferences and fraudulent transfers are, according to most treaties, determined by the law of the court which declared bankruptcy. A recent draft, however, refers for the voidability of acts to the law of the country in which the act became effective, and according to some treaties the effect of bankruptcy on rights acquired by execution is determined by the law of the country of the execution. The Hague Draft, as a compromise, refers voidability to the law of the court which declared bankruptcy, but reserves the right for the contracting States to declare that an invalidation not admitted by the local law would not be recognized with respect to local assets.

All treaties agree that the law of the situs of land governs the validity and the effect of a mortgage or other incumbrance. With only one exception, the treaties apply the same rule to chattel mortgages. Jurisdiction is given to the court of the situs for the enforcement of these rights, even though, as a general rule, the bankruptcy

142. France-Switzerland, § 6 (3); France-Italy, § 24 (2); Scandinavian Convention, § 6.
143. Scandinavian Convention, § 1 (2); Germano-Austrian Draft, § 10 (1).
144. Scandinavian Convention, § 4 (1); Germano-Austrian Draft, § 10 (2).
145. Scandinavian Convention, § 1 (3); Germano-Austrian Draft, § 8.
146. Cf. United States Bankruptcy Act, § 6, 52 Stat. 847 (1938), 11 U. S. C. A. § 24 (1943), which for exemptions refers to the law of the state of the Union in which the bankrupt has had his domicile; the Canadian Bankruptcy Act, 1927, § 23 (2), which refers to the law of the Province within which the property is located and the debtor resides.
147. France-Italy, § 24 (5); Scandinavian Convention, § 1 (2); Bustamante Code, § 419.
149. Scandinavian Convention, § 4 (3); Germano-Austrian Draft, § 11.
151. Franco-Switzerland, § 6 (5); France-Italy, § 24 (3); Belgium-Netherlands, § 23 (2); Scandinavian Convention, §§ 5 (1), 7 (1); Hague Draft, § 10; Germano-Austrian Draft, § 15; Montevideo Procedural Treaty, 1940, § 22.
152. Belgium-Netherlands, § 23 (1), referring to the law of the country in which bankruptcy is declared.
153. France-Italy, § 24 (3); Scandinavian Convention, §§ 5 (1), 7 (1); Hague Draft, § 10; Germano-Austrian Draft, § 15; Bustamante Code, § 420; Montevideo Procedural Treaty, 1940, § 22.
154. France-Italy, § 25 (2); Danubian treaties, e. g., Czechoslovakia-Yugoslavia, §§ 35 (5); Hague Draft, § 15; Germano-Austrian Draft, § 15; Bustamante Code, § 420; Montevideo Commercial Treaty, 1889, §§ 43, 1940, § 59.
court may have exclusive jurisdiction over all questions relating to the bankruptcy.\textsuperscript{155}

The choice of the law to govern priorities of payment has great importance. A distinction is made between liens on specific assets which are governed by the law of the situs, in application of the rule just mentioned, and statutory priorities not having the character of liens on specific assets. For these statutory priorities, in some legal systems called general liens on all assets,\textsuperscript{160} the solutions are not uniform. Some treaties,\textsuperscript{167} as well as the Hague Draft,\textsuperscript{168} submit priorities to the law of the court which declared bankruptcy. Other treaties\textsuperscript{169} submit "general liens" to the law of the situs of the property. A recent draft\textsuperscript{160} declares that the existence of a priority right must be determined by the law governing the claim itself. When under the treaty priorities are governed by the law of the bankruptcy court, an exception is made regarding taxes levied by a state other than that of the bankruptcy court. The priority of such taxes is determined by the local law and enforceable only on local assets.\textsuperscript{161}

These are the major questions of choice of law which are settled in the treaties. A variety of details are also covered. Some treaties determine even the location of claims owned by the bankrupt for the purposes of the application of the treaty.\textsuperscript{162}

The extraterritorial effect which is granted by treaty to the bankruptcy declared by the competent court covers all decisions rendered in the bankruptcy proceeding. This applies especially to orders confirming compositions. Compositions, therefore, have extraterritorial effect.\textsuperscript{163} None of the treaties gives consideration to the question of extraterritorial effect for orders of discharge. The possibility of a discharge from debts by order of the court, not connected with a composition accepted by a majority of creditors, is peculiar to Anglo-

\textsuperscript{155} E. g., France-Italy, § 25 (1), and the municipal bankruptcy law of many countries.


\textsuperscript{157} Scandinavian Convention, § 1; Montevideo Procedural Treaty, 1940, § 22. Hague Draft, § 11.

\textsuperscript{158} E. g., France-Italy, § 24 (1).

\textsuperscript{159} Germano-Austrian Draft, § 14.

\textsuperscript{160} Scandinavian Convention, § 7 (2); Hague Draft, § 11; Germano-Austrian Draft, § 14 (2).

\textsuperscript{161} Scandinavian Convention, § 8: situated in the country in which bankruptcy was declared; Germano-Austrian Draft, § 22: situated at the domicile of the bankrupt's debtor.

\textsuperscript{162} The treaties signed by France; Belgium-Netherlands, § 21 (3); Hague Draft, § 7; Germano-Austrian Draft, § 18; Bustamante Code, § 421.
American law\textsuperscript{164} and the recent law of some South American countries.\textsuperscript{185}

Today bankruptcy proceedings everywhere are being superseded by arrangement proceedings.\textsuperscript{166} All modern treaties declare that the rules given for straight bankruptcy are applicable to these proceedings\textsuperscript{167} and thus secure extraterritorial effect for arrangements.

**BRITISH COMMONWEALTH**

While agreements to avoid concurrent bankruptcies now have become a common feature between civil law countries, the same is not true of common law countries. No agreement on bankruptcy exists between the nations forming the British Commonwealth, nor between these nations and the United States. Nor has a basis for bankruptcy agreements so far been found between common law and civil law countries. Great Britain has concluded with other European countries numerous treaties on judicial assistance\textsuperscript{168} and the recognition and


165. Discharges from debts in bankruptcies, classified as fortuitous, i. e., due to circumstances out of control of the bankrupt, were first allowed in Argentina in 1902. Under the actual Argentine Bankruptcy Law No. 11,719 of 1933, §§ 186, 191, re habilitation with the effect of a discharge is possible after a lapse of three years. For criticism of a suggested immediate rehabilitation, see T. Castillo, La quiebra en el derecho argentino (1940) No. 854. Discharge after five years is granted by the Chilean Bankruptcy Law No. 1297 of 1931, § 134, and the Peruvian Bankruptcy Law No. 7,566 of 1932, § 172. The Brazilian draft of 1940 of a new bankruptcy law, § 128, provides for a three year limitation period.


167. E. g., France-Italy, § 23; Belgium-Netherlands, § 24; Scandinavian Convention, § 5; Germano-Austrian Draft, § 21; Bustamante Code, § 414; Montevideo Commercial Treaty, 1940, § 53; Montevideo Procedural Treaty, 1940, § 25.

168. Research in International Law: Judicial Assistance, Appendix I (1939) 33 Am. J. Int. L. Supp. 120, lists the treaties.
enforcement of money judgments, but as yet no treaty on bankruptcy.

The problems involved in a jurisdictional conflict regarding bankruptcy are the same whether the conflict arises between two common law or two civil law countries. One may wonder, therefore, about the lack of bankruptcy agreements between the common law countries. Insofar as the British Commonwealth is concerned, a study of the English rules of conflict of laws regarding bankruptcy discloses the reasons.

In two cases, Solomons v. Ross, in 1764, and Jollet v. Deponthieu, in 1769, the English courts have sustained trustees in bankruptcy appointed in Holland in their claims on assets located in England which English creditors had attached. Since then it has been the English doctrine that all movable property, no matter where it may be situated at the time of the assignment by the foreign bankruptcy law, passes to the foreign trustee if the debtor was subject to the jurisdiction of the foreign court. Even with respect to immovable property situated in England a foreign trustee was granted authority to act as a receiver of such immovables, to sell them, and to deal with the proceeds as trustee in bankruptcy. The English doctrine has been followed by the courts in Ireland, and as to movables also by the courts in Canada, Australia, New Zealand, and India. The courts in South Africa apply the same rule as the


170. 1 H. BL. 131, note (1764).

171. Id. at 132, note (1769).

172. CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 473; DICEY, CONFLICT OF LAWS (5th ed. 1932 by Keith) 498, rule 124.

173. Aliwon v. Furnival, 1 C. M. & R. 277 (Ex. 1834); In re Blithman, L. R. 2 Eq. 23 (1865); In re Davidson, L. R. 15 Eq. 483 (1873); In re Lawson's Trusts, [1896] 1 Ch. 175; In re Anderson, [1911] 1 K. B. 896, JOURNAL DE DROIT INTERNATIONAL, 1912, 385; In re Craig, 86 L. J. 62, 114 L. T. 896 (Ch. 1916); In re Burke, King v. Terry, 54 L. J. 430 (1919); Bergerem v. March, 151 L. T. 264, 125 L. T. R. (N. S.) 630 (K. B. 1921), JOURNAL DE DROIT INTERNATIONAL, 1922, 438; Macauley v. Guaranty Trust of New York, 44 T. L. R. 99 (Ch. 1927), JOURNAL DE DROIT INTERNATIONAL, 1928, 1080.


175. Neale and another, Assignees of Grattan v. Cottingham, 1 H. Bl. 132, note (1764); Re Bolton, [1920] 2 Ir. R. 324.


178. Ex parte Bettle, 14 N. Z. L. R. 129 (1895).

179. See MULLA, LAW OF INSOLVENCY IN BRITISH INDIA (1930) 58.

doctrine of the Roman-Dutch law. Since 1803, the Scottish courts have recognized the effects of a foreign bankruptcy under the doctrine of mobilia sequuntur personam.

The fact that in all parts of the British Commonwealth the title of a foreign trustee in bankruptcy is recognized at least regarding movables, has to a large extent secured for the Commonwealth the ubiquity of bankruptcy even without any express agreement. Jurisdictional conflicts, however, are possible. Often under the municipal law the presence of assets, or the fact that the debtor has carried on business in the country, suffices to give bankruptcy jurisdiction. More than one court, therefore, may have jurisdiction. While the Scottish courts may recognize the binding effect of the bankruptcy declared by the court of the domicile of the debtor, the English courts hold that it is a matter of discretion and convenience whether another bankruptcy should be declared in England. So concurrent bankruptcies are not infrequent. Reluctance in England and Scotland to recognize the retroactive effect of a foreign bankruptcy may make a second bankruptcy declaration even necessary to insure equal treatment for all creditors. As between England and Scotland, concurrent bankruptcies can be prevented under special circumstances by application of a provision inserted in the bankruptcy statutes of both countries. When a majority of creditors in number and value resides in the other country, the court, upon application, may stay the proceedings if from the situation of the property or other causes it appears


185. English Bankruptcy Act, 1914, § 4 (I) (d); Bankruptcy (Scotland) Act, 1913, § 11 (in the case of companies); Australian Bankruptcy Act, 1924-1933, § 55 (I); Indian Insolvency Acts, 1909, and 1920, § II.

186. Royal Bank of Scotland v. Scott, Smith and Co. (Stein's case), 17 Fac. Coll. 72 (1813); Goetze v. Aders, 2 R. 150 (1874).


188. Cf. Ex parte McCulloch, 14 Ch. D. 716 (1889) (bankruptcy declared in Ireland, debtor trading in Liverpool, adjudication in England granted); In re A Debtor (199 of 1922), [1922] 2 Ch. D. 470 (bankruptcy in Scotland, subsequent receiving order in England sustained).


190. Hunter v. Palmer, 3 S. 586 (1825); Goetze v. Aders, 2 R. 150, 153 (1874).
that the estate ought to be distributed under the law of the other country.¹⁹¹

English, Scottish, and Irish bankruptcy judgments by virtue of a special provision in the law.¹⁹² have full effect in any part of the United Kingdom. Based on imperial statutes.¹⁹³ they have effect in the entire Empire.¹⁹⁴ A provision in the English and Irish Bankruptcy Acts.¹⁹⁵ orders all courts of the Empire to give judicial assistance to each other in bankruptcy matters. Whether bankruptcy judgments rendered in the Dominions or Colonies are to be recognized elsewhere in the Commonwealth, however, is solely governed by comity.¹⁹⁶ Long ago suggestions were made to secure by express agreement and reciprocal legislation the mutual recognition of bankruptcy judgments within the British Commonwealth and Empire.

Such proposals were before the first Colonial Conference held in London in 1887.¹⁹⁷ In 1885, Mr. Piggott had submitted to the Colonial Office the draft of a Bill for the more speedy execution in the United Kingdom of judgments obtained in Indian and Colonial courts.¹⁹⁸ This draft, based on the registration system now adopted in England for the execution of money judgments rendered in Dominions and foreign countries with which reciprocity has been established,¹⁹⁹ also applied the principle of registration to orders in bankruptcy.²⁰⁰ After discussions between the Board of Trade and the Colonial Office, the latter prepared for the Colonial Conference its own draft,²⁰¹ and finally a separate Bill for Bankruptcy and Winding-up of Companies was brought before the Conference.

This Bill of which there were two drafts²⁰² provides that, if reciprocal arrangements have been made in a British possession, bank-

¹⁹¹. ENGLISH BANKRUPTCY ACT, 1914, § 12; BANKRUPTCY (Scotland) Act, 1913, § 43. Cf. INDIAN PRESIDENCY-TOWN INSOLVENCY ACT, 1909, § 22, according to which the court may annul or stay proceedings if bankruptcy is declared in another British court and the property of the debtor can be more conveniently distributed by the other court.

¹⁹². ENGLISH BANKRUPTCY ACT, 1914, § 121; BANKRUPTCY (Ireland) AMENDMENT ACT, 1872, § 70.

¹⁹³. Cf. the Canadian decision in Re Eades Estate, 33 Dom. L. R. 335 (Man. 1917).

¹⁹⁴. Subject to the right of repeal provided for any Dominion by the Statute of Westminster, 1931.

¹⁹⁵. ENGLISH BANKRUPTCY ACT, 1914, § 122; BANKRUPTCY (Ireland) AMENDMENT ACT, 1872, §71.


¹⁹⁷. 2 PROCEEDINGS OF THE COLONIAL CONFERENCE (1887), Sec. II: Legal Questions. Cf. Moore, Conflict of Laws within the Empire: Bankruptcy and Company Winding-up (1906) 16 (N. S.) J. Comp. Leg. 384, 390 et seq.


¹⁹⁹. FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933; see note 169 supra.

²⁰⁰. First draft (No. 15) at 40; second draft (No. 16) at 42 of the Proceedings.
ruptcy judgments from that possession shall have effect in the United Kingdom. A bankruptcy court in the United Kingdom, on application, directs that the bankruptcy judgment rendered in the possession shall have effect. If the circumstances require it, the court may make the direction subject to the condition that creditors in the United Kingdom may prove their debts there. The court has the same power over the bankruptcy as if it had been a judgment made by the court itself. The property is administered by the Official Receiver, and if the court orders that the property shall vest in any person as trustee, such trustee has the same powers and is subject to the same obligations as if he were appointed under the English bankruptcy law.

If it appears to the court that the bankrupt by reason of being domiciled or resident in the United Kingdom could have been made bankrupt by the court, instead of giving the direction applied for, the court may require that the principal proceedings be carried on in the United Kingdom and make a receiving order as if a bankruptcy petition had been presented. In determining where the principal proceedings shall be carried on, the court shall have regard for the residence of the majority of the creditors, their number and the value of their claims, the situation of the property of the bankrupt, the places and manner in which he carried on business—really all the circumstances of the case. In the event of conflicting decisions as to the place where the principal proceedings shall be carried on, the Judicial Committee of the Privy Council shall determine. For the liquidation of corporations the principal proceedings shall always be in the place where the corporation is domiciled, i.e., at its place of registration. Regarding the recognition of discharges, three proposals are in the Bill: the colonial discharge is to have effect in the United Kingdom as if granted there; it is to have the same effect in the United Kingdom as it would have in the Colony; it is left for the court to determine whether a discharge shall be granted in the United Kingdom.

The Colonial Conference which also had before it suggestions from Sir S. W. Griffith, later Chief Justice of Australia, reached no formal conclusions on the subject. No progress has since been made, though from time to time suggestions have been advanced to

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203. The first draft further provided that if it appeared to the court that, having regard for the circumstances under which the debts of the creditors in the United Kingdom were incurred, those creditors have a special claim upon the assets in the United Kingdom, the court could make the direction subject to the condition that the court would recognize the claim to the extent that it thought fit.

204. The Official Receiver admits or rejects the proofs in that case.

205. Regarding the Official Receiver in the English bankruptcy system, see Williams on Bankruptcy (15th ed. 1937) 400 et seq. Also Reilley, Bankruptcy in Canada (1934) 9 J. N. A. Ref. Bankr. 25 et seq.

206. Proceedings, 45-6: a system of multiple bankruptcies, comparable to that developed in the Montevideo Treaties, note 81, supra.
BANKRUPTCY TREATIES

solve the bankruptcy question within the British Commonwealth. More recently, the Congress of Chambers of Commerce of the British Empire at London in 1924 stressed the advantages of uniformity of bankruptcy legislation within the Empire and upon the Home and the Dominion Governments the desirability of an Inter-Imperial Convention by which assets located in one part of the Empire may be rendered subject to the administration of the bankruptcy courts in another part.

Of much greater importance than the Inter-Dominion problem is the international aspect of the bankruptcy question. A rather peculiar situation has developed. Due to the initiation in the 18th century of the liberal attitude of the courts within the British Commonwealth, foreign trustees in bankruptcy have a fair chance of collecting assets located within the Commonwealth. However, trustees appointed within the Commonwealth trying to collect assets located outside of it are generally much less successful. The countries on the European Continent have departed from the liberal policy which they had in the 18th century. In the United States, from the earliest days of its independence, courts have refused to follow the doctrine laid down in England. An English or a Canadian trustee may not receive in the United States what an American trustee can obtain in England or Canada.

Since the end of the last century the necessity of an international understanding has been stressed by English jurists, and after World War I increased attention was given to the question. The lack of cooperation between the bankruptcy courts of different countries was denounced in 1921 by Master W. Valentine Ball of the Supreme Court of Judicature in a paper presented to the Hague Conference of the International Law Association. The suggestion was made that bankruptcy declared at the commercial domicile of the debtor should

209. Compare Lord Thurlow's statement in Ex parte Blakes, 1 Cox Eq. 398 (1787) that he had no idea of any country refusing to take notice of the rights of the assignees under their laws, with the results of the survey, note 7, infra.
210. See Story, Conflict of Laws (8th ed. 1883) 572 and the decisions in note 228, infra.
be recognized everywhere. Later Dr. E. Leslie Burgin in a paper read before the Grotius Society urged the need for an international bankruptcy convention. He presented at the Stockholm Conference of the International Law Association in 1924 a draft of a Bankruptcy Convention. Dr. Burgin's draft provides that with respect to movables a foreign bankruptcy judgment recognized and covered by an order of a domestic court shall operate as a transfer of the assets wherever situated for the benefit of the creditors; the foreign trustee shall be given power for the collection and administration of those assets within the jurisdiction of the domestic court.

In the commentary accompanying the draft Dr. Burgin considers bankruptcy a question of status which should be regulated by the personal law, i.e., in the English system, the law of domicile. He believes that it is much too drastic for an adjudication in any country to have full effect automatically in any other. With the declaration of bankruptcy, assets wherever situate should pass to the control of some official. There should be machinery open to the official to apply to the courts of the country in which assets are located in order to have his position recognized and himself clothed with adequate powers. There should be local discretion as to following the foreign court. An analogy is drawn with the English practice in the matter of the administration of estates of deceased persons where the English courts usually follow, but not as a matter of course, the foreign grant and make an equivalent order in England if the foreign court making such order is the court of the country of the domicile. The foreign trustee should be allowed to apply by petition to the local court for an order in the nature of an ancillary bankruptcy. In a proper case the court would grant ancillary bankruptcy, would protect the assets, give the foreign trustee local powers of administration over the local assets, and "whilst retaining control of that administration" would "materially assist in rendering the bankruptcy international." Whether under the system envisaged a separate administration with separate proof of claims is necessary in any case is not clearly stated. The discussion which followed at Stockholm and at subsequent conferences did not lead to any result.

215. Id. at 458 et seq.
216. Id. at 474 et seq.
In the meantime the Government of the Netherlands had issued invitations for another Conference on Private International Law. As the bankruptcy subject was a topic to be discussed by the planned Conference, the British Government decided to attend. The 5th Conference on Private International Law convened at the Hague in 1925. In the early stages of the Conference, the British Delegation disagreed with the majority of the governments represented on the type of convention to be concluded. The majority desired a convention by which there would be only one bankruptcy at the commercial domicile of the debtor with effect everywhere. After expressing its viewpoint in a formal statement, the British Delegation withdrew from the Conference declaring that a convention which would be an elaboration upon the basis of the majority opinion would be so alien to English conceptions that it would be impossible for England to adhere to it.218

The statement is as follows: 219

"Owing to the differences which appear to exist between the English bankruptcy law and those of other countries in regard, for example, to such matters as the relation back of the trustee's title (report de la faillite) and the extent to which property acquired by the debtor subsequently to the bankruptcy vests in the trustee, it seems doubtful whether it would be practicable for Great Britain to be party to a convention under which the effects of a bankruptcy declared in one country are extended to the other country ipso facto and without qualification. At the same time H. M. Government are impressed with the desirability of facilitating, as far as possible, the collection in one country of the assets of the debtor declared bankrupt in the other and the administration of the estate for the benefit of all creditors alike, whatever their nationality.

"Accordingly the system which H. M. Government envisage is one according to which, when a debtor is declared bankrupt in one country, that fact should be in itself a ground for declaring him bankrupt in the other also, and that, where such a course did not appear to involve practical inconveniences, the trustee in the first country should be trustee in the second also.

"In other words, instead of an arrangement under which there would be only one bankruptcy in the two countries there would be a concurrent bankruptcy in the second country, in aid of that in the first, the administration under which would be coordinated so far as practicable and all creditors treated on an equal footing."

The conclusiveness of the position as expressed in this statement may be challenged on three counts. First, following the doctrine of

218. Actes de la 5e Conférence de Droit International Privé de la Haye (1925) 331.
219. Id. at 46.
Solomons v. Ross and Jollet v. Deponthieu, discussed on page 79, English courts have delivered movable property to foreign trustees named by a competent court without requiring a concurrent bankruptcy in England. Secondly, no bankruptcy treaty extends the effects of the bankruptcy declared by the competent court ipso facto and without qualification; this is also true of the Hague Draft.²²⁰ Treaties may, and often do, require a sanctioning order of the local court, especially for acts of execution. Qualifications are always made in the extension of the effects of the bankruptcy to the other country. If deemed necessary, the question of relation back ²²¹ and that regarding after-acquired property ²²² can as well be made the subject of qualifications. Thirdly, a discretionary power for the local court to decide in the particular case whether there should or should not be a concurrent bankruptcy is not incompatible with a treaty system which as a matter of principle provides for a single bankruptcy administration.²²³

The Hague Conference of 1925, it may be mentioned, is commonly labeled a failure, not only because of the departure of the British Delegation from the Conference but because the draft-convention evolved from the model-treaty adopted by the Conference has not been ratified by any country. Drafting of a convention acceptable to all, or most countries of the world, if not impossible, is apparently a very difficult undertaking.²²⁴ The outlook of the renewed efforts undertaken since then by the International Law Association ²²⁵ is no more

²²⁰. See note 71 supra, and Appendix.
²²¹. Effects of bankruptcy referred back to act of bankruptcy: English Bankruptcy Act, 1914, § 37, The Bankruptcy Amendment Act (Northern Ireland), 1929, § 10, Indian Presidency-Towns Insolvency Act, 1909, § 51; to date of filing of petition: United States Bankruptcy Act, 1898, § 70 (a), Canadian Bankruptcy Act, 1927, § 4 (11); to date from which debtor ceased to meet his liabilities: French Com. Code, § 441 (without time limit), Belgian Com. Code, § 442 (maximum six months), Italian Com. Code, § 704 (maximum three years).
²²². Divisible property comprises property acquired by or devolving on the debtor after commencement of the bankruptcy before his discharge: English Bankruptcy Act, 1914, § 38 (2) (a), Irish Bankrupt and Insolvent Act, 1857, § 267, Canadian Bankruptcy Act, 1927, § 23 (2) (a), Bankruptcy (Scotland) Act, 1913, § 98; comprises property devolving on the debtor by bequest, devise, or inheritance within six months after bankruptcy: United States Bankruptcy Act, § 70 (a) as amended in 1938; comprises property acquired by or devolving on the debtor while in bankruptcy: French Com. Code, § 443 (1), Belgian Com. Code, § 444, Italian Com. Code, § 699, Austrian Bankruptcy Act, 1914, § 1, Swiss Code of Execution and Bankruptcy, 1889, § 197 (2), Argentine Bankruptcy Act, 1933, § 104; does not comprise property acquired by or devolving on the debtor after bankruptcy declaration: German Bankruptcy Act, § 1 (This, however, does not hinder individual execution in after-acquired property, as no discharge is granted in the bankruptcy: cf. note 164, supra).
²²³. Cf. the draft before the Colonial Conference of 1887, notes 197, 202, supra.
²²⁴. Cf. Niboyet, Manuel de Droit International Privé (2d ed. 1928) 5, n. 3; Straznicky, Les Conférences de Droit International Privé depuis la fin de la guerre mondiale (1923) 44 Recueil des Cours 474, n. 1; author's note 73, supra.
²²⁵. In 1932, at the Oxford Conference of the International Law Association, the Dutch jurist Dr. de Wilde suggested a Convention by which, without solving the problem of the extension of the effects of bankruptcy, the trustee in bankruptcy would be given the persona standi in judicio so as to secure his recognition everywhere as the
promising. Progress has been made only by negotiations between specific countries. The reason is not difficult to ascertain. A treaty-type fitting neighbor-states with a similar bankruptcy legislation, for example, cannot possibly be acceptable to countries which may be distant from each other and have entirely different legal systems. As said in the resolution adopted in 1939 by the 10th Congress of the International Chamber of Commerce, conclusion of a multilateral convention appears impracticable at the present time for many reasons, particularly because of the great diversity of national laws, and the efforts should, therefore, be pursued in the direction of bilateral treaties.

UNITED STATES

Except for the fact that in 1939 the American Delegation to the 10th Congress of the International Chamber of Commerce voted in favor of the resolution urging the conclusion of bilateral bankruptcy treaties, little is known about the present position of the United States regarding bankruptcy treaties. In the United States it is the established rule that claims of a foreign trustee in bankruptcy on local assets will not be sustained against domestic creditors. The foreign trustee may be given the assets in the absence of attaching local creditors. The problems involved were fully discussed, especially in the early decisions when the courts in the states decline to follow the English doctrine and the United States Supreme Court, speaking

only representative of the bankrupt and of the creditors from his country. 37 INTERNATIONAL LAW ASSOCIATION REPORT: OXFORD 292, 294. Though with reservations, a draft was accepted in 1936 by the Paris Conference. 39 INTERNATIONAL LAW ASSOCIATION REPORT: PARIS 226 (reservations at 217-218, 223, 226). At the same Conference, a scheme for a Convention was submitted by the Swiss Branch, in which concurrent bankruptcies with entirely separate administrations are admitted in the case of a debtor with separate “centers of activity” in several countries. As in the Montevideo Treaties, a priority right on local assets for the creditors of each “center” is provided for in the scheme. 39 INTERNATIONAL LAW ASSOCIATION REPORT: PARIS 207 (criticisms from the Swedish Branch at 310).


227. Id. A resolution urging an international convention had previously been adopted, with the support of the American Delegation, by the Third Congress of the International Chamber of Commerce held in Brussels in 1925. See 8 REPORTE DE DROIT INTERNATIONAL (1930) 297.

228. Taylor v. Garry, Kirby 313 (Conn. 1787); Blake v. Williams, 23 Mass. 286 (1838); Wallace v. Patterson, 2 Harr. & M. 463 (Md. 1790); Wood v. Parsons, 27 Mich. 159 (1872); Saunders v. Williams, 5 N. H. 213 (1830); Abrahm v. Pestoro, 3 Wend. 538 (N. Y. 1839); McNeil and Colquhouin, 2 N. C. 24 (1797); Milne v. Moreton, 6 Binn. 355 (Pa. 1814); Topham v. Chapman, 1 Mill 283 (S. C. 1817); Discotto Gesellschaft v. Umbreit, 127 Wis. 651, 106 N. W. 821 (1905), aff’d, 208 U. S. 570, 26 Sup. Ct. 337, 52 L. Ed. 625 (1907).


230. The cases note 228, supra; Holmes v. Remsen, 4 Johns. Ch. 460 (N. Y. 1820), decided by Chancellor Kent on the basis of the English doctrine. Cf. 2 KENT, COMMENTARIES ON AMERICAN LAW (14th ed. 1896) 466.
through Chief Justice Marshall, held "that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States." 231 An opinion rendered by the highest court of Massachusetts in 1828 stated:

"It may be well at some future time when there shall be bankrupt laws here, to accept the proffer of Great Britain, France, or Holland, to reciprocate the benefits of such a system [of ubiquity of bankruptcy], but we are persuaded, if such a change shall take place, it must be under the auspices of the national legislature, or the national courts, or some treaty with the commercial nations of Europe, and not by adjudication of a court for one out of the numerous governments which compose the United States." 232

Except for short periods 233 there was no federal bankruptcy legislation in the United States before 1898. State insolvency and assignment legislation with its geographically limited effect created within the Union conflict problems similar to those in the international field, 234 though American citizens had the protection of the Federal Constitution 235 against discrimination between local and other creditors. 236 With expanding interstate commerce the inadequacy of state legislation made federal bankruptcy legislation as authorized by the Federal Constitution 237 a necessity.

Interstate conflict problems have not fully disappeared with the introduction of federal bankruptcy legislation. The federal Bankruptcy Act of 1898 does not apply to all kinds of debtors. 238 In respect to certain debtor groups state insolvency legislation is, therefore, not disallowed. 239 Until 1934 there was no federal proceeding for the reorganization of insolvent corporations. Resort had to be made to


234. See 1 Wharton, Conflict of Laws (3d ed. 1905) 831; Bailey, An Assignment in Insolvency and its Effects upon Property and Persons out of the State (1894) 7 Harv. L. Rev. 281; Williston, loc. cit. supra note 17.


239. See Glenn on Liquidation (1935) § 276 (liquidation of state banks), § 278 (liquidation of insurance companies).
receivership proceedings. As a receiver generally cannot maintain
an action outside the state of his appointment, the necessity often
arises for ancillary receiverships in other states in which assets of the
corporation are located. This situation is also present in the adminis-
tration of insolvent estates of deceased persons. Contrary to the prac-
tice in most other countries the American bankruptcy legislation is
not applicable to the administration of insolvent decedents’ estates.
The settlement of a decedent’s insolvent estate is governed by state
law. In the absence of a statute permitting it, an administrator or
executor appointed in one state cannot bring action in his representa-
tive capacity in the courts of another. Ancillary appointments in
other states often become necessary. The assets in each state in which
an ancillary administration is carried on are as a matter of principle
separate and distinct funds. A strict insistence upon this separation
would lead to great difficulties. In the matter of insolvent estates the
courts, therefore, have shown a disposition to treat the estates as a
whole, as an entire fund in which all creditors shall be paid pro rata.
To avoid multiple administrations and distributions, the courts have,
in the exercise of their discretion, sometimes ordered the transfer of
local assets to the domiciliary administrator. The same rule applies
to receiverships.

The efforts of the courts to reach satisfactory results have been
supplemented by statutory enactments in several states. Uniform

240. See Finletter, The Law of Bankruptcy Reorganization (1939) 1, 12 et seq.; 1 Gerdes, Corporate Reorganizations (1936) 40; 1 Clare on Receivers (2d ed. 1929) 431.
243. Cf. Glenn, op. cit. supra note 239, at 215, 242. Under former § 74 (e) of the federal Bankruptcy Act as amended June 7, 1934, the administrator or executor of a deceased debtor could take the benefit of the Act for the purpose of effecting a com-
position with the creditors of the estate, provided leave be obtained from the court
which had assumed jurisdiction of the estate. Not maintained under the revision by
the Chandler Act in 1938.
244. Restatement, Conflict of Laws (1934), § 507.
245. In re Hanreddy’s Estate, 176 Wis. 570, 186 N. W. 744 (1922); In re Braun’s
Estate, 276 Mich. 598, 268 N. W. 890 (1936). Cf. Hopkins, Conflict of Laws in Ad-
mistration of Decedent’s Intangibles (1943) 28 Iowa L. Rev. 422, 613; Cheatham,
The Statutory Successor, the Receiver and Executor in Conflict of Laws (1944) 44
Col. L. Rev. 549.
247. People v. Granite State Provident Ass’n, 161 N. Y. 492, 55 N. E. 1053
(1900); In re Stoddard, 242 N. Y. 148, 151 N. E. 159 (1926); Superior Cabinet Corp.
248. For such statutes, see Woerner, American Law of Administration (3d ed. 1923) § 163. Cf., e. g., Ohio Code, § 10511.
Acts regarding (1) the powers of foreign réprésentatives \(^{240}\) and (2) ancillary administrations of estates \(^{250}\) are now being drafted by the Commissioners on Uniform State Laws. The purpose of these Acts is to obviate, so far as is in the interest of all concerned, the necessity of ancillary administrations by vesting the domiciliary administrator with plenary power to deal with the whole estate.\(^{261}\) The courts are allowed to deny ancillary administration if it appears that the affairs may be settled conveniently without it.\(^{252}\) If an ancillary administration is necessary, preference in appointment as local administrator is to be given to the person who is domiciliary administrator.\(^{253}\) At any time the court may order, upon such conditions as it sees fit, removal of the local assets to the domiciliary jurisdiction for administration and distribution.\(^{254}\) If the estate either locally or as a whole is insolvent, all creditors shall receive an equal share in proportion to their respective claims.\(^{255}\) The question of priority rights is to be governed by the law of the decedent's domicile.\(^{256}\)

The rules developed within the Union in administration of insolvent estates and receivership matters are an American counterpart to regulations in bankruptcy treaties. One may venture to say that these rules indicate what in the United States would be considered adequate for an agreement on bankruptcy if such an agreement were to be considered with a country, especially a neighbor, having a similar bankruptcy legislation.\(^{258}\) In respect to countries with laws which greatly differ,\(^{259}\) a different type of regulation would probably

\(^{240}\) Handbook 1942, National Conference of Commissioners on Uniform State Laws, 243 et seq.; Report 1943, Special Committee on Uniform Ancillary Administration of Estates Act, 17 et seq.

\(^{250}\) Handbook 1942, 253 et seq.; Report 1943, 5 et seq.

\(^{251}\) Sec. 2, Draft, Uniform Powers of Foreign Representatives Act.

\(^{252}\) Sec. 3, Draft, Uniform Ancillary Administration of Estates Act.

\(^{253}\) Sections 4 and 7 of the same draft.

\(^{254}\) Sec. 8 of the same draft.

\(^{255}\) Sec. 12 of the same draft.

\(^{256}\) Sec. 11 of the same draft.

\(^{257}\) The draft of a Convention on Judicial Assistance by "Research in International Law under the Auspices of the Harvard Law School", published in 1939, does not deal with the bankruptcy subject. The whole question of the recognition and execution of foreign judgments was reserved for a separate undertaking. RESEARCH IN INTERNATIONAL LAW: JUDICIAL ASSISTANCE—NEUTRALITY—AGGRESSION (1939) 26; republished (1939) 33 Am. J. Int. L. Supp. 26. Since then, the American Bar Association has adopted a resolution favoring the adherence of the United States to a convention to be entered into by all States of the Americas, which would make provisions inter alia for the recognition and execution of final judgments according to the recognized principles of international law. (1941) 27 A. B. A. J. 808.

\(^{258}\) Justice Nesbitt of the Supreme Court of Canada suggested in 1904 at the Universal Congress of Lawyers and Jurists held in St. Louis the conclusion of a bankruptcy convention with the United States. UNIVERSAL CONGRESS OF LAWYERS AND JURISTS (1905) 226. For a comparison of American and Canadian bankruptcy law, see cross-references in COLLEY ON BANKRUPTCY (14th ed. 1940); DUNCAN AND RELLEY, BANKRUPTCY IN CANADA (2d ed. 1933).

\(^{259}\) For differences between American and Mexican bankruptcy law, e. g., cf. the Venable Case, GENERAL CLAIMS COMMISSION UNITED STATES—MEXICO, OPINIONS I
have to be considered. Discussion of the various possibilities would extend beyond the scope of this review. The likeliness of the United States entering agreements on bankruptcy is difficult to ascertain. One may however expect that, sooner or later, the same factors which lead to federal or uniform legislation within the Union will cause a favorable disposition towards the conclusion of bankruptcy agreements with other countries.

CONCLUSIONS

The bankruptcy treaties already concluded and the plans for more agreements show that judicial assistance in bankruptcy is recognized to be indispensable to normal commercial relations. The importance of such assistance increases with expanding international commerce. This must be of special concern to creditor nations.

From the legal viewpoint there is no difficulty in the matter of bankruptcy agreements that could not be solved. Voluminous material on this subject is available for study and guidance. Precedents exist for all types of agreements.

A comparison of the bankruptcy laws of the countries concerned is essential in preparing an agreement suitable for the particular situation. Special rules to bridge differing legal systems may be necessary. Qualifications in granting the extraterritorial effect may be found desirable.

Comparative studies are easily accomplished between countries belonging to the same language group. Difficulties arise when there is difference of language and legal systems. Information on foreign bankruptcy law is then for the most part inadequate. This is particularly the case in the Anglo-Saxon countries.260 The general

(1927) 331, (1928) 22 Am. J. Int. L. 432 (regarding the different position of the trustee).

The new Mexican Bankruptcy Act of Dec. 31, 1942, provides with respect to the effect in Mexico of a foreign bankruptcy judgment that, in the absence of a treaty, a foreign bankruptcy judgment can be executed only after proof of its regularity as to the form and if the judgment shows the existence of the conditions required for a bankruptcy declaration by Mexican law (Statute, § 14 (1)). Considering the differences between American and Mexican bankruptcy law, it will be difficult to obtain execution of an American bankruptcy judgment in Mexico. Cf. Arce, Manual de Derecho Internacional Privado Mexicano (1943) 381. Here it may be added that the new Mexican Bankruptcy Law contains a provision to the effect that branches in Mexico of foreign commercial enterprises can be declared bankrupt in Mexico irrespective of a foreign bankruptcy jurisdiction; in such a case, according to § 13 (3), the bankruptcy of the branch is comprised of the assets in Mexico and the claims resulting from transactions with the branch. By this a priority is created in favor of branch creditors. This priority rule, according to the leading commentary, is a guaranty against local priority rules contained in other foreign laws (Rodríguez Rodríguez, Ley de Quebras y de Suspensión de Pagos (1943) 29). The explanation is not satisfactory to the many countries, like the United States, which have no such local priority rule in their law.

260. The only comparative study in English of European bankruptcy law is Duncombe, Bankruptcy—A Study in Comparative Legislation, published in 1893 and now out of date. There are European publications of recent date dealing with
paucity of source material is partly responsible for the relatively slow progress made in the treaty field and for the fact that most treaties so far have been concluded between countries of the same language group. This cannot be satisfactory. International commerce does not choose its routes according to language and legal system. It was said that "there is no type of legal studies that will strengthen the muscles of the mind like the comparative study of the two great legal systems." Comparative study in bankruptcy law, in addition to being good mental practice, will serve an actual interest. International commerce is the immediate beneficiary and should, therefore, liberally support such work.

Conclusion of bankruptcy agreements has its political aspects. The chances for the conclusion of such agreements depend upon a favorable political atmosphere. Commercial treaties have become a common feature. Bankruptcy agreements are complementary to commercial treaties. When foreign relations warrant the conclusion of a commercial treaty, an agreement on the bankruptcy subject should be within the bounds of possibility.

Absence of such agreements can be of general concern. If the country in which the bankruptcy occurs, has no agreement with the country in which assets are located, creditors from other countries may be exposed to the disadvantages resulting from the possible lack of co-operation. Attempts have, therefore, been made to solve the problem by a convention embracing all countries. This has been found to be impossible. The more complicated procedure of bilateral treaties must be followed to reach the goal of a complete net of bankruptcy agreements.

International and national commercial organizations can lend valuable assistance in presenting the problems involved and stressing their importance. As with other questions vital to international commerce, familiarity with the facts will lead to a solution. The commercial circles can easily insure execution of the policy found necessary.

The international bankruptcy problems are too complex for improvised solutions. Occasional efforts like those undertaken at various international gatherings are bound to fail. Continual and persistent labor is necessary. Some time ago the suggestion was made by an

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English and American bankruptcy law; e. g., ECKSTEIN, Das Englishe Konkursrecht (Berlin, 1935); DEL MARMOL, Les origines et les principes de la réglementation de la faillite dans les pays de common law (Paris and Brussels, 1936); DEL MARMOL, La réorganisation des sociétés insolvables aux États-Unis (Paris, 1938); NADELMANN, Chapitre X: "Réorganisation de sociétés" de la loi fédérale américaine sur la faillite—Analyse et traduction (Paris, 1939).

261. Vanderbilt, Law School Study after the War (1944) 22 Can. B. Rev. 68, 80.
international congress that an international bankruptcy center be created in connection with one of the existing international bodies for purposes of assembling material and supplying information on bankruptcy. This plan received the support of international commerce. Actual proposals are being advanced for the creation by the nations of the world of a special agency for dealing with international trade matters. Such an agency, or the planned international bankruptcy center, could be entrusted with the task of co-ordinating the efforts devoted to the progressive solution of the bankruptcy problems in the international field.


263. The International Chamber of Commerce, one of the international bodies which the Congress had in mind, expressed its interest in the execution of the project. Cf. Eder in (Oct. 1937) COMPARATIVE LAW SERIES 5.

APPENDIX

MODEL TREATY ON BANKRUPTCY

Adopted by the 5th Conference on Private International Law, The Hague, 1925 (Translation)

Article 1. A declaration of bankruptcy in any one of the contracting States by the court which has jurisdiction according to the provisions in Article 2 is recognized and will be effective in the other contracting States in the manner and the measure determined by the following Articles.

Each State is permitted to declare its intention to limit the effects of the Convention to the case of debtors who are merchants. If this reservation is made, the bankruptcy will have the effect indicated in the first paragraph only if the judge of the State in which the effect is claimed recognizes that the debtor is a merchant.

Article 2. In order that a bankruptcy declaration in one of the contracting States extend its effects to the other contracting States, the bankruptcy must have been declared by a court of the State in which the debtor has his principal industrial or commercial establishment, or, if this establishment has not been taken into consideration by the law of the State where bankruptcy has been declared, by a court of the State where the debtor has his domicile; in the case of a corporation or association, bankruptcy must have been declared by the court of the State where the statutory registered seat is located provided that it be neither fraudulent nor fictitious.

A declaration of bankruptcy by a court competent according to the present Article bars any subsequent bankruptcy declaration after the publication prescribed by Article 8 (2) has been made.

Article 3. A bankruptcy declared in a contracting State by a court other than the court competent according to the rules of Article 2 does not profit from this Convention.

Article 4. The effects of a bankruptcy declared in a contracting State by a court competent according to the rules of Article 2 shall extend to the territory of the other contracting States.

Consequently, the trustee may take every measure of protection and administration and exercise all rights as the representa-
tive of the debtor or the estate. However, he may proceed to the
sale of immovable property or to acts of execution by force only
after the judgment of bankruptcy declaration has been vested
with an exequatur.

Article 5. The judge of a contracting State shall grant the exequatur
for a bankruptcy judgment rendered in another contracting State
when it has been established:
1. that bankruptcy was declared by a court competent ac-
cording to the rules of Article 2;
2. that the decision is executory in the State where rendered;
3. that the copy of the record produced complies with the con-
ditions necessary according to the law of that State for its au-
thenticity;
4. that the debtor was legally cited, or represented, or has
defaulted;
5. that the bankruptcy judgment contains nothing contrary
to public order and public policy of the country of execution;
6. in a State which has made the reservation mentioned in
Article 1 (2) of the present Convention, that the debtor is a
merchant.

It is among the duties of the judge to investigate whether
these conditions are fulfilled.

The same conditions must be established in any case in which
it has been contested and a court of one of the contracting States
is called upon to recognize a bankruptcy declared in another con-
tracting State.

Article 6. The law of the country where bankruptcy has been declared
according to Article 2 shall govern the invalidation of acts of the
debtor as a result of the bankruptcy declaration and the effect of
these acts vis-à-vis the estate.

However, a contracting State may reserve the right with
respect to assets located in its territory not to recognize the in-
validation or the lack of effect vis-à-vis the estate should the local
law not admit them.

Article 7. The judgment rendered in a contracting State which con-
firms the composition after bankruptcy shall be recognized in the
other contracting States, and be enforceable by means of an ex-
sequatur, when the conditions enumerated in Article 5 are fulfilled.
with respect to this judgment and the publication prescribed by Article 8 has also been made before the conclusion of the composition.

**Article 8.** The bankruptcy declared according to Article 2 is to be published in the manner and under the penalties established by the law of the State where the bankruptcy has been declared.

In addition, the bankruptcy judgment shall be published by the trustee in the States where the bankrupt has a branch and in any State where the trustee intends to invoke the effects of the bankruptcy. In each State this publication is made in the form prescribed by the local law and this law determines the consequences of an omission of that publication regarding assets located there.

**Article 9.** In all bankruptcies the creditor-citizens of one contracting State have the same rights as the national creditors.

**Article 10.** Liens and real rights shall be governed, under the reservations which follow, by the law of the State in which the im movables or movables affected by them are located.

A displacement of a movable after bankruptcy has been published has no pertinence.

**Article 11.** General liens are governed by the law of the bankruptcy declared according to Article 2. However, liens of the Treasury are governed by the law of the State in which the assets are located.

**Article 12.** The preceding provisions do not bar the judicial authorities addressed from applying the rules of private international law in force in their State for a decision on the question whether a person is entitled to a specific real right, particularly whether a wife has title to a legal mortgage right on the property of her husband.

However, it is the law of the location which determines the limitations which in the interest of third persons may be placed upon the exercise of preferential rights on the property of the debtor who has become bankrupt.

**Article 13.** The provisions of Article 6 are applicable to the invalidation of an act creating a real right on property of the debtor.

**Article 14.** When according to the preceding provisions the law of the bankruptcy is applicable to liens and real rights, liens and real rights in the maritime law likewise are governed by that law.
When according to the preceding provisions the law of the location is applicable, the law of the flag is substituted for that law with respect to liens and real rights on vessels.

**Article 15.** The holder of a lien or real right may exercise his rights before the judicial authorities of the State in which the property subject to the lien or real right is located.

The trustee of bankruptcy declared according to Article 2 retains the right to include in the estate a surplus remaining after the holders of rights mentioned in the preceding paragraph have been satisfied.

**Article 16.** The present Convention applies to bankruptcies declared in a contracting State by a court competent according to Article 2 irrespective of the nationality of the debtor.

**Article 17.** The present Convention does not prevent the contracting States from applying measures passed by their own legislation in order to ensure the continuance of a public service, the operation of which is in the hands of a bankrupt enterprise.

Power is also reserved to take exceptional legislative measures for the liquidation of a specific enterprise to maintain public order.