CREDITOR EQUALITY IN INTER-STATE BANKRUPTCIES: A REQUISITE OF UNIFORMITY IN THE REGULATION OF BANKRUPTCY *

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With growing intercourse between nations, bankruptcies with assets in more than one country become more frequent. Extended inter-Hemisphere trade leads also to more bankruptcies with assets dispersed over the Hemisphere. Neighbor states are involved in the first place, and countries with extensive foreign trade. The difficulties arising in such inter-state bankruptcies are often great because of the conflict of jurisdictions and of laws.

Lack of uniformity in the regulation of bankruptcy shows its disadvantages in such instances. Differences in the law necessarily complicate jurisdictional conflicts. When the priorities—for wages, taxes, and so forth—are not the same, when the rules on voidable preferences differ, when not the same classes of claims are excluded from proof, an assumption of jurisdiction over the local assets may be indispensable to secure for the interested parties the benefit of the local law. Uniformity of the law, on the other hand, makes the exercise of this right exclusively a matter of practical considerations—provided of course no differentiation is intended between domestic creditors and creditors from abroad. Cases where practical considerations do not ask for several administrations arise in sufficient number, especially between neighbor states, to make their disposition in a cheap and efficient way a matter of justified concern.

* The substance of this article was originally presented in a paper read before the Sixth Conference of the Inter-American Bar Association, Detroit, Michigan, May 22-June 1, 1949. A Spanish version has appeared in 55 REV. JUR. ARGENTINA LA LEY (September 17, 1949).

The Detroit Conference adopted the following Resolution:

(1) That in bankruptcy, including the case of concurrent bankruptcies, no differentiation should be made between creditors on the basis of nationality, domicile, or place of residence;

(2) That in bankruptcy no differentiation should be made between unsecured claims on the basis of the place of contract or the place of payment;

(3) That a committee be appointed by the Executive Committee to draft a model uniform law which shall resolve the differences in the law as to the treatment of creditors and the realization of assets in bankruptcies affecting creditors domiciled and property situated in different countries, said committee to report at the next Conference.

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Considerations of this kind, in connection with complaints about differentiation between domestic creditors and creditors from abroad, have led to demands in many quarters for greater uniformity in the regulation of bankruptcy in the Western Hemisphere. From the beginning, the "Committee on Uniformity of the Law of Civil and Commercial Obligations" of the Inter-American Bar Association has included in the subjects to be considered: "Bankruptcy, especially in relation to the rights of creditors from abroad."¹ A resolution adopted by the Fifth Conference of the Association now suggests that a draft for the uniform regulation of bankruptcy be formulated.²

UNIFORM BANKRUPTCY REGULATION

Is the uniform regulation of bankruptcy feasible? Bankruptcy is not customarily considered a branch of the law suitable for world-wide unification. The International Institute for the Unification of the Private Law has not extended its activities to bankruptcy.³ The unification question was broached at the Second International Congress of Comparative Law in 1937. Says the report by Professor Percerou, dean of bankruptcy lawyers, and his collaborator: ". . . the statutory law of bankruptcy and compositions, in text and even more in practical application, is, generally speaking, still very divergent in all countries. It is, of course, not surprising that each legislature should seek the solution best fitted to the economic, social, and political conditions of the country. To believe in the possibility of complete uniformity of the law in a field where the course of legal evolution has been so different and where the character and special customs of each country play such an important part, is to fail to recognize that nations are different. Complete uniformity, therefore, is presently an utopian dream. . . ." ⁴

The status of bankruptcy and composition legislation in the Western Hemisphere substantiates these findings. Considerable

1. See Dolz, *La reunión del Consejo de la Federación Interamericana de Abogados en Washington*, 5 REV. DEL COLEGIO DE ABOGADOS DE LA HABANA 457, 462 (Cuba, 1942); Eder, *Comité sobre la comparación del derecho civil y mercantil de la Federación Interamericana de Abogados*, 3 REV. PERUANA DE DERECHO INT. 96 (1943); Valance, *Post-War Plans of the Inter-American Bar Association*, 37 AM. J. INT'L L. 106, 113 (1943).

2. Resolution 98, THEMES AND RESOLUTIONS OF THE FIFTH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION 45 (1948); 8 REV. PERUANA DE DERECHO INT. 89 (1948).

3. See PILOTTI, *ACTIVITY OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW* (1947). Cf. Olachea, *La unificación del derecho privado en América*, 1 REV. PERUANA DE DERECHO INT. 89 (1941).

4. Percerou and Nadelmann, *Changes in Bankruptcy Procedure Caused by the Economic Crisis*, [1937] ANNALES DU DROIT COMMERCIAL FRANÇAIS, ÉTRANGER ET INTERNATIONAL 181, 197 (in French), 12 J. N. A. REF. BANKR. 68, 87 (1938). Cf. 2 THALLER, *DES FAILLITES EN DROIT COMPARÉ* 379 (1887).

differences exist between the Latin American bankruptcy law and the law in Canada and the United States; they are in existence also within the two great law groups. English statutes were the model for the early bankruptcy legislation in the United States⁵ and in Canada.⁶ Legislation in the United States has since the turn of the century followed its own ways in accordance with local conditions. Canadian legislation has continued to follow the English closely, with the result that the differences have become substantial.⁷ Only more recently, is a "rapprochement" noticeable. In Latin America, the European models were used by the codifiers in different ways in drafting the local laws. Local law has continued to develop independently in the Latin American States. Only in a few instances, revisions have been coordinated in recent years.⁸ The general status is still not very different from the one which the American Congress of Jurisconsults faced in 1877. Assembled in Lima for the purpose of the unification of the law, this congress, attended only by Latin American countries, had on the list of topics suggested for unification: "Commercial legislation, especially in the matter of Bankruptcy and Priorities."⁹ The Committee on Unification of Commercial Legislation found itself compelled to report: "It would have been very profitable to conclude a treaty by which the Latin American Republics unify their commercial legislation—if not totally so at least in those parts which have a connection with international law. However, after serious consideration of the difficulties which, at this time, exist for the production of a treaty of such a magnitude, the Committee has thought it convenient to limit itself to the adoption of a number of rules to apply in those cases where conflicts exist between the American codes and the commercial laws of other countries. The treaty now presented to the Congress for consideration has precisely this aim."¹⁰

Fruitful discussion of possibilities for the unification of the law of bankruptcy in the Western Hemisphere would require mutual knowledge of the numerous laws. Comparative studies are almost completely lacking, but some modern treatises now have comparative

5. See CAINES, *LEX MERCATORIA AMERICANA* 464 (1802); WARREN, *BANKRUPTCY IN THE UNITED STATES HISTORY* (1935); Weisman, *Some Chapters of Bankruptcy History: From the Bankruptcy Clause to the Act of 1898*, 22 J. N. A. REF. BANKR. 99 (1948).

6. See DUNCAN AND REILLEY, *BANKRUPTCY IN CANADA* 4 (1933); DE LA DURANTAYE, *TRAITÉ DE LA FAILLITE* 21 (1934).

7. Compare, e. g., regarding admission of tort claims, U. S. Bankruptcy Act of 1898, as amended, §§ 63(a) (6) and (7), 52 STAT. 873 (1938), 11 U. S. C. § 103 (1940), with Canadian Bankruptcy Act, § 401(1), CAN. REV. STAT., c. 11 (1927).

8. See DURAN BERNALES, *EXPLICACIONES Y JURISPRUDENCIA DE LA LEY DE QUEBRAS DE CHILE, CORRELACIONADA CON LA LEY PROCESAL DEL PERU* (1935).

9. 2 CONG. AMER. DE LIMA 110, 120 (1938).

10. *Id.* at 391; ACTAS Y TRATADOS DEL CONGRESO DE MONTEVIDEO 76 (1911).

law parts. The comparisons are kept, however, mainly within the law group to which the particular law belongs. No comparative work on Latin American bankruptcy law has been published in English since the treatise on Latin-American Commercial Law by Esquivel Obregón more than twenty five years ago and substantial changes have taken place since then.¹¹ Thirty years ago, the Bankruptcy Act of the United States was brought out in a translation in Argentina.¹² The substantial revision of the Act in 1938 has not been brought out in Spanish language so far as is known.¹³ Thus, much preparatory work remains to be done before possibilities of substantial Hemisphere unification can be discussed with profit.¹⁴

The absence of preparatory studies makes discussion of possibilities of partial unification similarly difficult. The parts of the law considered for unification must be studied against the background of the whole body of the law. Uniformity of the law would be most desirable in those arts from which the greatest complications arise in interstate cases. Could the rules on priorities and preferences, for example, be unified? The difficulties are apparent.

Some countries have a long list of claims payable in advance of the general creditors; in others, the priority claims are limited to wages, taxes, and rent. Everywhere, these priorities are limited as to period of time and amount, yet the maximum differs from country to country. Again, the ranking among themselves of the various priority classes is not the same everywhere and what is a priority in one system appears sometimes in another as a general or special lien. Revisions of the priority system create a difficult domestic problem for each legislature. Because the controlling factors in the social, economic, and political fields are not the same everywhere, uniformity could hardly be achieved except on a regional basis where conditions are similar.

Even more difficult would be the unification of the rules on preferences. Preferences are the most intricate chapter in the law of bankruptcy everywhere. The problems which arise are often closely connected with rules of the general law. For example, the validity of

11. ESQUIVEL OBREGÓN, *LATIN-AMERICAN COMMERCIAL LAW* 599 (1921). Substantial changes in the law took place, *e. g.*, in Argentina (1933), Brazil (1945), Chile (1931), Colombia (1940), Mexico (1942), Peru (1932).

12. NAÓN, *LEY DE BANCARROTAS DE LOS ESTADOS UNIDOS DE AMÉRICA* (1918).

13. New text: HANNA AND MACLACHLAN, *THE BANKRUPTCY ACT OF 1898 AS AMENDED* (1947). Commentary: COLLIER ON BANKRUPTCY (14th ed. Moore and Oglebay, 1940). See BARREDA MOLLER, *LA LEY DE QUIEBRAS EN LOS ESTADOS UNIDOS*, 30 *REV. DEL FORO* 294 (Peru, 1943).

14. Cf. GUTTERIDGE, *COMPARATIVE LAW* 145 (1946); Yntema, *Comparative Research and Unification of the Law*, 1 *INTER-AMER. BAR ASSOC. REP.* 220 (1942), 29 *REV. JUR. ARGENTINA LA LEY* 813 (1943).

an assignment of accounts receivable during the critical period before bankruptcy depends in the first place upon the effect given to such assignments under normal circumstances. Some legal systems require notification of the debtor, and others not for the assignment to be effective against third parties. The general law would have to be unified in order to secure uniform results also in the bankruptcy situation.¹⁵ The "critical period before bankruptcy," on the other hand, is determined in very different ways in the various bankruptcy systems. They all have advantages and disadvantages. Little likelihood exists that many countries will wish to abandon their own solution tried out over perhaps a long period of time for another system which may prove unworkable in the practice of the courts. Moreover, unification of the rules on preferences would not mean a guarantee of uniform application because in a difficult field like this the courts may construe the uniform rules differently.

Possibilities for even a partial unification of the bankruptcy law will not be easily found for the whole Hemisphere. Regional unification, on the other hand, presents a different problem. In a number of countries, the basic law is sufficiently similar, and the social, economic, and political conditions are sufficiently alike to make efforts in this direction promising. Regional movements may be envisaged in this Hemisphere as they have made their appearance in other parts of the world.¹⁶ The reduction of the many types of bankruptcy laws to a few would be of advantage to the whole Hemisphere. Even further coordination of the law would become easier.

AGREEMENT ON CONFLICTS RULES

When little can be done to unify the law, attention turns to substitute solutions. Incertitude is removed if agreement is reached on rules to govern the conflict of laws.¹⁷ Many efforts have been made in this direction in the bankruptcy field.¹⁸ Private bodies like the Institute of International Law and the International Law Association

15. Cf. Pemberton, *Notice Filing for Assignments of Accounts Receivable*, 13 LAW & CONTEMP. PROB. 643 (1948) (discussion of the question as an internal United States problem).

16. See Birger Ekeberg, *The Scandinavian Co-operation in the Field of Legislation*, in INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIFICATION OF LAW 321, 333 (1948). Cf. FEDERATION OF CHAMBERS OF COMMERCE OF THE BRITISH EMPIRE, BANKRUPTCY LAW IN THE BRITISH EMPIRE 5 (1932).

17. ". . . our time urgently needs unification of certain parts of business law and for the rest of private international relations a practical modus vivendi among the national systems, including reasonable conflicts rules." Rabel, *International Tribunals for Private Matters*, 3 ARB. J. 209, 211 (1948).

18. References in Nadelmann, *International Bankruptcy Law: Its Present Status*, 5 U. OF TORONTO L. J. 324, 18 J. N. A. REF. BANKR. 104 (1944).

have tried their hands, and The Hague Conferences on Private International Law have dealt with the problem on government level.

The Hague Conferences have had a limited success. The British delegation withdrew from the Fifth Conference when it was decided to draft a treaty providing for a single administration by the domiciliary court with effect everywhere.¹⁹ The draft which was adopted in 1925²⁰ gives extraterritorial effect to the domiciliary adjudication, but makes allowance for the application of local law in certain respects. Thus general and special liens are governed by the law of the situs. Priorities, except taxes, on the other hand, are governed by the law of the bankruptcy court. In regard of preferences, a State may reserve the right not to recognize, for local assets, a voiding effect under the law of the bankruptcy court if the act is not void under local law. No ratifications were obtained for the draft convention, but bilateral and multilateral treaties have been concluded along the lines of the draft.²¹

In the Western Hemisphere, the convention to be mentioned in the first place because of the number of ratifications obtained is the Bustamante Code of Private International Law adopted in 1928 by the Sixth Conference of American States. Like the Hague Draft, the Bustamante Code²² provides for a single bankruptcy adjudication with effect everywhere. An exception is made only for the case of a debtor with economically entirely separate establishments in different countries. Fifteen Latin American States have ratified the Code and thus secured, in their relations, single administration of all the assets. Besides the United States and Canada, the States which have not ratified are: Mexico, Colombia, Uruguay, Paraguay, and Argentina.

Argentina, Uruguay, Paraguay, and Peru, joined more recently by Bolivia and Colombia, are in their relations governed by the rules of the Montevideo Treaty of 1889 on International Commercial Law. This treaty²³ distinguishes—as does the Bustamante Code—between the “independent house” case and other situations. In the first even-

19. ACTES DE LA 5^E CONFÉRENCE DE DROIT INTERNATIONAL PRIVÉ DE LA HAYE 46, 331 (1925). Reproduced in Nadelmann, *Bankruptcy Treaties*, 93 U. OF PA. L. REV. 58, 85 (1944), 10 REV. DE LA ESCUELA NACIONAL DE JURISPRUDENCIA, No. 37, pp. 105, 137 (Mexico, 1948).

20. *Id.* at 341. Translations in 93 U. OF PA. L. REV. 94 (1944), 10 REV. DE LA ESCUELA NACIONAL DE JURISPRUDENCIA, No. 37, at 146 (Mexico, 1948).

21. *E. g.*, the Franco-Italian Treaty of 1930; the Scandinavian Bankruptcy Convention of 1933. References in Nadelmann, *supra* note 19.

22. Art. 414-422 of the CODE, THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928, 367 (1931); CONFERENCIAS INTERNACIONALES AMERICANAS 1889-1936, 304 (1938).

23. Art. 35-48 of the Treaty. ACTAS Y TRATADOS CELEBRADOS POR EL CONGRESO INTERNACIONAL SUD-AMERICANO DE MONTEVIDEO 842 (Montevideo, 1911); REPORT OF THE INTERNATIONAL AMERICAN CONGRESS 876 (1890).

tuality separate bankruptcies are permitted for each house. In the other cases the court of the commercial domicile of the debtor has exclusive bankruptcy jurisdiction. The domiciliary adjudication is published abroad if assets are located in other treaty countries. The local creditors have the right within a given time to ask for a separate local adjudication. Local and domiciliary bankruptcy are conducted entirely separately. For the purpose of determining which claims belong to each bankruptcy, the treaty provides that "local creditors" means creditors with claims payable in the country of the proceeding.²⁴ A controversy exists whether the right for the local creditors to ask for a separate adjudication applies in all instances or only when an independent house is in the country.²⁵

The place-of-payment criterion for separating claims was criticized as early as 1889 by Lisandro Segovia with respect to independent houses.²⁶ Gonzalo Ramirez, drafter of the treaty, defended the rule by giving the example of a bankrupt with independent houses in Rio and Montevideo who owes a non-commercial debt connected with neither house. He stressed also the fact that the chapter on Decedents' Estates in the Montevideo Treaty on International Civil Law has a rule to the effect that debts to be paid in any of the contracting States shall enjoy priority in regard to property located there at the time of the decedent's demise.²⁷ The propriety of this rule for decedents' estates has now become a controversial issue within the treaty states²⁸ and between the treaty partners.²⁹ Its applicability to insolvent estates presents a special problem.³⁰ As for the example of the non-commercial debt, commentators of the basic Roman law rule were in favor of the admission in all distributions.³¹

The controversy over the appropriateness of the place-of-payment priority in bankruptcies has become more acute recently. The new

24. Art. 39 and 40 of the Treaty.

25. See Minutes of the March 15, 1940 Session of the COMMISSION ON INTERNATIONAL COMMERCIAL LAW, SECOND SOUTH AMERICAN CONGRESS OF PRIVATE INTERNATIONAL LAW, DOCUMENTACION PROVISORIA, Acta No. 3, p. 7 (Montevideo, 1940).

26. SEGOVIA, EL DERECHO INTERNACIONAL PRIVADO Y EL CONGRESO SUD-AMERICANO DE MONTEVIDEO 162 (Buenos Aires, 1889).

27. RAMIREZ, EL DERECHO PROCESAL INTERNACIONAL EN EL CONGRESO DE MONTEVIDEO 83 (Montevideo, 1892).

28. See 2 ROMERO DEL PRADO, MANUAL DE DERECHO INTERNACIONAL PRIVADO 151 (Buenos Aires, 1944) with further references.

29. See, for Peru, Bustamante y Rivero, *El Tratado de Derecho Civil Internacional de 1940*, 2 REV. PERUANA DE DERECHO INT. 232, 386 (1942).

30. Cf. Carlos Alberto Alcorta, *El Profesor Meili y el régimen de la quiebra en el Congreso Sud-Americano de Montevideo*, 14 JURISPRUDENCIA ARGENTINA, PART: DOCTRINE, 66 (1924).

31. See, e. g., Paulus Castrensis, COMMENTARIA IN DIG. VETUS, PART 2, DE TRIBUTORIA ACTIONE, SECTION "SI PLURES." Cf. Gregorio Lopez, LAS SIETE PARTIDAS 5. 14. 11. Gloss No. 4; 2 DOMINGUEZ VINCENTE, ILUSTRACIÓN A LA CURIA FILÍPICA, c. XII, No. 59 (Madrid, 1790).

Montevideo Treaties of 1940 on International Civil Procedure³² and on International Terrestrial Commercial Law,³³ adopted by the Second South American Congress on Private International Law, go farther in this respect than the treaty of 1889. They contain a new provision to the effect that, even when only one bankruptcy is declared, creditors have a right of priority of payment out of the assets in the country where their claim is to be paid.³⁴ The delegate from Uruguay who proposed the addition argued that this is but the logical consequence of the treaty system. The provision was added against the wishes of the Argentine delegates. Prominent Argentine authors have since criticized the new rule.³⁵ A comprehensive work published by a Uruguayan law professor calls it a distortion of the true meaning of the Montevideo doctrine.³⁶ Uruguay alone has so far ratified the new treaties.

At the Franco-Latin-American Legal Conference held in Paris in 1948, one of the topics discussed was the experience with the Bustamante Code and the Treaties of Montevideo. A speaker from Uruguay characterized the system of Montevideo as that of multiple bankruptcies with the consequences resulting from this principle. Said he: "We are in general opposed to the idea of the ubiquity of the effect of the adjudications in matters of compositions and bankruptcy. We have the principle that each country regulates these questions according to its own law and that two adjudications are made. Naturally, the principle of a priority of the local over the foreign creditors is established."³⁷ It was not said why the latter—the priority—is natural. The treaty system as such is often called an application of the doctrine of territoriality and the influence of Story has been mentioned in this connection.³⁸ It should be noted that Story has in strong words criticized priority rights for local credi-

32. SEGUNDO CONGRESO SUDAMERICANO DE DERECHO INTERNACIONAL PRIVADO, ACTA FINAL 41 (Montevideo, 1940), 18 REV. JUR. ARGENTINA LA LEY, PART: LEGISLATION, 3 (1940); 37 AM. J. INT'L L. 116 (Supp. 1943).

33. *Id.* at 61; REV. at 17; AM. J. at 132.

34. Section 20 of the Treaty on Procedural Law; Section 48(2) of the Treaty on Commercial Law.

35. 2 ROMERO DEL PRADO, *op. cit. supra* note 28, at 585, 963; Videla Aranguren, *El concurso civil de acreedores en el Congreso de Montevideo 1939-40*, 4 REV. ARGENTINA DE DERECHO INT. 214, 342 (1914); *idem*, *Las quiebras en el Congreso de Montevideo 1939-40*, 5 REV. ARGENTINA DE DERECHO INT. 448, 450 (1942).

36. ALFONSÍN, QUIEBRAS-LA DOCTRINA DE MONTEVIDEO Y LOS TRATADOS DE 1889 Y 1940, 135 (Montevideo, 1943).

37. Professor Supervielle, at the session of April 15, 1948, 71 BULLETIN TRIMESTRIEL DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE 881 (1948).

38. Couture et Alfonsín, *L'expérience des Traités de Montevideo*, 71 BULLETIN TRIMESTRIEL DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE 695, 701.

tors.³⁹ Territoriality and a system of differentiation between foreign and local creditors are different things.^{39a}

The workability of the priority system of the Montevideo Treaties has been questioned, and quite properly, it is believed. The question has been asked whether a business man will give open credit if told that, in the event of bankruptcy, he does not share equally in all the assets, but only in those available in the country where his claim is to be paid. The creditor would be at the mercy of circumstances impossible to anticipate since the transfer of assets is at the pleasure of the solvent owner. The assignment of local assets to one group of unsecured claims rather than another has arbitrary results. Credit is not given in reliance on local assets only. All the assets of the debtor are the creditor's guarantee. The priority rule, made applicable also to compositions under the new treaties, would not facilitate the conclusion of compositions either.^{39b}

An inter-Hemisphere accord on conflict of laws in bankruptcy cannot be envisaged on the basis of the priority idea. The Bustamante Code was a deliberate departure from the priority system of Montevideo⁴⁰—a departure now sanctioned by fifteen States, among them Peru, a signatory of the Montevideo Treaty. In the common law countries, the equity rule that "Equality is Equity" governs, making the priority unacceptable.

At the Lima Conference of the Inter-American Bar Association, the reporter for the Committee, Doctor Guillermo Dasso, suggested

39. 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1107 (1833; Spanish ed. 1881).

39a. Professor Niboyet, representative of the school of territoriality in its extreme form, takes the view that claims cannot be localized according to country and are entitled to participation in all distributions of the assets of the debtor. 4 NIBOYET, *TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS* 920 note 2 (1947).

39b. The classic example of complications in a composition involving more than one country is the failure in 1346 of the house of the Bardi in Florence. The company, which had branches all over Europe, had become bankrupt mainly because of the failure of the kings of England and Sicily to repay the substantial credits granted to them. As was then common practice, the foreign creditors—in England, the Kingdom of Naples, and elsewhere—proceeded in their respective countries with reprisals against other Florentine merchants. A composition was concluded by the Bardi company in the Florentine courts, but limited to the local assets and debts. Creditors from England and the Kingdom of Naples were excluded and referred to the foreign assets, in particular, the claim against their kings. See SAVORI, *LA CRISI DELLE COMPAGNIE MERCANTILI DEI BARDI E DEI PERUZZI* 173 (Florence, 1926). For similar difficulties, overcome by the intervention of the Pope, in the Ammanati bankruptcy of 1302, see FLINIAUX, *La faillite des Ammanati de Pistoie et le Saint-Siège*, 3 (4th ser.) *REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 436 (France, 1924); Nadelmann, *Bankruptcy Treaties* 93 U. OF PA. L. REV. 58 (1944), 10 *REV. DE LA ESCUELA NACIONAL DE JURISPRUDENCIA*, No. 37, 105 (Mexico, 1948); Valdespino G., *Comentarios sobre el Artículo "Tratados sobre Quiebras"*, 51 *REV. DE DERECHO INTERNACIONAL* 87 (Cuba, 1947). On the reprisal system, see CASSANDRO, *LE RAPPRESAGIE E IL FALLIMENTO A VENEZIA NEI SECOLI XIII-XIV* (Turino, 1938); Haskins, *Three Early Petitions of the Commonalty*, 12 *SPECULUM* 314, 315/16 (1937).

40. See BUSTAMANTE Y SIRVÉN, *LA COMISIÓN DE JURISCONSULTOS DE RIO DE JANEIRO Y EL DERECHO INTERNACIONAL*, § 187 (1927).

that the Montevideo Treaty of 1940 on International Civil Procedure may furnish a pattern acceptable to all if the priority rule is removed and the right for local adjudications maintained. The statutory system in the United States preserves the possibility for a local adjudication and, at the same time, provides for creditor equality. The National Bankruptcy Act gives the courts jurisdiction to declare the bankruptcy of a non-resident debtor adjudicated bankrupt abroad if assets are in the United States.⁴¹ The Act provides that, if a creditor has received payments in distributions abroad, he will share equally in the distributions here after the other creditors have first received the same pro rata of their claims as he obtained abroad.⁴² This principle of marshalling the assets, applied also in the Canadian courts,⁴³ protects the local creditors and, at the same time, secures equal treatment for all unsecured creditors so far as feasible.

The need for regulation by treaty may appear questionable in view of the possibility of a solution by statute. Probably, a greater degree of cooperation between the several administrations could be obtained by way of detailed provisions in a treaty. A discussion of the treaty question would be profitable. Clarification of the issues involved should lead to greater uniformity also in the statutory law on the subject of jurisdiction and marshalling the assets. The Inter-American Council of Jurists, competent organ of the Organization of American States,⁴⁴ would render a great service if, through the Inter-American Juridical Committee of Rio de Janeiro, it did secure an inter-Hemisphere study of the topic from the viewpoint of uniform legislation as well as agreement by treaty.

OBSELETE PRIORITY RULES

Treaties and agreements on uniform legislation may not be obtainable for some time. The present condition of statutory law in the Hemisphere on creditor treatment in concurrent bankruptcies asks for immediate attention, however. Creditors from non-treaty states face the statutory law and the security of their claims is affected by it. The great interest in the statutory law has not been realized every-

41. U. S. Bankruptcy Act of 1898, as amended, § 2, 52 STAT. 842 (1938), 11 U. S. C. § 11(a) (1) (1940). See Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 HARV. L. REV. 1025, 1038 (1946), 21 J. N. A. REF. BANKR. 43 (1947).

42. § 65(d) of the Act, 30 STAT. 564 (1898), 11 U. S. C. § 105(d) (1940). Nadelmann, *supra* note 41, at 1049. NAÓN, *LEY DE BANCARROTAS DE LOS ESTADOS UNIDOS DE AMÉRICA* 67, 163 (Buenos Aires, 1918).

43. *Re Breakwater Co.*, 22 Dom. L. Rep. 294, 33 Ont. L. Rep. 65 (1914), referring to the leading English case *Banco de Portugal v. Waddell*, 5 App. Cas. 161 (1880), and *In re Kloebe*, 28 Ch. D. 175 (1884).

44. Article 67, CHARTER OF THE ORGANIZATION OF AMERICAN STATES, 18 DEP'T STATE BULL. 666 (1948).

where. Otherwise treatises on the conflict of laws would not pass over the domestic statutory law, as they sometimes do, while dealing in detail with the treaty law.

The Lima Conference of the Inter-American Bar Association had before it a survey of statutory rules in American States on the admission of claims in concurrent bankruptcies.⁴⁵ This survey, privately made and probably not faultless,⁴⁶ conveys a feeling which the author thinks substantiated by facts, that the status of the law on the subject is alarming. Apparently, rules are still on the statute books which are difficult to reconcile with present-day views on the subject.

In one group of countries, all creditors are paid on a strict equality basis in concurrent bankruptcies; the system of marshalling the assets is followed. In another large group, differences are made among the unsecured creditors, and certain types of creditors are paid first. In some countries, priority is given to the claims of citizens, in others to claims of resident creditors. In another group again, priority is given to "local" claims, "local" sometimes meaning locally contracted claims, sometimes claims payable within the country. Combinations of such priorities appear also. For example, in one case "resident creditors" is defined as meaning: first, residents and, second, nationals even when residing abroad.

Some signatories of the Bustamante Code, which secures equality for all creditors, still have in their internal law rules discriminating against creditors from abroad.^{46a} Countries which have subscribed to the Montevideo Treaty with its place-of-payment priority, maintain in their law a provision which gives the priority to residents.

The author of the recent book *A Modern Law of Nations* suggests in discussing the relation between public and private international law: "When an agreement has been concluded between two or more states on a subject traditionally recognized as a proper subject for a treaty, a court would be justified, in the absence of other

45. Nadelmann, *Concurrent Bankruptcies and Creditor Equality in the Americas*, 96 U. OF PA. L. REV. 171 (1947), 22 J. N. A. REF. BANKR. 51 (1948).

46. Some local priority rule may have been listed by mistake, as in ANTHOINE DE SAINT-JOSEPH, *CONCORDANCE ENTRE LES CODES DE COMMERCE ÉTRANGERS ET LE CODE DE COMMERCE FRANÇAIS* (Paris, 1844), where a local priority rule in the Prussian Code of Civil Procedure of 1793 is listed which had been abandoned in 1798 because of difficulties with neighbor states. The work having been used by the Codifiers in South America, the question arises whether the abolished rule, the only priority rule listed, is the model for the rule of the Commercial Code of 1859 for the Province of Buenos Aires, still appearing in the statutes of Argentina, Paraguay, Uruguay, and Peru, that resident creditors shall be paid first in the case of concurrent bankruptcies. Cf. Nadelmann, *supra* note 45, at 178; *idem.*, *El Profesor Meili y el Régimen de la Quiebra en el Congreso Sud-Americano de Montevideo*, 12 BOLETÍN DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES DE CÓRDOBA 83, 85 (Argentina, 1948).

46a. See, e. g., for Brazil, 3 MIRANDA VALVERDE, *COMENTARIOS A LEI DE FALÊNCIAS* 143 (1949).

evidence, in assuming that the parties intended to contract with reference to international law.”⁴⁷ Are creditors from non-treaty states still subjected to provisions apparently held inadequate in the country involved? May an “Equal Protection” or “Most Favored Nation” clause in a Treaty of Friendship and Commerce furnish security against application of the discriminatory rule?^{47a} Under present conditions of international law, with no recourse open to an international commercial tribunal, creditors will be wise in not taking risks.^{47b}

American exporters have been criticized for being hard in giving open credit. The question was brought up, for example, in 1916 at the Buenos Aires meeting of the—then called—“International High Commission for Uniform Legislation” in the discussion of the topic: “Uniformity of the laws to improve the conditions of claims resulting from the sale of merchandise.”⁴⁸ Recommended by the Argentine Delegates, a resolution was adopted that “it is necessary to include in the laws of all the nations of the Pan-American Union provisions which favor the legal condition of claims resulting from the sale of merchandise.”⁴⁹ It seems that it would be advisable, in the first place, to remove from the statute books rules which rank claims of exporters after the claims of the resident creditors.

The Economic Agreement of Bogotá, signed recently at the Ninth International Conference of American States, provides in the part on Private Investments: “They [the States] recognize that the international flow of such capital will be stimulated to the extent that nationals of other countries are afforded opportunities for investment and security for existing and future investments.”^{49a} An Inter-American Economic Conference is scheduled to meet later this year for the implementation of the Bogotá Agreement, where among other things improvement of the inter-Hemisphere credit system will be discussed.^{49b}

47. JESSUP, *A MODERN LAW OF NATIONS* 142 (1948). Discrimination as between local and foreign creditors is discussed at page 36.

47a. The inclusion of a special Creditor Equality clause in such treaties has been recommended. Nadelmann, *Legal Treatment of Foreign and Domestic Creditors*, 11 *LAW & CONTEMP. PROB.* 696, 710 (1946). The new “Point IV” Program of Aid to Underdeveloped Countries, currently under discussion, may afford an opportunity to negotiate modern treaties of friendship, commerce and navigation or special investment treaties. See Webb, *Investment of American Private Capital Abroad*, 21 *DEPT STATE BULL.* 305, 306 (1949). *Hearings before Committee on Banking and Currency on S. 2197*, 81st Cong., 1st Sess. 4, 17 (1949) (foreign investment guaranties by Export-Import Bank). Countries which discriminate between domestic creditors and creditors from abroad should not be admissible under the program.

47b. *Cf.* LEWIS, *THE UNITED STATES AND FOREIGN INVESTMENT PROBLEMS* 281 (1948).

48. ALTA COMISIÓN INTERNACIONAL DE LEGISLACIÓN UNIFORME, ACTAS, INFORMES, RESOLUCIONES Y DOCUMENTACIÓN GENERAL 897, 899 (Buenos Aires, 1916).

49. *Id.* at page VIII.

49a. 1 *ANNALS OF THE ORGANIZATION OF AMERICAN STATES* 102 (1949).

49b. *Id.* at pages 150, 170, 243.

Problems of security cannot be divorced from credit discussions.⁵⁰ The United States Government has been asked by a number of important national organizations to protect American creditors against discriminatory rules abroad.⁵¹ The question of the local priority rules is thus likely to be brought up at the Buenos Aires Conference on government level.

The keeping of obsolete rules on the statute books is a subject of concern everywhere.⁵² In the first place a local problem, it becomes one with international ramifications if the provision involved affects the intercourse between nations. A quarter of a century ago, a leading Argentine lawyer warned in a paper before the Argentine Branch of the International Law Association that maintenance of the old priority rules could lead to international difficulties.⁵³ The Inter-American Bar Association helps inter-Hemisphere relations in trying, within its means, to remove possibilities for such difficulties.

The effort made in this direction at the Lima Conference of the Inter-American Bar Association is worthy of attention. The "Committee on Uniformity of Law of Civil and Commercial Obligations," on which a large number of countries were represented, agreed, according to the minutes,⁵⁴ to recommend uniformity of the bankruptcy and composition legislation of the American States on the basis of the principle of "unity" and of the recognition of the right for all creditors, including non-resident foreigners, to be treated alike. Unanimously, it proposed adoption of a resolution:

"(1) To declare that the regime of bankruptcy should be made uniform on the basis of 'unity' within the order of the

50. Cf. Salazar, *Future Foreign Investments and Their Relations With the Legislation of Each Country*, 1 INTER-AM. BAR ASSOC. PROC. 425 (1941).

51. E. g., The National Bankruptcy Conference, 16 DEP'T STATE BULL. 724 (1947); American Bar Association, 22 J. N. A. REF. BANKR. 118 (1948); Commercial Law League of America, 52 COM. L. J. 89 (1947); Foreign Credit Interchange Bureau, National Association of Credit Men, 49 CREDIT AND FINANCIAL MANAGEMENT, No. 4, at 28 (1947).

52. Provisions are not removed even when declared unconstitutional. Cf., e. g., Tenn. Laws 1877, c. 31, § 5, 3 TENN. CODE ANN. § 4134 (Williams, 1942), declared unconstitutional in regard of United States citizens in *Blake v. McClung*, 172 U. S. 239 (1898), and rendered generally harmless by the National Bankruptcy Act for the fields covered by the Act.

53. Carlos Alberto Alcorta, *Régimen internacional de la quiebra*, 14 JUR. ARGENTINA, PART: DOCTRINE, 130 (1924), 2 REV. ARGENTINA DE DERECHO INTL. 354 (1931), 4 VICO, CURSO DE DERECHO INTERNACIONAL PRIVADO 34 (2d ed. Buenos Aires, 1939). The well-known incident of 1784 between France and Swiss Cantons is referred to. Cf. the retaliation provision of the famous Regulations for the Exchange Place of the City of Lyons of June 2, 1667, Art. 12; 1 RENOUARD, TRAITÉ DES FAILLITES 62 (3d ed. Paris, 1857); JUSTICE, A GENERAL TREATISE OF MONIES AND EXCHANGES 141 (London, 1707).

54. COLEGIO DE ABOGADOS DE LIMA, ANALES DE LA V CONFERENCIA INTER-AMERICANA DE ABOGADOS 467 (Lima, 1949).

different nations and of equality for local creditors and creditors from abroad;

(2) To recommend to the Inter-American Bar Association the draft of a uniform law embodying these principles and giving consideration to the papers presented to the Committee by Messrs. Guillermo Dasso and Kurt H. Nadelmann, and presentation of the results of the work to the Sixth Conference."

The text was revised in the Council of the Association, and the resolution adopted by the Conference⁵⁵ merely says:

Resolved, that the Executive Committee formulate a draft for the uniform regulation of bankruptcy and business failure, giving consideration to the papers presented in this Committee by Messrs. Guillermo Dasso of Peru and Kurt H. Nadelmann of the United States.

No draft has been prepared by the Executive Committee. The drafting would have been an Herculean task, especially in view of the absence of directives as to basic principles. The experience of the last Conference must be kept in mind in approaching the problem anew.

CONCLUSIONS

The field of agreement is much larger than often thought. Clear delimitation of what is controversial and what is not is essential for constructive work. Use of such terms as "unity," "universality" and "territoriality" of bankruptcy has not been found helpful in international discussions because of different meanings given to these terms in different countries.

1. On the subject of *single bankruptcy* versus *several*, the generally accepted view seems to be that the single administration system is not feasible between all countries and that the question can be best discussed on a country to country or regional basis.⁵⁶ A model for the single administration type is the Bustamante Code, one for several administrations, the Montevideo system. Another solution consists in giving the courts discretion in the exercise of jurisdiction over the local assets. This system is found in the common law coun-

55. *Id.* at 167.

56. Cf. Resolution 17, INTERNATIONAL CHAMBER OF COMMERCE, RESOLUTIONS OF THE XTH CONGRESS 17 (1939); [1939] ANNALES DE DROIT COMMERCIAL FRANÇAIS, ÉTRANGER ET INTERNATIONAL, Supp. No. 3, SUR LE DROIT COMPARÉ DES FAILLITES ET DES CONCORDATS 4. For a proposal regarding the United States and Canada, see Busler, *Bankruptcy Reciprocity: A Study as to a Treaty With Canada*, 33 A. B. A. J. 1026 (1947); *Superintendent of Bankruptcy, Canada, to Chief of Bankruptcy Division, Administrative Office of the United States Courts*, [1946] A. B. A. PROC., SECTION OF CORPORATION, BANKING AND MERCANTILE LAW 10.

tries.⁵⁷ The diversity of systems is probably unavoidable and not necessarily disadvantageous.

2. On the question of *differentiation between unsecured creditors* in the case of concurrent administrations, at least partial agreement seems to exist. So far as can be ascertained, support is now completely lacking for differentiations on the basis of nationality, domicile, or place of residence. Disapproval of such differentiations should be expressed in the interest of the speedy removal of obsolete provisions kept in the statute books.

3. The question whether claims payable within the country may be given priority over other claims remains controversial. The propriety of such a differentiation is questioned even within the countries where support for it has been strong. Whatever the ultimate disposition of this issue in the countries concerned, the differentiation is a deviation from a generally accepted basic principle of the law: creditor equality. It would seem that such a deviation should not be applied except if agreed upon among countries. Creditors from countries where creditor equality obtains should not be subjected to differentiation.

Henry Wheaton, the international lawyer, like Joseph Story took an early interest in the conflicts of laws in bankruptcy.⁵⁸ They created difficult problems even within the United States because of the lack, at the time, of a national bankruptcy law. In campaigning in 1815 for such a law, Wheaton used as closing words for an article in the "National Intelligencer"⁵⁹ the well-known quotation from Cicero, once used by Lord Mansfield for Maritime Law⁶⁰ and later by Story for principles of Negotiable Instruments Law:⁶¹ "*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et apud omnes gentes et omni tempore una eademque lex obtinebit.*"

57. See Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 HARV. L. REV. 1025, 1041 (1946); *id.*, *Compositions—Reorganizations and Arrangements—in the Conflict of Laws*, 61 HARV. L. REV. 804, 835 (1948).

58. He had been counsel in *Baker v. Levi Wheaton*, 5 Mass. Rep. 509 (1809) (effect in Massachusetts of Rhode Island discharge). He appeared, with Daniel Webster, in the leading discharge case, *Ogden v. Saunders*, 12 Wheat. 213 (U. S. 1827). Cf. 1 LIFE AND LETTERS OF JOSEPH STORY 270 (Wm. W. Story ed. 1851) (letter to Wheaton of Dec. 13, 1815).

59. Daily Intelligencer, Washington, D. C., Jan. 6, 1815, under the signature "Jurisconsultus"; continued Jan. 24, 1815. Republished as pamphlet "CONSIDERATIONS ON THE ESTABLISHMENT OF A UNIFORM SYSTEM OF BANKRUPT LAW THROUGHOUT THE UNITED STATES" (1815) (copy in the Harvard Law School Library).

60. *Luke v. Lyde*, 2 Burr. 883, 887, 97 Eng. Rep. 614 (1759).

61. *Swift v. Tyson*, 16 Pet. 1, 19 (U. S. 1842). Cf. LAMBERT ET XIRAU, *L'ANCÊTRE AMÉRICAIN DU DROIT COMPARÉ—LA DOCTRINE DU JUGE STORY* 159 (Paris, 1947); Howe, *Jus Gentium and Law Merchant*, 50 AM. L. REG. (N. S.) 375, 393 (1902).

Bankruptcy laws, it is true, are everywhere, and everywhere do they serve the same purpose: securing equal distribution of the assets among all creditors. Why the equality rule should not apply when assets happen to be in more than one country, remains to be shown.⁶² It would be difficult to reconcile it with our "One World" concept.

62. For abnormal situations, like the one resulting from the Soviet nationalization decrees of 1917, cf. Nadelmann, *Legal Treatment of Foreign and Domestic Creditors*, 11 LAW & CONTEMP. PROB. 696, 706 (1946).