THE RECOGNITION OF AMERICAN ARRANGEMENTS ABROAD*

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One of the resolutions adopted at Havana in 1941 by the First Conference of the Inter-American Bar Association deals with the protection of foreign investments and recommends

"that the academies, institutes, or associations of lawyers, and particularly those which are members of the Inter-American Bar Association, exert influence in their respective countries in behalf of legislative uniformity in matters relative to foreign investments, endeavoring to have included in such legislation principles which, while assuring the integrity and economic and commercial progress of each country, shall afford the foreign investor sufficient protection to encourage such investments."

The very fact that adoption of such a resolution had to be recommended, indicates that legislation is not uniform and that protection is somewhere insufficient in matters relative to foreign investments. What is the position of a foreign creditor in case of insolvency of his debtor? Will the foreign creditor have at least the same rights as domestic creditors? Information on this question will be found in the following discussion, which pertains to a question connected with the problem. Sufficient protection is not guaranteed everywhere: the law of some countries, especially in South America,2 still gives a preference on local assets to local creditors in certain circumstances.

It is rather astonishing to see that up to now legislation of this kind could be maintained in some countries to the disadvantage of other, less "protectionalistic", countries. Means exist to assure legislative uniformity on these points. But this presupposes knowledge of the situation, i. e., adequate information, which, to some extent, is lacking. Want of sufficient information on questions involving foreign bankruptcy law is a complaint heard in all parts of the world. Insufficient information on these matters is acknowledged also in this coun-

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1. Vallance, Some Outstanding Events at the Havana Conference of the Inter-American Bar Association (1941) 8 J. D. C. BAR ASS’N 199, 442, 444; (1942) 20 CAN. B. REV. 28, 47.
2. See pages 794-796 infra.
try. This applies especially to questions which concern the extraterritorial effects of bankruptcy. In fact, most of the rare publications dealing with the international aspect of the bankruptcy problem are written in other languages than English. The matter deserves attention not only in the interest of investors, but also for the development of international commerce in general. Insecurity and distrust in this field hamper commercial relations. Improvement can be obtained only on the basis of sufficient information. The purpose of this article is to furnish material on one of the more recent questions which belong to this field.

The problem here to be discussed is that of the extraterritorial effects of arrangements. Bankruptcy has been increasingly replaced, everywhere in the world, by the modern arrangement proceedings. The old question of the extraterritorial effects of bankruptcy, therefore, loses somewhat its practical importance and the interest now concentrates on the extraterritorial effects of arrangements.

What will happen if, after confirmation in this country of an arrangement in a proceeding under Chapter XI of the Federal Bankruptcy Act, a creditor residing abroad sues the debtor abroad upon personal service or in rem, in order to attach assets belonging to the debtor, located in the foreign country? The effect of the confirmation by court of the arrangement is, as stated in Section 367 (1) of the Bankruptcy Act, that the plan is binding upon the debtor and upon all creditors of the debtor, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable. The confirmation discharges the debtor from all his unsecured debts and liabilities provided for by the arrangement (Sec. 37). Provable debts due to foreign creditors resident abroad are not excepted and are likewise discharged, so far, at any rate, as enforcement of them in the United States is concerned. But will a court in a foreign country recognize the effects of the discharge resulting from the American arrangement, or will a creditor be enabled to attach and collect there the whole amount of his claim?

3. Valuable information on foreign bankruptcy law will be found in Trade Promotion Series, published by U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce.


The answer to this question can have serious consequences not only for the parties concerned, but also for the other creditors. If one of the creditors can appropriate property located outside of the protection of the courts of this country, he will receive more than the other creditors bound by the arrangement. The result may be that the debtor becomes unable to execute the arrangement if the plan was based on the assumption that all his assets are at his free disposal. Then the plan becomes unfeasible. Feasibility of the plan is one of the conditions for its confirmation (Sec. 366 (3) of the Act). It is therefore necessary to study in advance the extraterritorial effects of the arrangement in any case where assets are located abroad and creditors exist who cannot be compelled by the courts of this country to respect the arrangement.

Recognition by a foreign court of a discharge granted in this country cannot be presumed. It will also be a mistake to believe that the foreign court will follow the same rules a court of this country would apply under similar circumstances. It may be said at the very beginning that foreign courts have disregarded discharges granted outside of their country even in cases where the pursuing creditor participated in the arrangement proceeding and consented to the plan confirmed by the court.

In order to judge the feasibility of a plan, precise information is, therefore, needed upon the rules which govern abroad the question of the recognition of foreign arrangements. This information is not easy to obtain. Only rarely do treaties on Bankruptcy and treaties on Conflict of Laws furnish information on the question of recognition of arrangements abroad. This is true, to the same extent, of books published here and abroad. The lack of suitable information cannot be attributed exclusively to the fact that in some countries modern arrangement proceedings were introduced only recently.7 Sub-

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7. Arrangement proceedings comparable to that of former Section 74, added to the Federal Bankruptcy Act in 1933, replaced by Chapter XI of the Chandler Act, 1938, were included in the statute books of the following countries:

- Ireland: Bankrupt and Insolvent Act, 1857, §§343-354 (arrangements under the control of the court).
- Belgium: concordat préventif, provisionally by law of June 20, 1883, definitively by law of June 29, 1887.—[Temporary measure: gestion contrôlée, of Oct. 15, 1934.]
- Luxemburg: concordat préventif, by law of April 14, 1886, amended by law of Feb. 1, 1911.
- Brazil: concordato preventivo, by law No. 917 of 1890, amended by law No. 2024 of 1903, replaced by Bankruptcy law No. 5746 of 1929, §149 et seq.
- Greece: by law of Feb. 6, 1893, repealed in 1895.
- Norway: akkordforhandling, by law of May 6, 1899, amended in 1906, 1921 and 1930.
- Egypt: by decree of March 26, 1900, amended by law of Dec. 24, 1906.
stitional information is also lacking on the recognition abroad of discharges granted in straight bankruptcy; and reliable material on the extraterritorial effects of bankruptcy itself is still scarce in spite of the fact that extensive literature exists on the old case unity—universal-ity v. plurality—territoriality as a dogmatic question. The reasons for the lack of adequate information are twofold. First, even in the domestic law the rules governing the recognition of foreign discharges are often far from being clearly established. Most of the statutes do not deal with the question, the writers disagree and the rare decisions of the courts are, at times, contradictory. This confusing situation at home is not encouraging for research work in foreign law. Secondly, probably in no branch of the law is information in foreign law lacking to such a degree as in the matter of bankruptcy and, especially, modern bankruptcy (arrangement) legislation. The absence of this basic

        Argentina: concordato preventivo (convocatoria de acreedores), by law No. 4156 of 1902, replaced by Bankruptcy law No. 11719 of 1933, § 8 et seq.
        Italy: concordato preventivo, by law of May 24, 1903, amended in 1921, 1924 and 1930 (decree of August 1st).
        Denmark: tvangsakord udenford konkurs, by law of April 14, 1905, amended by law of April 12, 1927.
        Sweden: akord utan konkurs, by Arrangement law of May 13, 1921.
        Japan: by Arrangement law of April 24, 1922.
        Spain: by law on suspensión de pagos of July 26, 1922.
        Iceland: by law No. 19 of 1924.
        Australia: by Bankruptcy Act, 1924-1933, Part XI.
        Turkey: by law on Executions and Bankruptcy No. 1424 of 1929, replaced by law No. 2004 of 1932.
        Yugoslavia: by Amarrangement law of Nov. 22, 1929.
        Czechoslovakia: by Arrangement law of March 27, 1931.
        Chile: convenio, by Bankruptcy decree No. 1297 of 1931, §§ 144-5.
        Finland: by law of May 10, 1932.
        Canada: by the Companies’ Creditors Arrangement Act of 1933.
        France: règlement amiable homologué, by decree of Aug. 25, 1937.—[Temporary measure: règlement transactionnel, of July 2, 1919.]
        England: The Liabilities (War-Time Adjustment) Act, 1941.

8. Valuable material will be found in 7 Travers, Droit Commercial International, pt. 1 (1935), pt. 2 (1936); Valensi, Faillite in 8 Lapadula et Néouze, Repertoire de Droit International (1930) 286.
9. "Universality", as opposed to "territoriality", is used by English writers in the sense of ubiquity; on the dogmatic question, see 8 Saviñy, System (1849) § 374; Saviñy, Précis de Droit International Law (Guthrie trans. 1888) 257; Wharton, Conflict of Laws (3d ed. 1905) §§ 387, 388, 896, 897.
10. The Second International Congress of Comparative Law, The Hague, 1937, took cognizance of the great difficulty now existing in obtaining information as to the
information increases the difficulty of research in foreign Private International Law relating to these matters.

An attempt to supply some information concerning the recognition of foreign arrangements will here be made. In order to render this enterprise feasible, in the limited space of a law review article, the information will be confined to statutory provisions in the foreign law and to decisions of higher courts. Other authorities will, in general, not be given. As to the decisions, it must be kept in mind that in the Civil Law countries judicial decisions are not binding except with respect to the case in which they were actually rendered. But that does not mean that continuance of ruling in the same sense is, in fact, less probable than in the countries where stare decisis does apply. In most of the countries the law on the question is well established, and it will be possible to draw conclusions as to the feasibility of a plan which involves the question of its recognition abroad.

The word "arrangement" as used here will mean "any plan of a debtor" confirmed in a judicial proceeding outside or inside of bankruptcy for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms. What will be said about arrangements, will likewise apply to corporate reorganizations under Chapter X of the Bankruptcy Act, inasmuch as the reorganization plan also deals with the rights of unsecured creditors.

It will be appropriate to discuss the law of this country concerning the recognition of foreign arrangements before reviewing the foreign law on the same question. This will allow a comparison which becomes mandatory in cases where under the rule of reciprocity the foreign law recognizes the effects of a foreign arrangement only if the other country does likewise.

In the law of most of the countries, though not everywhere, an interdependence exists between the effects to be given to foreign arrangements and the effects of a foreign bankruptcy adjudication: recognition of a foreign arrangement depends upon what effects bankruptcy would have under the same circumstances. The scope of the

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11. Leading textbooks will be cited, however, in order to facilitate further research. As well as an arrangement proceeding under the Federal Bankruptcy Act it may be a state insolvency proceeding in a matter not regulated nor superseded by the Federal Bankruptcy Act. Cf. Mulder and Solomon, Effect of the Chandler Act Upon General Assignments and Compositions (1939) 87 U. of Pa. L. Rev. 763.

12. Definition of "arrangement" given by Chapter XI of the Bankruptcy Act, § 306 (1).

investigation will, therefore, necessarily include to a large extent the bankruptcy question.

**DOMESTIC LAW**

In the law of the United States of America no statutory provision deals with the question of recognition of foreign arrangements. The Restatement of the law of the Conflict of Laws, prepared under the auspices of the American Law Institute, mentions the problem of the effects of a discharge in bankruptcy in its Section 375 where it is said that "a discharge in bankruptcy bars in accordance with the terms of the bankruptcy law all creditors who are subject to the jurisdiction of the bankruptcy court".

As to the effects of an assignment resulting from bankruptcy declared abroad, the law is well established. The general rule is that a statutory foreign assignment cannot *ipso jure* affect local property and that claims of a foreign trustee in bankruptcy will not be sustained against domestic creditors. But the foreign trustee may be given the assets in the absence of attaching local creditors. This privilege was not extended to include local land.

The law concerning the effects of a foreign discharge cannot be restated with the same certainty. It has been held that a foreign discharge in bankruptcy is a bar to an action by a creditor who participated in the foreign proceeding by proving his claim under a composition order and accepting a *pro rata* dividend. It also has been held that a discharge bars all creditors who are subject to the jurisdiction of the bankruptcy court. But is a foreign discharge in bankruptcy never a defense to an action by a creditor unless he were subject to the jurisdiction of the foreign court or gave the court jurisdiction by consent? This question is not settled and the authorities are split.

15. RESTATEMENT, CONFLICT OF LAWS (1934).
16. Concerning the extraterritorial effects of assignment statutes of a State of the Union, see Mulder and Solomon, *loc. cit. supra* note 11, at 777.
17. Compare the effects of the appointment of a receiver in equity receiverships: "The appointment of a foreign receiver will not affect attachments made either prior or subsequent to such appointment." RESTATEMENT, CONFLICT OF LAWS (1934) § 546.
18. Harrison v. Sterry, 5 Cranch 289, 302 (U. S. 1809); Ogden v. Saunders, 12 Wheat. 212, 360 (U. S. 1827). In the case of Harrison v. Sterry, *supra*, decided by the Supreme Court of the United States, it is expressly adjudicated that in the case of a contract made with foreigners, in a foreign country, "the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States," and judgment was given in favor of the attaching creditors, against the claim of the foreign (English) assignees.
22. Long v. Hammond, 40 Me. 204 (1855) (resident of New Brunswick discharged in New Brunswick).
The rule that no foreign discharge in bankruptcy is a defense to an action by a creditor residing here unless, by consent, he gave the foreign court jurisdiction over his claim, is attributed to the Supreme Court of the United States and applied by the New York courts. The decision of the Supreme Court was rendered in a discharge case involving the insolvency law of one of the States of the Union. The question before the court was stated to be "whether a discharge of a debtor under a state insolvency law would be valid against a creditor and citizen of another state who had never voluntarily subjected himself to the State laws otherwise than by the origin of his contract", and was argued in two forms, first, as a question of international law, and secondly, under the Federal Constitution. Upon the first branch of the argument, the English rule was admitted to be that "the assignment of the bankrupt's effects under the law of the country of the contract should carry the interest in his debts wherever his debtor may reside", and then it was declared to be "perfectly clear that in the United States a different doctrine has been established; and since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in one instance carries with it a negation of the principle altogether". At a later stage of the opinion, attention is called to the circumstances that the discharge is always and necessarily an adjudication of a court and depends wholly upon the operative force of that adjudication; and that "neither comity nor justice requires that we shall hold one of our citizens bound by a judgment of a foreign court to which he was not a party, could not be compelled to be a party, and of which he might have had no notice".

The decision of the Supreme Court has been disregarded, in cases involving discharges granted outside of the United States, by the courts of Maine, Massachusetts, and Vermont, under the contention that it rests upon provisions of the Federal Constitution, and not upon the principles of international law also mentioned in the opinion. These courts applied a rule, which is the law of England, under which recognition is to be given to the discharge of a contract if granted by the law

25. See Bailey, A Discharge in Insolvency and Its Effects Upon Non-residents (1893) 6 HARV. L. REV. 349.
29. See p. 788 infra.
of the country in which the contract was made and to be performed.\textsuperscript{30} It was admitted as inconsistent to hold that a foreign assignment cannot be sustained against domestic creditors, and still that the discharge can put an end to the debt.\textsuperscript{31} But it was declared that the two things are not irreconcilable, that they stand on different grounds and depend on distinct principles.\textsuperscript{32}

More recently, it was held by the Supreme Court of the United States, in \textit{Canada Southern Ry. Co. v. Gebhard},\textsuperscript{33} a case involving the extraterritorial effects of a "scheme of arrangement" made in Canada by an insolvent Canadian Railway Corporation, that American holders of secured bonds of that Corporation are bound by the arrangement sanctioned in Canada. The bonds were payable in New York. This ruling\textsuperscript{34} cannot result from an application of the so-called English rule, as the place of performance of the contract was made outside of Canada, and it seems to be inconsistent with the many cases to the effect that foreign creditors who stay aloof are not bound by a debtor's discharge for insolvency under the law of his own state.\textsuperscript{35} It was said by the Supreme Court of the United States on a recent occasion\textsuperscript{36} with reference to the ruling in the \textit{Gebhard} case: "That case only laid down the doctrine recently affirmed by this Court . . . that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property". Yet it remains to be explained why, in this case, the doctrine concerning the legal relations of the members of a corporation was made applicable to creditor relations. Rather than to

\textsuperscript{30} As to criticism of the underlying theory that bankruptcy discharges enter into the agreement and form a part of the contract like other modes of release, \textit{see} Goodsell \textit{v. Benson}, 13 R. I. 225, 246 (1881), and \textit{Ogden v. Saunders, 12 Wheat. 212, 343 (U. S. 1827)}, where it is said: "The principle is that laws act upon a contract, not that they enter into it, and become a stipulation of the parties."

\textsuperscript{31} As pointed out in \textit{Goodsell v. Benson, 13 R. I. 225, 247 (1881)}, "the most oppressive effect of doctrines so inconsistent would be that while a considerable portion of the debtor's debts here would be discharged by his merely giving up his English property, it would leave any property he might have here still in his ownership and control."

\textsuperscript{32} \textit{May v. Breed, 61 Mass. 15, 41 (1851)}.  
\textsuperscript{33} 109 U. S. 527 (1883).  
\textsuperscript{34} The adjudication by the Supreme Court is not conclusive upon the courts of the States, as the case came to the Supreme Court from a lower federal court and was not decided upon a federal question.  
\textsuperscript{36} \textit{Second Russian Ins. Co. v. Miller, 268 U. S. 552, 560 (1924)}.  
refer to the law of the jurisdiction in which the corporation was organized, should not stress be laid on the fact that the claim was secured by a mortgage on property located in Canada? Insofar as the security was concerned, lex rei sitae was applicable.

In the Gebhard case the Supreme Court made a clear distinction between the extraterritorial effects of a discharge granted in straight bankruptcy and the effects of reorganization plans accepted by a majority of creditors and sanctioned by the competent authority. "The true spirit of international comity requires that schemes of this character legalized at home should be recognized in other countries", was said in the majority opinion. To what extent "international comity" exists in this matter up to this time, will be shown in the review of the foreign law.

It seems rather difficult to draw any general conclusions from the discussion of American authority; the recognition of foreign arrangements in this country must be considered as unsettled. Courts of some States of the Union will continue to apply the English rule, courts of other States may rely on the rule attributed to the Supreme Court of the United States concerning the non-recognition of foreign discharges. Whether or not a distinction has to be made between discharges in bankruptcy and discharges resulting from reorganization schemes and arrangements remains an open question. Uniformity in the decisions cannot be expected. It may be recalled for the intelligence of foreign readers that federal courts have no independent rules of common law and, therefore, of Conflict of Laws, but must follow the rules established in the State courts of their district.

FOREIGN LAW

As already mentioned, it is the law of England that a discharge from a debt or liability under the bankruptcy law of the country where the debt or liability is to be paid or satisfied, is a discharge therefrom in England. The order of discharge made under any other law than that which is the law governing the debt in question is ineffective in Eng-

37. The question of reciprocity was not raised. Hilton v. Guyot, 159 U. S. 113 (1895); where conclusive effect of a foreign judgment was denied by the Supreme Court on the ground of want of reciprocity, was decided 12 years later; cf. Goodrich, HANDBOOK OF THE CONFLICT OF LAWS (2d ed. 1938) 527.
40. Ellis v. M'Henry, L. R. 6 C. P. 227 (1871), and authorities there cited.
land. The English doctrine has been followed in Canada and in other parts of the British Empire.

Concerning the recognition of an assignment resulting from bankruptcy declared abroad, the courts in England and Canada have consistently applied the doctrine of universality according to which they hold that all movable property no matter where it may be situated at the time of the assignment by the foreign law, passes to the foreign trustee. It is sufficient that the debtor is properly subject to the jurisdiction of the foreign country in which the trustee was appointed, whether he is domiciled there or not. Though the principle of universality is not applied to immovables, the English courts in the exercise of their discretionary jurisdiction may permit a foreign trustee to sell land situated in England for the benefit of the bankrupt owners' creditors.

In certain countries in Continental Europe no foreign bankruptcy is given effect unless provided for by treaty or international convention. The property of the bankrupt may be attached at home by any creditor, domestic or foreign, notwithstanding the bankruptcy proceeding abroad, or a second bankruptcy may be declared. To the group of countries thus applying the principle of territoriality to a foreign bank-

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44. Solomons v. Ross, 1 H. Bl. 131, n. (a) (Ch. 1764); Jollet v. Deponenthieu, 1 H. Bl. 132, n. (a) (Ch. 1769); Alivon v. Furnival, 1 Cr. M. & R. 277, 149 Eng. Rep. R. 1084 (Ex. 1834).
46. In re Davidson's Settlement Trusts, L. R. 15 Eq. 383 (1873); In re Lawson's Trust, [1896] 1 Ch. 175; In re Anderson [1911] 1 K. B. 896; In re Craig, 86 L. J. 62 (Ch. 1916); Bergerem v. Marsh, 91 L. J. K. B. (n. s.) 80 (1921); see Dicey, Conflict of Laws (Keith's 5th ed. 1932) 498-499; Cheshire, Private International Law (2d ed. 1938) 479-480; Williams, Law and Practice in Bankruptcy (Bladen & Buckley, 15th ed. 1937) 247.
49. Should not, in application of the principle of universality, any rule of the foreign bankruptcy law which prevents actions against the debtor also be recognized? This question is raised in 3 Piggott, Foreign Judgments and Jurisdiction (3d ed. 1910) 127-137. "With great respect, I submit that so long as bankruptcy jurisdiction is based on other considerations than the making of contracts in the country, so long as it is based, as the English law is based, merely on the commission of an act of bankruptcy in the country which has no relation to any contract or to any particular obligation to any particular creditor, it is untrue to say that the making of a contract in a country imports a submission to the law of discharge of that country, because it does import a submission to the law of that country as it deals with the particular contract." Id. at 132.
ruptcy belong: Denmark,⁵⁰ Germany,⁵¹ the Netherlands,⁵² Sweden,⁵³ Switzerland,⁵⁴ and, in Africa, Egypt.⁵⁵ In these countries a composition in the foreign bankruptcy proceeding is given the same effect with respect to the debtor’s property at home as the foreign bankruptcy, i. e., no effect at all.⁵⁶ This is equally true for compositions in foreign arrangement proceedings.⁵⁷ Courts in Germany⁵⁸ and Holland⁵⁹ upheld attachments even though made by creditors who previously had given their consent in writing to the foreign composition. It was said that the consent could not be interpreted as including property located at home if this were not especially expressed.

Non-recognition of foreign arrangements is the rule also in another group of European countries which, regarding the effects of foreign bankruptcy, makes a distinction between movables and immovables and admit the delivery to a foreign trustee of movables under the condition of reciprocity. To this group belong: Austria,⁶⁰


⁵¹. Bankruptcy Code § 237: “(1) If a debtor adjudicated bankrupt abroad has assets in this country, execution may be had against his assets here. (2) Exceptions to this rule may be made by proclamation of the Ministers of Justice and of Foreign Affairs.”

No exceptions were made. See 2 E. Jæger, KOMMENTAR ZUR KONKURSORDNUNG (6-7th ed. 1936) §§ 237-238; Nussbaum, DEUTSCHES INTERNATIONALES PRIVATRECHT (1932) §§ 67, 68; Kohler, LEERBUCH DES KONKURSRECHTS (1891) 637.

⁵². Sup. Ct., H. R., April 5, 1888, W. 5538, JOURNAL DU DROIT INTERNATIONAL (hereinafter cited Clunet) (1888) 564; May 31, 1907, W. 8553; May 1, 1924, W. 11237; Clunet (1925) 1119. See Molengauff, DE FAillISSEMENTSWET (3d ed. 1936) c. X; De Vries, DE EXTRATERRITORIALITEIT VAN HET FAillISSEMENT IN HET INTERNATIONAAL PRIVATRECHT (1926).


⁵⁹. App. den Bosch, July 24, 1894, W. 6536, Clunet (1896) 663.

⁶⁰. Bankruptcy Act of 1914, § 67: “(1) ... movables located here belonging to a debtor declared bankrupt abroad will be delivered to the foreign bankruptcy authority upon request if bankruptcy is not declared at home. Delivery will be made after payment of liens acquired before the filing of the request. (2) Delivery will be refused if the foreign State does not accord reciprocity. In case of doubt the Minister of Justice must be asked for a decision on this question.”
Hungary,\textsuperscript{61} Czechoslovakia,\textsuperscript{62} and Yugoslavia.\textsuperscript{63} The reason given by the courts for the non-recognition of foreign arrangements was, in some cases: absence of statutory provisions providing for recognition,\textsuperscript{64} in others: lack of reciprocity.\textsuperscript{65} Under the rule of reciprocity it was held in cases involving Austrian arrangements in Czechoslovakia, and Czechoslovakian arrangements in Austria, that a creditor who had participated in the foreign proceeding, was bound by the arrangement.\textsuperscript{66} But in a case before the Austrian Supreme Court \textsuperscript{67} concerning an arrangement in Hungary it was held, also under the rule of reciprocity, that mere participation in the foreign proceeding was insufficient to bind the creditor, that consent to the arrangement was indispensable. In cases where reciprocity was deemed lacking, even creditors who had voted for the foreign arrangement were allowed to attach local property.\textsuperscript{68}

Bankruptcy is treated as a question of \textit{status} \textsuperscript{69} by the courts of some other European countries. It is said that bankruptcy belongs to the laws whose effects are to regulate the "capacity" and "incapacity" of persons.\textsuperscript{70} In the application of this contention the insolvent declared bankrupt under the law which governs his status is considered bankrupt throughout the world. This doctrine is applied by the courts in Belgium,\textsuperscript{71} Luxemburg,\textsuperscript{72} and Rumania,\textsuperscript{73} which thus recognize the effects of a foreign bankruptcy adjudication as well as the effects of an arrangement in the foreign bankruptcy proceedings.\textsuperscript{74} The foreign

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\item \textsuperscript{61} Bankruptcy Law, § 75: "The courts will proceed concerning the delivery of movables in accordance with the principle of reciprocity and report to the Department of Justice any refusal of a delivery demanded."
\item \textsuperscript{62} Bankruptcy Law of 1931, § 60 (similar to Austrian Act, Note 60 \textit{supra}).
\item \textsuperscript{63} Bankruptcy Law of 1929, § 66 (similar to Austrian Act, Note 60 \textit{supra}).
\item \textsuperscript{65} Hungarian Sup. Ct., 1928, BI. F.
\item \textsuperscript{68} Czechosl. Sup. Ct., April 15, 1932, J. W. 1932, 2340, \textit{CLUNER} (1932) 1076.
\item \textsuperscript{70} Ob. G. H., March 26, 1935, Z. Bl. 1935, No. 280, \textit{CLUNER} (1936) 436.
\item \textsuperscript{73} As to significance of \textit{status} classification in European law see \textbf{KUEN}, \textit{COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW} (1937) 115-124.
\item \textsuperscript{74} For criticism of the \textit{status} theory, see Alb. Rollin, \textit{Etude sur la faillite en D. I. P.}, Rev. dr. Int. et Lég. Comp. (1903) 492.
\item \textsuperscript{76} App. Bucarest, June 21, 1933, Pand. Rom. 1935, 11, \textit{CLUNER} (1937) 629; see Negulesco in \textit{CLUNER} (1912) 806.
\item \textsuperscript{77} Courts in Belgium sometimes refused to give recognition to orders of discharge in straight bankruptcy with the contention that they were contrary to public policy: App.
The decree must be clothed with an *exequatur* (declared executory, as it is termed), by a domestic court only if execution is wanted. As to arrangements outside of bankruptcy, automatic recognition will depend upon the question whether or not, in the opinion of the court, the foreign arrangement proceeding affects the "capacity" of the debtor. If this is not the case, recognition will be refused until an *exequatur* has been granted in a proceeding for the enforcement of foreign judgments.

In another group of European countries recognition is given to a foreign bankruptcy on the theory, not that bankruptcy affects the status, but that bankruptcy as such has a character of *universality* (in the sense of ubiquity). To this group belong: Italy and Portugal, Greece and Bulgaria, and Norway *seemly*. But the question is highly controversial whether effect is to be given to the foreign decrees automatically, or only after they were rendered "executory" by decision of a domestic court.

In Italy and Portugal the majority rule, so far as the courts are concerned, seems to be that a distinction must be made between acts of execution and others: automatic recognition to be granted in all cases where no execution is wanted, e. g., if an arrangement is invoked by the debtor as a defense. On the contrary, courts in Bulgaria and Greece generally seem to refuse automatic recognition, except in the case of arrangements which were declared a good defense without being

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75. *Annuaire de l'Institut de Droit International* XIX, 287.
77. See *note 91 infra*.
80. Especially since the modification of C. Civ. Proc., § 941, concerning the execution of foreign judgments, in 1919-1925, the majority rule has been subject to criticism by authors. See *Cavagliari, Lezioni di diritto internazionale privato* (1933) 316; Enriques in *Riv. dir. intern.* (1934) 145, 376, 593; Meriggi, *Contributo alla dottrina a del fallimento in D. I. P.* (1936) 142.
81. See note 91 infra.
83. *See note 91 infra*.
rendered “executory.”\textsuperscript{84} In Norway\textsuperscript{85} the Supreme Court recognized automatically the effects of foreign bankruptcy.

The last group of European countries here to be considered includes countries which deal with foreign decrees in bankruptcy and arrangement matters as they do with foreign judgments in general. The decrees will be recognized under the same conditions as other foreign judgments. This is the case in France,\textsuperscript{86} Monaco,\textsuperscript{87} Spain,\textsuperscript{88} Turkey,\textsuperscript{89} and also in Belgian Congo.\textsuperscript{90} These countries provide for a preliminary proceeding, a proceeding for \textit{exequatur}, by which recognition and enforcement of a foreign judgment can be obtained.\textsuperscript{91} Thus, in order to be recognized, a foreign decree in bankruptcy must be provided with an \textit{exequatur}.\textsuperscript{92} If the debtor has already been declared bankrupt at home, no \textit{exequatur} will be granted.\textsuperscript{93} The same rules apply to arrangements: Recognition will be refused, even as to creditors who gave their consent to the foreign arrangement, until an \textit{exequatur} is granted.\textsuperscript{94}

 Whereas the law of France\textsuperscript{86} does not require reciprocity for the grant of an \textit{exequatur}, reciprocity\textsuperscript{86} is a prerequisite in Spain\textsuperscript{87} and


\textsuperscript{87} Superior Ct., Nov. 24, 1899, \textit{Clunet} (1900) 835.


\textsuperscript{89} Law 2004 of 1932 (Code of executions and bankruptcy).

\textsuperscript{90} Decree of July 27, 1934, § 127.

\textsuperscript{91} See Lorenzen, \textit{The Enforcement of American Judgments Abroad} (1919) 29 \textit{Yale L. J.} 188, (1920) 2 \textit{J. Comp. Leg.} (3d ser.) 124; Kuhn, \textit{op. cit. supra} note 69, at 105-113.

\textsuperscript{92} Orders of discharge in straight bankruptcy were sometimes declared against public policy by French courts (Seine, June 10, 1863, Gaz. Trib., June 22-23, 1863); sometimes \textit{exequatur} was granted (Seine, Nov. 15, 1853, Journ. Trib. Com. 1854, 128; Marseilles, Sept. 13, 1861; and Seine, May 22, 1863, Gaz. Trib., June 22-23, 1863; cf. App. Toulouse, Feb. 4, 1886, \textit{Clunet} (1886) 332). Compare note 74 supra.


\textsuperscript{95} But reciprocity is required in French Morocco (Dahir of August 12, 1913, § 19).

\textsuperscript{96} Compare Gutteridge, \textit{Reciprocity in Regard to Foreign Judgments} (1932) 13 \textit{Brit. Y. B. Int. Law} 99.

\textsuperscript{97} Code of Civ. Proc., §§ 952, 953. See Lorenzen, \textit{loc. cit. supra} note 91, at 298. § 954 which, under special conditions, allows the grant of an \textit{exequatur} in cases where reciprocity is doubtful, is limited to personal actions and seems, therefore, inapplicable
Turkey. Therefore, recognition will not be given in these states to a foreign bankruptcy or arrangement decree if the foreign country does not recognize the decrees of these states.

In the Far East the new Chinese Bankruptcy law contains a provision which declares that an arrangement entered or a bankruptcy declared abroad shall have no effect on the debtor's property located in China. Likewise, the Japanese bankruptcy law declares that bankruptcy declared abroad has no effect on assets in Japan.

In Latin-America statutory provisions in the law of some countries declare that bankruptcy declared abroad cannot affect the rights of domestic creditors on domestic property. This is the case in Mexico and Nicaragua, and also in Argentina, Paraguay, Peru, Uruguay, and Costa Rica. It is specified that contracts made by the debtor with local creditors cannot be affected by the foreign proceeding. Thus foreign arrangements will not be recognized.

The law of Argentina, Paraguay, Peru, Uruguay, and Costa Rica goes a step further insofar as a preference is given in these countries to local creditors on local assets whenever bankruptcy to the matter of bankruptcy. Cf. Trias de Bes, Derecho Internacional Privado (2d ed. 1940) 151.


102. Com. Code, § 982: "Except as provided in Sec. 949, a declaration of bankruptcy made in a foreign country cannot be pleaded against creditors of the bankrupt in Mexico either to dispute their rights upon property in Mexico or to avoid contracts made with the bankrupt." Sec. 949: "If a commercial enterprise becomes bankrupt abroad having one or more branches in the Republic, the latter shall be placed into liquidation, without prejudice to such branches being also declared bankrupt. The bankruptcy, both for the purpose of its declaration and its effects, shall be subject to the provisions of this code." See Pallares, Tratado de quiebras (Mexico, 1937) 283; Weless, Compendium of the Law of Mexico (Rev. ed. 1938) 414.

103. Bankruptcy Law 11719 of 1933, § 7: "(1) A foreign bankruptcy adjudication cannot be invoked against the creditors whom the insolvent has in the Republic, either to dispute their rights which they claim to have on the assets existing within the territory or to annul the transactions which they have had with the insolvent. (2) The bankruptcy also declared by the tribunals of the Republic shall not take into consideration the creditors belonging to the foreign bankruptcy, except if there remains a surplus after payment in full of creditors in the Republic." See T. Castello, La quiebra en el derecho argentino (1940) 94; Garcia Martinez, El concordato y la quiebra en el derecho argentino y comparado (1940); Henry P. Crawford, The New Law of Bankruptcy of the Argentine Republic as Translated (1934).

104. Identical with the Argentine law.

105. Bankruptcy Law 7566 of 1932, § 26 (1) and (2): identical with § 7 of the Argentine law; § 26 (3) provides that debts contracted abroad, but not dedicated to the business in Peru, will be paid after the "proper" debts of the Peruvian bankruptcy. See Sanchez Palacios, Ley procesal de quiebras (1939).

106. Com. Code, § 1577: identical with § 7 of the Argentine law; see Emilio Scarano, Tratado de la quiebra (1939).


108. Compare Blake v. McClung, 172 U. S. 239 (1898) and 176 U. S. 59 (1900), where a Tennessee statute was held unconstitutional which permitted foreign corpora-
is declared abroad and at home. In that case the balance only which may remain after payment of the local creditors will be turned over to the creditors in the foreign bankruptcy. This system is met with substantial criticism not only outside of the countries which have adopted the rule.109 Even without limitation to the case of concurrent bankruptcies the preference rule is established in Peru in favor of local creditors of foreign banking institutions operating in Peru.109a

In other Latin-American countries the effects of a foreign bankruptcy decree can be recognized, but only after the decree has been provided with an *exequatur*. This is the law in Brazil where a foreign bankruptcy adjudication of a debtor not domiciled in Brazil may be confirmed and carried into effect by the Federal Supreme Court.110 Likewise, foreign arrangements can be made effective by the grant of an *exequatur*. They will be binding only upon those creditors in Brazil who were cited to take part in the proceedings.111 But if the insolvent has a separate and distinct establishment in Brazil, this establishment will not be affected by the foreign bankruptcy even after an *exequatur*, and local creditors will be entitled to payment in preference from the assets of the local establishment.112

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109. See 2 ORIGONE, LEY DE QUIEBRAS (Buenos Aires, 1935) 331, who advocates a "less utilitarian, not to say egoistic solution" and suggests the conclusion of treaties; cf. Rodriguez Quesada in REV. DE DER. PUB. Y PRIV. (Montevideo) 1941, 67, 131.

109a. Banking Law 7159 of 1931, § 33: "Peruvian and foreign creditors domiciled in Peru shall have a preference on assets in Peru of a foreign banking institution."

110. Bankruptcy Law 5746 of 1929, § 160: "Foreign judgments declaring the bankruptcy of traders or joint stock companies domiciled in the country of the adjudication shall have the same effects as are produced by adjudication decrees in bankruptcy after having been approved by the Federal Supreme Court; with the following restrictions: (1) Independently of approval, but only on production of the judgment and the instrument of appointment in authentic form, the legal representatives of the estate shall be empowered, as mandatories, to seek in the Republic means for preserving the rights of the estate, collecting debts, compounding, if they hold power to do so, and bringing actions without the obligation of furnishing security for the costs. For these, however, the mandatory taking the proceedings will be liable. (2) No measures which import execution of the judgment, such as attachment and sale of the property of the bankrupt, can be taken before the decree of adjudication was rendered executory in virtue of the approval, in conformity with the law of Brazil. (3) Notwithstanding the approval of the judgment, creditors residing in the Republic who have mortgages on property located here, are not prevented from claiming what is due and levying execution on the mortgaged property. (4) Unsecured creditors residing in the Republic who have reduced claims to judgment prior to the approval, may continue the proceedings and levy execution on property of the bankrupt located in the Republic."

§ 164: "Foreign judgments which declare the bankruptcy of a debtor here domiciled cannot be executed in Brazil."

111. § 163: "Arrangements and other means to prevent bankruptcy, approved by foreign courts, are subject to the approval of the Federal Supreme Court and shall only be binding on those creditors residing in Brazil who were cited to take part in them."

112. § 161: "A foreign judgment which declares the bankruptcy of a trader or joint stock company having two establishments, one in the country of its domicile and another
Also in Panama, a foreign arrangement can be provided with an *exequatur* and thus made binding upon local creditors who were legally cited to take part in the proceedings. But if bankruptcy is declared abroad, local creditors can always institute local proceedings in which they are entitled to payment in preference from local assets. In the remaining group of Latin-American countries the rules governing the recognition of foreign judgments are applied to foreign decrees in bankruptcy and to arrangement matters. In Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Honduras, and Venezuela an *exequatur* is required for the recognition and execution of foreign judgments. Most of the statutes provide that reciprocity is a prerequisite for the grant of the *exequatur*. In these countries foreign arrangements and bankruptcy adjudications will be recognized under the same conditions as other judgments.

**DISCUSSION**

To sum up this brief review of foreign statutory provisions and decisions dealing with the question of the recognition of arrangements made abroad, it can be said without exaggeration that every conceivable solution of the problem can be found adopted somewhere in the world. Even greater than the number of solutions adopted is the number of theories applied. But the importance of the dogmatic background should not be exaggerated; in matters like these where the national interest is involved, the choice by a court of one or the other solution generally is much more a question of policy than of legal theory.

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114. §§ 1639, 1641. See Obregon, Latin-American Commercial Law (1921) 681.
117. Others limit the possibility of an *exequatur* to judgments on personal actions: Ecuador: § 449, C. C. P.; El Salvador: § 452, C. C. P.
Apparently at the present moment a large majority of countries is hostile to the recognition of foreign arrangements. Non-recognition prevails in the world, and the chances for recognition are limited to a few countries, the number becoming very small indeed if proof of the existence of reciprocity cannot be furnished to the satisfaction of the foreign court. The question as to the why of this negative result may, perhaps, best be answered by another question: Why should one country recognize foreign arrangements so long as recognition abroad of their own arrangements does not seem guaranteed? Experience has proved that, in general, unilateral generous gestures meet with little or no response in other countries.

As non-recognition prevails, a serious legal and practical problem arises for most of the arrangement cases where creditors reside abroad and assets are available outside of the country of the arrangement proceeding. It will often be possible to overcome the legal difficulties by practical measures. If the "foreign" creditor resides in a country which does not give preferential rights on local assets to local creditors, a reasonable chance exists for the acceptance by him of a plan which deals with all of the assets of the debtor, wherever located, for the benefit of all creditors. The "foreign" creditor would not receive more, and probably would receive less, if such a plan fails and separate proceedings had to be instituted in two countries, with doubled costs. All creditors would be allowed to participate in both proceedings and no preferential rights of voidable nature, obtained by attachment or otherwise, could be maintained. If the "foreign" creditor accepts the arrangement, a careful formulation of the letter of acceptance to be signed by him will leave no room for an interpretation that the acceptance does not cover assets located outside of the country of the arrangement proceeding. A provision in the plan providing that payment of the consideration can be obtained only upon the condition of delivery of a formal discharge, will often give the means to obtain the same result, although it already may be doubtful whether or not a discharge so obtained will be recognized by a foreign court which, in principle, does not recognize foreign arrangements.

In a case where creditors residing abroad are not likely to approve the plan or to take part in the distribution, the situation becomes rather intricate if these creditors are able to locate and attach assets in a country which does not recognize foreign arrangements. It would not be fair and equitable, and in the interest of all creditors, to let "foreign" creditors receive more than the local creditors, if this can be avoided. Except in cases where the "foreign" creditor is protected by a statute giving preferential rights to local creditors on local assets, institution
of two proceedings, here and abroad, will ensure equitable results. This course, therefore, may become mandatory. Sometimes it will be possible to make only one plan dealing with the whole property of the debtor and to obtain acceptance and confirmation of this one plan in the two proceedings. Otherwise two different plans must be made and the plan in the domestic arrangement proceeding limited to the domestic assets.

Would it be possible, in this case, to preclude from the participation in the domestic arrangement the creditors residing abroad, or to limit their share so that they will not receive more than all other creditors after having had the benefit of the assets located abroad? This would be only fair and equitable and would be an application of the principle laid down in Section 65 (d) of the Bankruptcy Act for distributions in straight bankruptcy, where it is said that creditors residing here shall first be paid a dividend equal to that received by other creditors abroad. A distinction in the plan between different kinds of creditors is feasible under Chapter XI dealing with arrangement proceedings: Sections 351 and 357 (i) allow the repartition of creditors into classes with a treatment upon different terms. But Section 362 requires for the confirmation of the arrangement the acceptance of the plan by a majority in number and amount in every class materially and adversely affected by the arrangement. Thus the feasibility of the plan would depend upon its acceptance by a majority of the non-resident creditors placed in the separate class.

The result would be different if the plan were made in a corporate reorganization proceeding under Chapter X of the Bankruptcy Act. In this case, lack of acceptance of the plan by the class formed by the creditors residing abroad would not hinder confirmation. Chapter X, Section 179 provides in effect that a plan need not be submitted for assent to creditors for whom payment or protection has been provided as prescribed by Section 216 (7). This section which purports to provide methods for the protection of non-assenting creditors, admits (subsection (d)) any method that will, “under and consistent with the circumstances of the particular case, equitably and fairly provide adequate protection for the realization by the class of creditors of the value of

119. In this sense & Collier, Bankruptcy (14th ed. 1941) § 366 (3) 1182.
120. § 65 (d): "Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts."
121. Chap. X, § 197, authorizes the judge to divide creditors into classes "according to the nature of their respective claims." Although it may be doubtful whether, in general, under this section unsecured creditors can be grouped in different classes, this seems justified in a case like this where only by means of differentiation can equality of treatment be secured. The basic offer to the two subclasses would be substantially the same. See Finletter, The Law of Bankruptcy Reorganization (1939) 461, 465, 470.
their claims against the property dealt with by the plan and affected by such claims". A provision in the plan leaving assets located abroad to the class of creditors residing abroad may well, in the particular case, secure that protection. Even without the consent of this class the plan, therefore, could be confirmed by the court. The absence in Chapter XI of a provision similar to that of Chapter X proves to be a disadvantage.

If a plan of local character as discussed is not feasible, the only remaining possibility is a plan dealing with the local assets in favor of all creditors on equal terms. Every creditor then will have to try to secure his share also in the distribution of the assets located abroad. This may be by means of bankruptcy or arrangement proceedings abroad. In case of difficulties, it may become necessary to abandon completely the idea of a domestic arrangement and to have the debtor adjudicated bankrupt here in order to secure to domestic creditors at least the protection given by Section 65 (d) of the Bankruptcy Act. This protection is limited to the assets available here and insufficient to counterbalance advantages which may arise from foreign statutes giving a preference on local assets to local creditors. In such cases satisfactory results cannot be obtained in the absence of treaties or international conventions.

AN INTERNATIONAL PROBLEM

Efforts to reach international agreements in the matter of bankruptcy have been made long ago. Their object in the earliest period was to abolish discrimination between foreign and domestic creditors. More recently, at its seventh meeting, in 1879 (London), the International Law Association passed a resolution advocating the conclusion of treaties in the matter of bankruptcy based on the following principles: unity and universality of bankruptcy, unity of jurisdiction and administration in the country of the domicil of the bankrupt. Then a Congress of Jurists, held in Turin in 1880, adopted a project of treaty based on the principle of universality and establishing the need of an _exequatur_ for acts of execution. The Institute of International Law, at its meeting in Paris in 1894, approved general rules in the matter of international bankruptcy on the same basis; they were also to be applied to arrangements. More detailed rules were adopted.

122. See MEHL, DIE GESCHICHTLICHE ENTWICKLUNG DES INTERNATIONALEN KON-KURSRECHTS (Zürich, 1908).
123. See the incidents, at the end of the 18th century, between France and the City of Frankfort, and France and Swiss Cantons related by Levy-Bruhl in _REV. CÔT. DR. INT._ (1938) 175.
125. CLUNET (1880) 625-629.
126. _Annuaire de l'Institut International_ XIII, 279; see report Weiss, _Annuaire XI_, 113.
by the Institute at Brussels in 1902, and a draft convention dealing with real rights in bankruptcy was voted at Oslo in 1912. In the meantime the official Conferences of Private International Law at The Hague had begun to deal with the matter. A draft convention concerning conflicts of laws in bankruptcy based on the principle of universality was submitted to the First Conference, in 1893, by its President Asser and discussed and revised during the following Conferences until its adoption by the fourth Conference in 1904.

After the World War I new efforts were made for the adoption of an international convention. The International Law Association resumed its work. The International Chamber of Commerce, at its third congress in 1925, stressed the necessity of an international agreement on the bankruptcy question in the interest of international commerce and suggested a convention based on the principle of universality. Finally, at The Hague in 1925, the fifth Conference of Private International Law, at which 22 nations were represented, adopted a model treaty of 17 sections based on the principle of universality: A bankruptcy declared by a court of the country where the debtor has his principal commercial establishment is given extraterritorial effect in the other countries (Sec. 2). The decree of adjudication must be published by the trustee in conformity with the local law in every country where the bankrupt has a branch or where he intends to invoke the effects of the adjudication (Sec. 8 (2)). Only for acts of execution is an exequatur needed (Secs. 4, 5). The treaty provides for the recognition, on the same basis, of arrangements after bankruptcy adjudication. It does not deal with arrangements out-

127. Discussion: Annuaire XIX, 115-134, 231-300; final text: Annuaire XX, 84.
128. Annuaire XXV, 670 (report Diena 433), CLUNET (1913) 731; see De Boeck in REV. DR. INT. PRIVÉ (1913) 289, 793.
130. Actes de la 4e Conférence (1904) 222, 223.
132. Journal of the I. C. C., 1925; resolution reproduced in 8 RÉPERTOIRE DE DROIT INTERNATIONAL 297, No. 265.
133. The United States did not participate. The British delegation, though in favor of the principle of universality, declared themselves unable to associate themselves with the draft that was then prepared and did not participate in the discussion. See Actes de la 5e Conférence, 1st Commission, report, p. 1, minute No. 3, pp. 3, 8; preliminary documents III, p. 163.
135. Sec. 7: "The decree confirming a composition after bankruptcy adjudication rendered in one country will be recognized in the other countries, and it will become there executory by means of an exequatur, if the decree fulfills the conditions stated in sec. 5, and if the measures of publication provided for by sec. 8 were taken before the composition was entered."
side of bankruptcy. The model treaty was brought into the form of an international convention by the Conference which followed in 1928. Ratification of this convention could not be obtained.

Other efforts to reach an international agreement have had no better result.

In the last years before the outbreak of World War II much concern was caused in the commercial world by the fact that in some countries, especially in Central Europe, foreign arrangements were disregarded by the courts even in cases where the attacking creditor had voted for the plan. It was suggested, at different occasions, to separate from the bankruptcy problem the arrangement question and to try to obtain an agreement at least on recognition of arrangements. The whole problem was again discussed, in June, 1939, by the International Chamber of Commerce at its tenth congress in Copenhagen. It was decided to publish in a special volume the international treaties already existing in this matter, in order to facilitate the conclusion of new treaties. In fact, whereas all efforts directed towards an international regulation of the bankruptcy problem have failed, constant progress has been made with the conclusion of bi- or multilateral treaties in this matter, especially between neighbor nations. The work done by the different international organizations proved very precious to this development.

Treaties

It may first be mentioned that the English Foreign Judgments (Reciprocal Enforcement) Act, 1933, was not made applicable to proceedings connected with bankruptcy or winding-up of companies. But so far as the British Empire is concerned, the question of the recog-

136. It was believed that legislation on this subject still varied too much in the different countries: reported, and criticized, by Alb. Rolin in (1926) 14 Recueil des Cours 137.
137. Actes de la 6e Conférence (1928) 422-423; full text of the Convention in 3 Percierou, op. cit. supra note 86, at 325.
138. The failure is generally attributed to the fact that the governments prefer to abide by individual treaties rather than by means of an international convention; cf. declaration of the French delegation, Actes de la 3e Conférence (1900) 157.
141. World Trade, J. of the I. C. C., August, 1939.
142. Not yet published, owing to the outbreak of the war.
143. At the League of Nations, the Committee of Experts, appointed in execution of the Resolution for the Progressive Codification of International Law, did not choose Bankruptcy as one of the subjects ripe for codification. Thus, unfortunately, "Research in International Law," conducted under the auspices of the Harvard Law School, did not include this subject.
nition of discharges is partly resolved: a discharge from any debt under a Bankruptcy Act of the Imperial Parliament is a complete bar in any country forming part of the British Empire to a debt in any part of the world.

In Continental Europe many countries have entered agreements with neighbors securing the mutual recognition of decisions in bankruptcy and arrangement matters. France has concluded treaties to this effect with Switzerland (1869), Belgium (1899), Italy (1930), and Monaco (1935). All of them provide that the effects of an adjudication order issued in one country shall extend to the territory of the other. The trustee is qualified for conservatory measures as the representative of the bankrupt or of the estate; but for any act of execution, the decree in pursuance of which he acts must be provided with an exequatur. The effects of arrangements extend to the territory of the other state. Decrees confirming arrangements are given the force of res judicata; they can be used as a defence without an exequatur.

A treaty concluded between The Netherlands and Belgium in 1925 operates on a similar basis.

The Scandinavian Bankruptcy-Convention, concluded in 1933 between Denmark, Finland, Iceland, Norway, and Sweden, goes one step further: it secures the effects of universality to bankruptcy declared by a competent court, without the need of an exequatur for executions. An arrangement proceeding begun in one of the countries renders a bankruptcy or arrangement proceeding in another impossible. If the arrangement proceeding results in the confirmation of the plan, the arrangement is binding also in the other countries.

A draft convention signed between Germany and Austria in 1932, but not ratified, was based on similar principles.

144. I. e., the English Bankruptcy Act, 1914, the Irish Bankruptcy and Insolvency Act, 1857, and the Bankruptcy (Scotland) Act, 1913.
145. Ellis v. McHenry (1871) L. R. 6 C. P. 228; but compare Nelson, in re, Dare and Dolphin, ex parte, (1918) I K. B. 459 in the matter of an Irish arrangement.
146. See 7 Travers, op. cit. supra note 8, part II; 8 Lyon-Caen and Renault, op. cit. supra note 86, Nos. 1314-1325; 3 Percou, op. cit. supra note 86.
149. Treaty of June 3, 1930, §§ 20-27; see Audinet in Rev. dr. int. privé 1931, 625; Perroud in Clunet 1934, 274; Ramella in Diritto fallimentare 1932, 813; English translation in 153 League of Nations Treaty Series 141.
152. Treaty of November 7, 1933; see Bentz in Rev. crít. dr. int. 1934, 870; 1935, 914 (text); E. Jaeger in Z. f. Dt. Zivil. Pros. 1939, 441; English translation in 155 League of Nations Treaty Series 133.
In Central Europe and in the Balkans, states recognizing, under the condition of reciprocity, the principle of universality for movables, took care to regulate their relations with neighbors on this basis, either by way of executive order, or by means of treaties. Thus Austria declared the reciprocity as in fact guaranteed with Czechoslovakia, Hungary, and Italy. Treaties with Bulgaria and Yugoslavia were concluded to the same effect. Czechoslovakia entered treaties providing for the same with Yugoslavia, Romania, and Bulgaria, Yugoslavia, also with Bulgaria. None of these treaties deals with the question of the recognition of arrangements. Modern arrangement proceedings were not operating at that time in all the countries concerned.

A treaty between Poland and Czechoslovakia of 1934 may also be mentioned. It deals with the matter in the opposite way. It is said that bankruptcy and arrangement proceedings opened in one state shall not affect the property of the debtor located in the other state. But the treaty provides for publication of the proceedings in both countries and, in addition, service of notice to the Consul of the other State if creditors there residing are involved in the proceedings.

In Latin America, two international conventions exist which deal with conflict of laws in bankruptcy, but in a very different way. The first is the Treaty on International Commercial Law signed at the Congress of Montevideo in 1889 and ratified by Argentina, Bolivia, Paraguay, Peru, and Uruguay. It provides for multiple bankruptcies in cases where the bankrupt has independent commercial establishments in different states (Sec. 36). After the adjudication in one of the states, notice has to be published in the others permitting local creditors to introduce local bankruptcy proceedings within 60 days (Sec. 39). The various proceedings will then be carried out separately under the law of the country in which they take place. But if the bankruptcy proceeding is carried out in one country only, either because the bankrupt has no multiple independent establishments, or because the local

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154. Rechtshilfe Er. 1932, § 56; cf. treaty with Italy of April 6, 1922, B. G. Bl. 1924, Nos. 261-262.
156. Treaty of May 1, 1923, §§ 54-56; B. G. Bl. 100 of 1929.
160. Cited by Daneff (1930) 32 Recueil des Cours de l’Ac. 538.
162. Actas y Tratados celebrados por el Congreso Internacional Sud-Americano de Montevideo (1911) 842; discussion 676, 720; Clunet (1897) 900; English translation in Oregon, Latin-American Commercial Law (1921) 685-687, and in Report of the International American Congress (Washington, D. C., 1890) 876.
creditors did not seek a separate adjudication, all creditors are bound to prove their claims before the court which declared the bankruptcy (Sec. 42). No provision deals with arrangement proceedings which, at that time, were quite unknown.

The Treaties of Montevideo were revised in 1939-1940 by a new Conference held in Montevideo in which Brazil, Chile, and Colombia participated, in addition to the old signatories. The new Treaty on International Terrestrial Commercial Law, signed on March 19, 1940, by Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru and Uruguay, but not yet ratified, maintains in its title VIII on “Bankruptcy” the basic principles laid down in the treaty of 1889. The new Treaty on International Procedural Law, signed by the same seven states, applies in its Title IV these principles to the insolvency of non-merchants. Both treaties declare their rules applicable to arrangement proceedings. But the new treaties carry an alteration worthy of mention: it is now said in Sec. 48 (2) of the new Commercial Treaty that, if there is only one bankruptcy adjudication, either because the bankrupt has no multiple independent commercial establishments, or because the local creditors did not seek a separate adjudication, even in this case the local creditors will have a preferential right to the assets which were located in their country. The Procedural Treaty contains a similar provision (Sec. 20).

The second treaty in Latin America which deals with conflicts of laws in the matter of bankruptcy is the Bustamante Code of Private International Law adopted at Havana in 1928 by the Sixth Pan-American Conference and ratified since then by 15 Latin-American countries. This treaty provides in its title IX on “Bankruptcy”

165. Text in 18 Revista Juridica Argentina “La Ley” (Leg.) 17 (1940); Revista Argentina de Derecho Internacional (1940) 336 et seq.
166. 18 Revista Juridica Argentina “La Ley” (Leg.) 3 (1940); Revista Argentina de Derecho Internacional (1940) 226 et seq.
167. Not contained in the draft prepared by the Argentine Institute of International Law (14 "La Ley" (Leg.) 119); compare Carlos Alberto Alcorta, Los Tratados de Montevideo de 1889 de 1889 (1931) 80.
168. Brazil signed the Treaty with this reservation: The provision allowing local creditors to apply for a separate adjudication of an independent establishment shall apply also to cases where the debtor had but an agency or branch in the country or performed there commercial transactions.
169. For criticism of this strengthening of the local preference rule, see Videla Aranguren in Revista Argentina de Derecho Internacional (1939) 311, n. 19, (1941) 200.
171. Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela.
that, if the insolvent has only one "domicil", there can be only one
bankruptcy or arrangement proceeding comprising all his assets and
liabilities in the contracting States (Sec. 414). But if the debtor has
in different States different commercial establishments which are en-
tirely separate economically, there may be as many proceedings as there
are establishments (Sec. 415). The bankruptcy adjudication is given
extraterritorial effect upon the previous compliance with the formal-
ities of publication and recording which may be required in each State
(Sec. 416). The decree has the effect of res judicata (Sec. 417), and
the trustee must be recognized everywhere (Sec. 418). Only for acts
of execution must the decree of adjudication be provided with an
exequatur (Secs. 417, 423, 424). Arrangements shall have extrater-
ritorial effect, saving rights to a "real action"\(^ {172} \) by a secured cred-
itor who did not accept the arrangement (Sec. 421).

It may be recalled that the United States was represented at the
Sixth Pan-American Conference at Havana. Its delegation reserved
its vote, but expressed the hope of adhering later to a considerable num-
ber of the Code's provisions after a careful study of the Code in all
its provisions.\(^ {173} \) Recently, the Eighth American Scientific Congress\(^ {174} \)
suggested that, after the translation into Spanish and Portuguese of the
Restatement of the Conflict of Laws, measures be taken to cooperate
in a detailed comparative study for the purpose of examining the extent
to which the law of this country can be reconciled with the Bustamante
Code. This resolution was endorsed by the First Conference of the
Inter-American Bar Association\(^ {175} \) and by the 1941 Convention of
the American Bar Association.\(^ {176} \) It is to be hoped that this com-
parative study will also comprise the matter of bankruptcy, in spite of
the fact that the Restatement deals rather sparingly with this matter.\(^ {177} \)

Conclusions

Already in 1883, it had been said by the Supreme Court of the
United States with reference to a foreign "reorganization" proceed-
ing: "the true spirit of international comity requires that schemes of
this character legalized at home be recognized in other countries".\(^ {178} \)

\(^{172}\) Acción real: including personal as well as real property.
\(^{173}\) The International Conferences of American States, 1889-1928 (1931)
371; (1930) 4 Tulane L. Rev. 520.
\(^{174}\) Washington, D. C., May, 1940.
\(^{175}\) (1941) 8 J. D. C. B. Ass'n 205; 39 Revista de Derecho Internacional 34
(1941).
\(^{176}\) (1941) 27 A. B. A. J. 808.
\(^{177}\) See the criticism to this point by Lorenzen and Heilman, The Restatement of
\(^{178}\) Canada Southern R. Co. v. Gebhard, 109 U. S. 527 (1883); discussed page 787
supra.
Since then, arrangements of all kinds, based on a majority vote of the creditors and approved by court, have been introduced everywhere in the legislation as an indispensable instrument in the economic field. Common interest of all countries requires that application of this instrument be not hindered by the existence of creditors residing abroad. Lack of reciprocal recognition of arrangements constitutes a danger for the development of international commerce. This has repeatedly been emphasized by the qualified representatives of the commercial world. It will be even more true in a world that becomes constantly smaller.

Arguments against the reciprocal recognition of arrangements hardly can be formulated, except by those who advocate discrimination between "foreign" and local creditors. On the basis of *par conditio creditorum*, disadvantages resulting from the recognition of foreign arrangements are fully compensated for by the recognition of domestic arrangements abroad. The superiority of one proceeding over multiple proceedings has never been questioned, even in the matter of straight bankruptcy. Concerning bankruptcy, doubt has been expressed about the feasibility of a single administration and liquidation, especially from the technical point of view. The number of treaties already concluded gives a persuasive answer. As to arrangements, the technical aspect is much less complicated; the most intricate bankruptcy problems do not arise in arrangement proceedings. The sole problem still to be resolved, therefore, seems to be: *how to secure the mutual recognition of arrangements.*

One of the ways to bring into operation the recognition throughout the world of the effects of arrangements would be an international convention. In adhering to a general convention, the signatory would be bound to recognize at home arrangements confirmed by the courts of any other of the present and future signatories of the convention. Such an adherence could not be given without a previous careful study of all foreign arrangement laws. Some of the statutes would be found unsatisfactory, *e. g.*, because their provisions concerning publication and notification do not sufficiently protect creditors residing abroad. Insertion into the convention of protective provisions to that effect would be possible. Reluctance of many countries to adopt this type of convention would not be removed. This has been proved by the failure of the Hague convention.

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179. "Of course, the practical impossibility of doing equity between creditors in a fragmentary administration should be sufficiently obvious." McLaughlin, Book Review (1936) 50 HARV. L. REV. 380.
180. The Bustamante Code has the form of such a convention; adherence is open to any country (Art. VI of the Convention).
181. Such a study would be highly instructive and furnish material also for the revision of Chapter XI of the Bankruptcy Act, recommended by the Attorney General’s Committee on Bankruptcy Administration (Report, 1940, 171).
There remains the way of the conclusion of individual treaties. Many countries, e. g., the signatories of the Bustamante Code, have already proved their willingness to come to such agreements. Negotiations with them would have a fair chance of success. Questions like that of jurisdiction and notification, and other questions arising from the study of the law of the treaty partner, would be settled by the treaties. The experience gained abroad with the existing treaties would prove helpful for the elaboration of the treaties. A standard type of treaty probably would result from this work.

The way towards a world-wide recognition of arrangements on the basis of reciprocity could be smoothed by the introduction of the principle itself into the domestic law. The now-existing insecurity as to the effects of foreign arrangements gives no advantage at all and is bad for the development of international commercial relations. Express recognition of the principle would act as an inducement to other countries to adopt a similar policy. Regulation by statute of the recognition problem also would relieve the courts from the burden of deciding on a question of rather political character with so many aspects that it hardly can be dealt with adequately on the occasion of a particular law suit. This applies likewise to the decision on the existence of reciprocity. Whether or not in a foreign country recognition of American arrangements seems guaranteed in law and in fact, is that kind of question where the help of a Ministry of Justice is needed. The decision should not be left to the hazards of a law suit, it should be reserved for the Government. The Government may have the faculty to certify the existence of reciprocity if it deems appropriate to do so. Refusal to certify would, in all probability, result in the opening of treaty negotiations. It is therefore suggested to insert in the Federal Bankruptcy Act a provision stating that the binding effect of foreign arrangements will be recognized under the condition of reciprocity, the existence of reciprocity to be established by treaty or certification of the Secretary of State.

Section VIII, clause 4 of Article I of the Constitution vests in Congress power to "establish . . . uniform laws on the subject of bankruptcies throughout the United States". The bankruptcy clause is to be interpreted, not in the light of the conditions with which framers of the Constitution were familiar, but in the light of what is required under modern conditions in order to deal adequately with the

182. Special attention could be paid to foreign statutes which give a preference on local assets to local creditors.
The relationship existing between embarrassed debtors and their creditors.\textsuperscript{184}

The foregoing review of the effects given abroad to American arrangements shows that the arrangement problem cannot be resolved satisfactorily from the domestic point of view without consideration of its extraterritorial aspects. That is to say that the international aspect of the arrangement and bankruptcy problem cannot be separated from the "subject of bankruptcies", but belongs to it; and a strong argument can be made that a provision designed to deal adequately with this question is included in the "bankruptcy power".

Discussion of the international aspects of arrangements is rather untimely. But to use Pascal's phrase, \textit{le droit a ses périodes}, words frequently recalled after the last war, there is some hope that again "one of the flood seasons is upon us".\textsuperscript{185} May this review of a very unsatisfactory pre-war situation prove of some help to the future framers of a better economic order in the world.


\textsuperscript{185} Cardozo, \textit{A Ministry of Justice} (1921) 35 Harv. L. Rev. 126.