A Reflection on Bankruptcy Jurisdiction: News from the European Common Market, the United States and Canada

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In private international law, as in other areas of "conflict", it is a rare occurrence to be able to report something pleasant. However, of all matters, bankruptcy law has been blessed with such an event. It merits reporting and assessment in connection with problems which have arisen on the "home front".

I. The E.E.C. Convention

The *Charter* of the European Economic Community obliges the member states to facilitate the recognition of judgments rendered by their courts.[1] The six original members decided to do this multilaterally, producing the E.E.C. *Convention on Jurisdiction and the Enforcement of Judgments* of 27 September 1968.[2] The *Convention* provides, among other things, that jurisdictionally improper fora may not be used against residents of the E.E.C. Such fora may have as their bases the plaintiff's nationality (France), the plaintiff's domicile (the Netherlands) and the presence of property for the grant of an *in personam* judgment (Germany). Instead, the general principle is that the defendant must be sued at his domicile, subject to a few generally accepted exceptions, *e.g.*, the place of the tort for actions in tort where a choice is given.

Each member state may continue to use its own rules of jurisdiction against non-residents of the E.E.C. even if the ground is "exorbitant". Judgments rendered on an "exorbitant" basis have been denied recognition outside the state of rendition yet the *Convention* forces the other member

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[1] *Treaty of Rome*, 25 March 1957, 298 U.N.T.S. 11, 87, art. 220

[2] 8 I.L.M. 229 (1969). See K. Lipstein, *The Law of the European Economic Community* (1974), 270-82.

states to recognize and cnforce them. Understandably, this aspect of the *Convention* has not been well rceeived by the rest of the world.[3]

In order to gain admittance to the E.E.C., the United Kingdom agreed in principle to accede to conventions already in force. Accession conventions have been concluded between the old and the three new members — Ireland, Denmark and the United Kingdom.[4] In the Unitcd Kingdom, Parliament must pass an act in order to make the courts apply the provisions of a treaty. Parliament has still to do so for the 1968 E.E.C. *Convention.* It must be remembered in this context that at common law, the recognition and enforcement of judgments rendered in a jurisdictionally improper forum would violate the principles of natural law.[5]

The E.E.C. *Convention* of 1968, as amended, does not cover bankruptcy decrees: due to the particular difficulties inherent in this area of the law it was thought best to deal with the subject in a separate convention. In 1970, after ten years work, a group of experts composed of representatives of the six founding members of the E.E.C. produced a *Draft Bankruptcy Convention*[6] for consideration by the member governments. As feared, the *Draft* followed the example of the 1968 *Judgments Convention.* If the debtor's centre of administration is located in one of the contracting states, then the courts of that state shall have exclusive bankruptcy jurisdiction; if the centre is outside the E.E.C., then the courts of any contracting state in which the debtor has an establishment shall have jurisdiction; in the absence of such an administrative centre or establishment, the courts of any state whose law permits them to declare the debtor bankrupt may do so.[7] Such an adjudication must be given effect in all member states. Local law may allow an adjudication on the basis of the mere presence of property or, possibly, because of the nationality or domicile of the creditor, or of the existence of a debt.

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[3] See Nadelmann, *Clouds over International Efforts to Unify Rules of Private International Law* (1977) 41 (No. 2) Law & Contemp. Prob. 54, 58; von Mehren, *Recognition and Enforcement of Foreign Judgements* [1980] Recueil des Cours de La Haye, t. 2, 11, 100-1; von Mehren, *Recognition and Enforcement of Sister-State Agreements: Reflections on General Theory and Current Practice in the European Community and the United States* (1981) 81 Colum. L. Rev. 1044, 1056.

[4] *Convention on Accession to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 9 October 1978, 18 I.L.M. 8 (1978).

[5] At the Hague Conference on Private International Law in the session of 1966, the United Kingdom delegation had led the fight against the use of exorbitant fora. See Nadelmann, *The Outer World and the Common Market Experts' Draft of a Convention on Recognition of Judgments* (1967) 5 C.M.L. Rev. 409, 419.

[6] *Draft of a Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings* [1975] Comm. Mkt Rep. (CCH) § 6111 [hereinafter the *Draft*]. See the analysis by Lipstein, *supra*, note 2, 284. See also Hillman, *An American Lawyer Looks at the Common Market Bankruptcy Convention* (1974) 48 Am. Bankr. L.J. 369.

[7] *Draft, ibid.*, arts 3-5.

In the United Kingdom, a six member Advisory Committee chaired by Sir Kenneth Cork and composed of accountants and lawyers from England, Scotland and Northern Ireland was appointed to report on the *Draft* of 1970. The *Cork Committee Report*, completed in 1976 and published as a Royal Command Paper,[8] contains evaluations including comparisons of English, Scottish and Irish bankruptcy law. It is a very valuable document. On the important question of the propriety of the provision permitting each state subsidiarily to use its own rules on jurisdiction and requiring member states to recognize adjudications made on such a basis, the Committee was divided. A majority thought they should accept it to "avoid a gap".[9] However, in his *Note of Reservations*,[10] one of the minority, Scottish Law Commissioner A.E. Anton, said the provision was unfair.[11] He also pointed out the risks created: a debtor of the bankrupt party may pay to the foreign trustee in bankruptcy and then, if he has assets outside the E.E.C., he may be forced to pay again.

Work on the 1970 *Draft* was resumed after the submission of the *Cork Committee Report*, with delegations from all nine member states present, and in June 1979 a revised *Draft* was relcased.[12] The objectionable part of the jurisdictional rule has disappeared. Bankruptcy declared on a local law basis does not come under the *Convention*, and thus need not be given effect in the other member states.[13] States which are not members of the E.E.C. have undoubtedly felt a certain relief at the result. Commissioner Anton's insistence on due process produced results and the furor created by the 1968 *Judgments Convention* likely had an important influence on the outcome.

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[8] *The E.E.C. Preliminary Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions, and Similar Proceedings*, Cmnd 6602 (1976), 141.

[9] *Ibid.*, 27-8, paras 119-21.

[10] *Ibid.*, 105.

[11] *Ibid.*, 123-4, paras 55-60.

[12] Commission of the European Communities, *Approximation of Laws*, III/D/72/80.

[13] E.E.C. *Bankruptcy Convention, Draft* of 1970, Article 5 — Jurisdiction based on national law: "Where neither the centre of administration nor any establishment is situated in a Contracting State, the courts of any Contracting State whose law permits them to declare the debtor bankrupt shall have jurisdiction to do so." *Draft* of 1980, Article 5: "Where neither the centre of administration nor any establishment is situated in a Contracting State, this Convention will not affect the competence of the court of any Contracting State to declare the debtor bankrupt if its law so permits. A bankruptcy thus declared shall not fall within the scope of this Convention." From the Explanatory Note: "Article 5, whilst not denying the right of the courts of the Contracting States to exercise other grounds of jurisdiction which might be regarded as being 'exorbitant', ensures that bankruptcies arising from the exercise of such jurisdiction, will have national effect only."

Qualified observers consider the prospects of the *Draft* to be poor.[14] Agreement on important points has not yet been reached even among the six original members. The addition of the United Kingdom — with its three separate bankruptcy jurisdictions — raises legal and practical problems of unusual difficulty. As Mr Anton said, different approaches *are* possible. Real progress could be made immediately by local removal of provisions or practices which help local creditors to obtain more than their equal share.[15]

II. The American and Canadian Law

It is not inappropriate to compare these events in Europe in the matter of bankruptcy jurisdiction with the current status of the American law on the subject. Although it is difficult to believe, the *Bankruptcy Reform Act of 1978* has produced a jurisdictionally improper basis for bankruptcy adjudications, namely, the presence of property in the United States, without the necessary limitation of the effects of such an adjudication to local assets.[16] Attacks on the *Act* are clearly invited.

Since its enactment, the *Bankruptcy Act of 1898*, which was superseded by the *Reform Act of 1978*, allowed the assumption of bankruptcy jurisdiction over non-resident debtors with assets in the United States to bring them to equal distribution among all creditors.[17] The *Act of 1876*, which had expired in 1878, did not do so. Judge John Lowell placed a provision to that effect in the draft of new federal bankruptcy legislation he prepared at the request of the Board of Trade of Boston. However, the Bankruptcy Bill of 1882, which emerged out of the "Lowell Bill" of 1880, was defeated in the House of Representatives.[18] Hence, some early recognition was given to the idea that local assets should not go only to those creditors

[14] It should be noted that the *Draft* fails to deal with the problems arising from the location of assets outside the E.E.C. The law of the place of adjudication will govern. See "The Common Market Bankruptcy Convention Draft: Foreign Assets and Related Problems", in K. Nadelmann, *Conflict of Laws: International and Interstate* [:] *Selected Essays* (1972), 340.

[15] For a discussion of the status of the law, see Nadelmann, *Codification of Conflicts Rules of Bankruptcy* (1974) 30 Ann. suisse de droit int'l 57; reprinted in *Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess., 1457 (1976), [hereinafter Hearings on H.R. 31 and H.R. 32].

[16] *Act of Nov. 6, 1978*, Pub. L. No. 95-598, 92 Stat. 2549, 11 U.S.C. §§ 109, 541 (Supp. II 1978) which deals with "Who may be a debtor" and "Property of the Estate", respectively. See also *Act of Nov. 6, 1978*, § 241(a), 28 U.S.C. § 1471(e) (Supp II 1978) (to take effect 1 April 1984): "The bankruptcy court in which a case under title II is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case."

[17] *Act of July 1, 1898*, ch. 541, § 2(a)(1), Pub. L. No. 55-541, 30 Stat. 545, 11 U.S.C. § 11(a)(1) (1976). See Nadelmann, *The National Bankruptcy Act and the Conflict of Laws* (1946) 59 Harv. L. Rev. 1025, 1040.

[18] See C. Warren, *Bankruptcy in United States History* (1935), 129-30.

who win the race of diligence.[19] The State of Maine added a "John Lowell clause" to its insolvency legislation in 1891.[20] Still more important, New York State had during the early part of the last century produced a procedure under which local assets of non-resident debtors could be brought to equal distribution among all creditors.[21] The federal *Bankruptcy Act of 1898* provided the possibility on a national basis.

It was at first unclear, however, whether the *Bankruptcy Act of 1898* gave American trustees in bankruptcy the power to claim assets located abroad. Following the example of English bankruptcy legislation, a "property wherever located" clause was formally added to the "title to property" section of the *Act* in 1952.[22] No exception was stated for the case of an adjudication against non-residents based on mere presence of property within the United States. A specific provision stating the obvious was at that time deemed unnecessary. The source which led to the amendment had dealt with the subject in clear terms.[23] In hindsight, reliance on what had originally appeared to be obvious involved poor judgment. A considerable degree of ambiguity was produced, especially for readers of the *Act* who are not familiar with the field.

The preparation for the *Bankruptcy Reform Act of 1978* furnished an occasion to set things straight. However, confusion developed from the start. The first *Bill*,[24] introduced in 1973, based on a draft prepared by the

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[19] See Lowell, *Conflict of Laws as Applied to Assignments for Creditors* (1888) 1 Harv. L. Rev. 259, 262, 264.

[20] Maine amended its *Insolvent Law of 1878* in 1891, making it applicable to non-residents with property in the state. See Me Rev. Stat., ch. 70, §17 (1883), am. *Act of Mar. 27, 1891*, ch. 109. Jurisdiction over non-resident assets is discussed in the context of New York in *Matter of Coates & Hilliard* 13 Barb. 452, 458, 460 (Gen. Ct, N.Y. 1852).

[21] This was achieved by transformation of the "foreign attachment" process into an insolvency proceeding. See *Matter of Coates & Hilliard, ibid.*

[22] *Act of July 7, 1952*, ch. 579, § 23, Pub. L. No. 82-456, 66 Stat. 429-30, amended *The Bankruptcy Act of 1898*, § 70a, 11 U.S.C. § 110(a) (1976). See J. MacLachlan, *Law of Bankruptcy* (1956), 184; Nadelmann, *Revision of Conflicts Provisions in the American Bankruptcy Act* (1952) 1 Int'l & Comp. L.Q. 484. "Property wherever located", meaning "property wherever located in the United States", had appeared in the depression legislation of the 1930s and went into the corporate reorganization chapters of the *Chandler Act of June 22, 1938*, ch. 575, §1, Pub. L. No. 75-696, 52 Stat. 884, 11 U.S.C. § 511 (1976). See Mussman & Riesenfeld, *Jurisdiction in Bankruptcy* (1948) 13 Law & Contemp. Prob. 88, 97-8.

[23] Nadelmann, *supra*, note 17, 1041: "As a matter of legal principle, when jurisdiction is assumed over non-residents solely on the basis of their property within the country, the jurisdiction is limited to affecting rights in that property.... Title to other than the local assets should, therefore, not be vested in the trustee in proceedings against non-residents." See also Nadelmann, *Revision of Conflicts Provisions in the American Bankruptcy Act, ibid.*, 486.

[24] *A Bill to establish a uniform law on the subject of bankruptcies* H.R. 10792, 93d Cong., 1st Sess., §4-601 (1973) [hereinafter the *Commission Bill*].

Commission on the Bankruptcy Laws of the United States created by Congress in 1970, omitted the "property wherever located" clause added to the *Act* in 1952, apparently due to an oversight. The clause reappeared in the Bill introduced on 4 January 1977, but without excluding the cases where mere presence of assets is the basis for the adjudication.[25] In an article[26] and an appearance before a subcommittee of the House Judiciary Committee[27] I urged that the limitation be added to the legislation. In the next Bill, introduced on 23 May 1977,[28] the limitation appeared but only for the case of bankruptcy adjudication of a foreign bank having assets in the United States. However, the limitation did not reappear in the next Bill, introduced on 11 July 1977,[29] which lead eventually to the *Reform Act of 1978*. The best that can be said is that those in charge did not know what they were dealing with.[30]

Where the only jurisdictional basis for an adjudication is property in the United States, it is exorbitant and, of course, futile for an American trustee in bankruptcy to claim assets abroad. Recent banking cases in the New York courts demonstrated the system in operation.[31] Jurisdiction is assumed to protect the interests of all creditors. A local proceeding takes place, or, depending upon the case, the assets may be released for disposition in the domiciliary bankruptcy court.[32]

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[25] H.R. 6, 95th Cong., 1st Sess., § 541 (1977).

[26] Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company* (1977) 52 N.Y.U. L. Rev. 1, 22.

[27] Supplement, 10 January 1967, to Memorandum of 3 May 1975, *Hearings on H.R. 31 and H.R. 32, supra*, note 15, 1453-6.

[28] H.R. 7330, 95th Cong., 1st Sess., §303 (1977): "(2) notwithstanding section 541 of this title, in such an involuntary case [against a foreign bank] property of the estate includes only property that is located in the United States. (3) Such an involuntary case does not bind the debtor, and is solely an exercise of exorbitant [*sic*] jurisdiction against the property specified in paragraph (2) of this subsection."

[29] H.R. 8200, 95th Cong., 1st Sess. (1977). Section 541 entitled "Property of the Estate" remained unchanged: "The commencement of a case creates an estate. Such estate is comprised of all the following property wherever located."

[30] *Cf.* Klee, *Legislative History of the New Bankruptcy Code* (1979) 28 De Paul L. Rev., reprinted in (1980) 54 Am. Bankr. L.J. 275, 293.

[31] See Nadelmann, *supra*, note 26; *Israel-British Bank (London) Ltd* v. *Fed. Dep. Ins. Corp.* 536 F. 2d 509 (2d Cir. 1976), *rev'g* 401 F. Supp. 1159, *cert. denied* 429 U.S. 978 (1976), and the notable decisions involving Finabank of Geneva, *Banque de Financement* v. *First National Bank of Boston* 568 F. 2d 911 (2d Cir. 1977).

[32] A good illustration of the working of the American system under *The Bankruptcy Act of 1898*, as am., is *Israel-British Bank (London) Ltd* (1978) 52 Am. Bankr. L.J. 371 (S.D.N.Y. (bankruptcy) 1978). The Israel-British Bank had not done business in the United States but kept some funds in New York. At the petition of the London receiver, bankruptcy proceedings were opened in New York to protect the American assets. After removing the preferences and assuring that the rights and conveniences of local creditors would not be prejudiced, the assets were allowed to go to London for disposition under a

Another aspect of the American *Bankruptcy Reform Act* capable of creating confusion in the international arena is its definition of "foreign proceedings".[33] "Foreign proceedings" are defined as those which take place in a "foreign country in which the debtor's domicile, residence, principal place of business, or *principal assets* were located at the commencement of such proceedings for the purpose of liquidating an estate, adjusting debts by composition, extension, discharge or effecting a reorganization".[34] The appearance of "principal assets" together with the classic trio of principal place of residence, domicile and residence is surprising. The location of principal assets is not used as a basis for bankruptcy jurisdiction anywhere else in the world. The definition misleads and has lead to considerable confusion already.

In the United States, "location of principal assets" is a well-known legal term.[35] The term first appeared in the legislation of the 1930s. Location of the principal place of business, of the principal assets, and of the place of incorporation, was made available for venue purposes regarding legal persons. "Location of principal assets", used by courts in trying to locate the principal place of business, was intended to counterbalance the requirement of "place of incorporation" used by courts when looking for the location of the principal place of business — which proved unsuitable for American conditions and was later dropped altogether.[36] "Location of principal assets" survived as a venue provision in its own right. It was used for venue in the corporate reorganization chapter added to the *Bankruptcy Act* in 1938,[37] and reappeared in the *Bankruptcy Rules*,[38] but was never incorporated into the part of the *Act* covering straight bankruptcy. However, it did appear in a

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court-approved creditors composition agreement. This was done in accord with *The Bankruptcy Act of 1898*, § 2(a)(22), 11 U.S.C. § 11(a)(22) (1976) and Rule 119 of the *Rules of Bankruptcy Procedure*, 11 U.S.C. Appendix (1976), whereby a court may suspend bankruptcy proceedings over the American assets of a non-resident and allow those assets to be administered according to the principal, domiciliary proceeding. Such powers also exist under the *Act of Nov. 6, 1978*, 11 U.S.C. § 305 (Supp. II 1978). See Nadelmann, *Israel-British Bank (London) Ltd: Yet Another Trans-Atlantic Crossing* (1978) 52 Am. Bankr. L.J. 369.

[33] The "Definitions" section first appeared in H.R. 7330, 95th Cong., 1st Sess. (1977).

[34] *Act of Nov. 6, 1978*, 11 U.S.C. §101 (19) (Supp. II 1978) [emphasis added]. See also *Act of Nov. 6, 1978*, 28 U.S.C. §1472 (Supp. II 1978) (to take effect 1 April 1984).

[35] For early discussions of "principal assets" see J. Gerdes, *Corporate Reorganizations* (1936), § 68; Weiner, *Corporate Reorganization: Section 77 of the Bankruptcy Act* (1934) 34 Colum. L. Rev. 1173, 1175-6; Note, *Venue Under the Chandler Bill in Corporate Bankruptcy and Reorganization Proceedings* (1938) U. Chi. L. Rev. 272, 275-8.

[36] Compare *Act of June 7, 1934*, ch. 424, § 77B (a), Pub. L. No. 73-296, 48 Stat. 912 with *Act of June 22, 1938*, 11 U.S.C. § 528 (1976).

[37] *Act of June 22, 1938*, 11 U.S.C. § 528 (1976).

[38] Rule 116(a)(2) of the Federal *Rules of Bankruptcy Procedure*, 11 U.S.C. Appendix (1976). The "principal assets" venue is available in the case of corporations and partnerships but not for natural persons.

1952 amendment[39] of the transfer section of the *Act* which says that, if the interests of the parties will be best served in a particular instance, the judge may transfer a case to a bankruptcy court in another jurisdiction — regardless of the location of the principal assets, principal place of business, or the residence of the bankrupt.[40] It is difficult to establish to what extent the "principal assets" venue is relied on in practice. Creditors can at best only guess their location. The "principal place of business" is far easier to identify.

It is interesting and informative to compare the Canadian law on the subject.[41] The *Bankruptcy Act, 1949* has an equivalent of the "property wherever located" clause.[42] However, the American problem concerning the application of the clause to cases where mere presence of assets in the basis for an adjudication does not arise. The Canadian *Bankruptcy Act* does not allow the assumption of jurisdiction over non-residents on the basis of mere presence of property.[43] A serious consequence is the impossibility of removing an attachment or garnishment which would be a preference under the *Act*.[44] A provision in the Canadian Bankruptcy Bill pending before Parliament would fill the gap.[45] Property would be a jurisdictional basis,[46]

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[39] *Act of July 7, 1952*, 11 U.S.C. § 55 (1976).

[40] *Act of Nov. 6, 1978*, 28 U.S.C. § 1475 (Supp. II 1978) (to take effect 1 April 1984) allows transfer to the bankruptcy court of another district in the interest of justice and for the convenience of the parties.

[41] See, in general, L. Duncan & J. Honsberger, *Bankruptcy in Canada*, 3d ed. (1961); J.-G. Castel, *Canadian Conflict of Laws* (1975), vol. 1 and (1977), vol. 2; J.-G. Castel, *Droit international privé québécois* (1980). See also L. Houlden & C. Morawetz, *Bankruptcy Law of Canada* and its supplement *Bankruptcy Law of Canada* [:] *Current Service* (1979).

[42] S.C. 1949, c. 7, s. 2(k).

[43] See Castel, *supra*, note 41, vol. 2, 491-2; but see *Companies — Creditors Arrangement Act*, R.S.C. 1970, c. C-25, ss. 2, 9(1); for discussion of the *Act*, see W. Fraser & J. Stewart, *Company Law of Canada*, 5th ed. (1962), 468, 473.

[44] In the common law provinces, *Galbraith* v. *Grimshaw* [1910] A.C. 508 (H.L.) would be followed. The House of Lords denied a Scottish trustee's claim to funds in London garnished by a local creditor before the opening of the proceedings in Scotland. Garnishment was void as a preference under Scottish law and could have been voided under English law had bankruptcy been declared in England. See J. Morris, *The Conflict of Laws*, 2d ed. (1980), 389-90; A. Anton, *Private International Law: A Treatise from the Standpoint of Scots Law* (1967), 442. See also Castel, *supra*, note 41, vol. 2, 504, citing to *Galbraith*: "The movable property passes subject to any existing charges recognized by Canadian law. However, the foreign trustee's title prevails if the foreign adjudication in bankruptcy preceded the attachment or garnishment of the debt in Canada." See Nadelmann, *supra*, note 26, 25-6. In Québec, powers of a foreign trustee in bankruptcy are not recognized. See Castel, *supra*, note 41, vol. 2, 505.

[45] Bill C-60, *An Act respecting bankruptcy and insolvency*, 30th Parl., 1st Sess., 5 May 1975, 1st reading. It was withdrawn, amended and re-submitted as Bill S-9, *An Act respecting bankruptcy and insolvency*, 31st Parl., 1st Sess., 8 November 1979, 1st reading.

[46] See Bill C-60, s. 2 for a definition of "locality of the debtor" and s. 9 entitled "Application of the Act".

and the courts would be given the power to limit the proceedings to assets in Canada.[47] The exercise of jurisdiction is made discretionary[48] as in the American *Bankruptcy Reform Act of 1978*.[49]

For the purposes of this comment, the Canadian law with respect to venue is particularly interesting.[50] In the *Bankruptcy Act* presently in force, the "locality" of a "debtor" means the principal place

> 2 (a) where the debtor has carried on business during the year immediately preceding his bankruptcy,
> (b) where the debtor has resided during the year immediately preceding his bankruptcy,
> (c) in cases not coming within paragraph (a) or (b) where the greater portion of the property of such debtor is situated.[51]

In contrast to current American law, venue under s. 2(c) is not made available in its own right, but subsidiarily. It will require some ingenuity to find the "principal place" where "the greater portion of the property" is located. The same is true for identification of "principal assets" under the American *Act*. One can live with it as long as only the question of venue is at issue and the power to transfer is limited to transfers within the same country. The important thing is that a transfer not affect the substantive rights of the parties.

Turning to international jurisdiction, the trap of using the presence of property as a basis for jurisdiction on the same level as "principal place of business" and "residence" seems to have been avoided in the Canadian law. In American bankruptcy law, the distinctive, subsidiary character of the basis was maintained until the *Reform Act of 1978*;[52] indeed, it wat not lost entirely in the early stages of the reform work. The Commission Bill of 1973 still spoke of "Applicability of the Act to Persons and Property".[53] The *Reform Act*, on the other hand, provides: "[O]nly a person that resides in the United States, or has a domicile, a place of business, or property in the United States, ... may be a debtor".[54] The ambiguity makes misunderstandings easy.

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[47] See Bill C-60, s. 316 (8).

[48] Castel, *supra*, note 41, vol. 2, 493.

[49] *Act of Nov. 6, 1978*, 11 U.S.C. § 305 (Supp. II 1978).

[50] See Duncan & Honsberger, *supra*, note 41, 39.

[51] R.S.C. 1970, c. B-3, s. 2.

[52] *Bankruptcy Act of 1898*, §2(a)(1), 11 U.S.C. §11 (1976). See Nadelmann, *supra*, note 15, 75-6.

[53] *Commission Bill, supra*, note 24 § 1-103, entitled "Applicability of Act to Persons and *Property*": "Relief may be obtained by or directed under this Act in respect of a debtor or his *estate* if he resides or has his domicile or place of business within the United States" [emphasis added].

[54] *Act of Nov. 6, 1978*, 11 U.S.C. § 109(a) (Supp. II 1978). The Commission Report, H.R. Doc. No. 93-1371, 93d Cong., 1st Sess. (1973) does not explain why the list was started with

III. The Draft Convention

Notice must be taken of negotiations for a bankruptcy treaty between Canada and the United States which have run into difficulties concerning the jurisdictional approach to be used. A draft treaty released on 29 October 1979 has been made available on both sides of the border.[55] In his treatise on Québec private international law, J.-G. Castel calls the draft "original".[56] This is certainly the case. Jurisdiction would go to the state within whose territory the greater portion of the debtor's property is located. Immoveable and moveable property is "conclusively presumed" to be located where it is physically situated. Shares, debts and other forms of incorporeal property are "conclusively presumed" to be located at the debtor's principal place of business, or his residence if he is not a merchant. Rules are given for determination of the value of property. If excessively lengthy or expensive evaluations are foreseeable, the court sitting on the case may retain jurisdiction.

A "location of the greater portion of the assets" test is thus promoted for the assignment of bankruptcy jurisdiction between Canada and the United States. Yet, the draft stops half-way. By way of unrebuttable presumption, large parts of the assets are to be considered as located at the principal place of business of the debtor, which is the proper place for the assumption of bankruptcy jurisdiction. The possible extent of future legal acrobatics can only be left to speculation.[57]

Business clearly involves the taking of risks, but here the creditor is asked to take a gamble on the law of the location of the debtor's assets at an uncertain future time, which may severely limit the amount he can recover. Practically, this cannot be defended, because property is volatile. Legally, it is completely untenable. The creditor's claim is against the totality of the assets. The source of the idea may well have been the erroneous treatment of "property" as jurisdictional basis in the American *Bankruptcy Reform Act.*

"Principal property" is also used as a test in the draft: the Convention is to apply only if the principal property is in one or both of the countries,

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"residence" rather than "principal place of business", and why "principal" was dropped from "principal place of business". Section 109, with "property" emphasized, is mentioned and discussed in Hanisch, *Aktuelle Probleme des Internationalen Insolvenzrechts* (1980) 36 Ann. suisse de droit int'l 109, 119, fn. 30.

[55] Becker, *Transnational Insolvency Transferred* (1981) 29 Am. J. Comp. L. 706, 712-3. For a summary of the draft see Castel, *Droit international privé québécois, supra,* note 41, 443. See also Houlden & Morawetz, *Current Service, supra,* note 41, "New Developments", Rel. 5, April 1981, reprinting the summary of the draft given in Superintendent of Bankruptcy, *Information Statement No. 9,* 7 September 1979.

[56] Castel, *ibid.,* 444.

[57] The switching of litigation to other courts is allowed for controversies whose resolution is capable of being adjudicated by a court other than the one in which the case is pending.

principal property being defined as "property fairly considered of greater value than in any other state". Leaving the question of practicality aside, there is no apparent reason for this limitation in the draft.

Bankruptcy jurisdiction has traditionally gone to the court of the debtor's principal place of business.[58] In treaties dealing with bankruptcy that place is also taken as the logical point of departure.[59] Yet, the law of that court cannot be made the governing law for all purposes, since the debtor may have been active in more than one state. Conflict of laws' principles can suggest that foreign law be applied and hence modern treaties include choice of law rules. The draft discussed here merely says that the rules of private international law have to be considered, which is self-evident. More help should be provided by a treaty.

The draftsmen may, in this case, have assumed that the law in the United States and Canada is more or less the same. This is unrealistic. Both the bankruptcy legislation and the substantive law on which it is based differ greatly.[60]

The great division, for international bankruptcy problems, is between cases where both assets and creditors are located abroad and cases where no local creditors are within the foreign court's jurisdiction. American courts have not helped creditors located abroad against their own trustees in bankruptcy.[61] When bankruptcy is declared abroad, and assets and creditors are located within the court's jurisdiction, the domestic creditors have a right to expect their legal system to protect their interests. The relinquishment of jurisdiction should only occur with knowledge of all the facts. An alternative is that multiple proceedings may be found to be preferable because of the conditions of the case.

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[58] See Nadelmann, *Bankruptcy Treaties* (1944) 93 U. Pa. L. Rev. 58.

[59] Ibid., 72. The same general approach is contained in the E.E.C. *Draft Convention, supra*, note 6.

[60] For an argument over the merits of the floating charge, an English security device used in Canada but not in the United States, see Rubin, *The U.S. Creditors' Unfair Advantage Over Canadian Creditors* (1979) 84 Com. L.J. 470. The floating charge is described in, *e.g.*, Muir Hunter, "Appointments over the Property of a Company — Termination of Receivership" in R. Walton, *Kerr on the Law and Practice as to Receivers*, 15th ed. (1978), chap. 18. See also Abel, "Has Article 9 Scuttled the Floating Charge?" in J. Ziegel & W. Foster, *Aspects of Comparative Commercial Law: Sales, Consumer Credit, and Secured Transactions* (1969), 410. For American conflicts rules see Leflar, *Conflict of Laws under the U.C.C.* (1981) 35 Ark. L. Rev. 87.

[61] See Nadelmann, *supra*, note 17, 1046. *Cf.* J. Story, *Commentaries on the Conflict of Laws*, 2d ed. (1841), §414; and see *Cornfeld* v. *Investors Overseas Services, Ltd* 471 F. Supp. 1255 (S.D.N.Y. 1979), *aff'd* 614 F. 2d 1286 (2d Cir. 1979).

Control over local assets can make all the difference, as was shown in the New York phase of the *Herstatt* case,[62] which ended with the agreement by all parties involved on a scheme for the distribution of more than $160 million in New York banks. An important issue in the failure of the Cologne bank was the treatment of claims resulting from incomplete foreign exchange spot-transactions, for which funds in the New York banks were to furnish the counterpart. The release of the funds to proceedings in Cologne would have led to the reduction of these claims to ordinary claims. The possibility of a bankruptcy adjudication in New York, involving the application of American (federal or state) law possibly more favourable to the issue, produced sufficient pressure for a solution accepted as fair by the banking world involved.

For "simple border" cases, administration in one proceeding by the court of the debtor's principal place of business is normally the best solution. Where several establishments are involved, multiple proceedings are likely to be preferable.[63] A good treaty must provide a satisfactory treatment of all types of cases but the draft, with its single administration requirement, does not do so.

The great advantage of the traditional, common law grant of wide discretionary powers to judges in bankruptcy proceedings is that it can make treatment of complex problems much less difficult.[64] The American bankruptcy legislation has recognized this principle, so that the judge has the power to decide whether local assets should be permitted to go abroad.[65] The proposed Canadian Bankruptcy Bill would have the same effect.[66] This possible approach has not been overlooked in the work that has been done on international bankruptcy law. The drafts produced at the Colonial Conference held in London in 1887 are of special interest.[67] The

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[62] See Becker, *International Insolvency: The Case of Herstatt* (1976) 62 A.B.A.J. 1290; Nadelmann, *supra*, note 26.

[63] See, *e.g.*, *Re E.H. Clarke & Co* [1923] 1 D.L.R. 716 (Ont. S.C.); Duncan & Honsberger, *supra*, note 41, 40.

[64] A good example is the long-established, identical English and Scottish provisions allowing transfer to the jurisdiction where the majority of the creditors (in number and value) reside, if the location of the property, *inter alia*, suggests that the estate ought to be distributed under the law of another jurisdiction. See *An Act to Consolidate the Law Relating to Bankruptcy, 1914*, 4 & 5 Geo. V, c. 59, s. 12; *Bankruptcy (Scotland) Act, 1913*, 3 & 4 Geo. V, c. 20, s. 43; A. Anton, *supra*, note 44, 434. For an historical perspective see W. Bell, "On the Bankruptcy Laws of England and Scotland" in National Association for the Promotion of Social Science, [1860] Transactions, 183, 189-90.

[65] See *supra*, note 32, *passim*.

[66] Bill C-60, ss. 316(3), (5).

[67] *Proceedings of the Colonial Conference* (1887), vol. 2, chap. 2, "Legal Questions". See Moore, *Conflict of Laws within the Empire: Bankruptcy and Winding Up* (1906) 7 J. Comp. Ly (N.S.) 384, 390; Nadelmann, *supra*, note 58.

recommendation of the British delegation at the 1925 Hague Conference on Private International Law pointed in the same direction.[68] Perhaps the most important work in this area is the attempt at resolving problems in the field of receiverships and decedents' estates matters by the American Conference of Commissioners on Uniform State Laws and the Canadian Conference of Commissioners on Uniformity of Legislation.[69]

Encouraged by a remark made by a Canadian Supreme Court Justice at the turn of the century,[70] this writer suggested the need for a treaty between Canada and the United States in 1944.[71] John Honsberger has more recently urged the better co-ordination of legislation from a Canadian perspective.[72] The Commission on American Bankruptcy Law, instituted in 1970, received recommendations from several committees of the National Bankruptcy Conference to the effect that a treaty should be drafted subsequent to parallel local adjustment of the respective bodies of law.[73] This was followed by a similar official Canadian government pronouncement.[74]

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[68] See Nadelmann, *ibid.*

[69] See *Uniform Probate Code* 8 U.L.A. § 3-717 (1969). Contrary to what is the case in Canada, decedents' estates are not covered by the American bankruptcy legislation. See Nadelmann, *Insolvent Decedents' Estates* (1951) 49 Mich. L. Rev. 1129, 1150. Also of interest is the Hague Conference on Private International Law, *Convention Concerning the International Administration of Estates of Deceased Persons* 11 I.L.M. 1277 (1972).

[70] Mr Justice Nesbitt in *Universal Congress of Lawyers and Jurists* [:] *Records* (1905), 226.

[71] Nadelmann, *International Bankruptcy Law: Its Present Status* (1944) 5 U.T.L.J. 324, 351.

[72] Honsberger, *The Need for a Rapprochement of the Bankruptcy Systems of Canada and the United States* (1972) 18 McGill L.J. 147.

[73] These recommendations are in the files of the Commission (now in the National Archives, Washington D.C.).

[74] Canada: Department of Corporate and Consumer Affairs, *Corporate Bureau Bulletin* (November 1977), 69, 70-1. John Howard, acting deputy minister of C.C.A., addressed the 51st annual meeting of the National Conference of Referees in Bankruptcy in Québec on 9 September 1977: "Although the present bankruptcy laws of the United States and Canada both contain provisions relating to international bankruptcies, there is no doubt that these provisions are very much on the periphery of each statute. The growing internationalization of business requires that these issues be moved much closer to centre stage.
"The basic policy of my Department is to set out in the proposed new bankruptcy law flexible international bankruptcy provisions that will enable articulation of the Canadian law with the law of any foreign state that deals with bankruptcies in a similar manner.
"But because of the different treatment in each country of the claims of secured creditors and preferred creditors, fraudulent preferences, the status of a bankrupt, the release of debts, and the discharge of the debtor, it is impossible ever to achieve complete harmonization, which presupposes completely uniform policies with respect to each of these basic issues.
"There is, however, real hope for at least much better coordination of the application of the several domestic bankruptcy laws that relate to a multinational case, particularly where the

The difficulties with the current draft should not lead to abandonment of the project. Comfort can be taken from the responsible attitudes of the courts on both sides of the border. Contrary to an *obiter dictum* in *Re C.A. Kennedy Co. and Stibbe-Monk Ltd*[75] that the attitude of some American courts toward recognition of foreign receivers is "parochial in the extreme", recent American decisions giving assistance to Canadian receivers demonstrate that the opposite is true.[76] In a clash between local creditors and the demands of a foreign trustee, the American conflicts rule does favour the creditors; but local proceedings are available to secure equal

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laws applicable are those of the United States and Canada. Both economies are based on similar values and market structures. Both are creditor countries. Each is the largest trading partner of the other. And each has demonstrated for a number of years that it is more concerned about achieving equitable treatment for its domestic creditors than in achieving some advantage for those creditors in any multinational insolvency proceedings.

"To date, however, we have not succeeded to coordinate our statutes. Where a bankrupt carries on business or has property in each country, usually the only solution at present is to conduct concurrent bankruptcy proceedings in each country, which not only entails complicated conflict of law issues but also total duplication of administration.

"There are three basic approaches to resolve this problem. First, we can continue to administer concurrent bankruptcies but seek to achieve as much cooperation as possible among the trustees in each jurisdiction. This approach has worked reasonably well in the case of the IOS financial empire, which involves several trustees and liquidators who administer some $500 million dollars of IOS Group assets in as many countries. Their activities are coordinated by an international committee made up of representatives of the SEC, the Luxembourg Banking Commission, the Bahamas Central Bank, the Québec Securities Commission, the Ontario Securities Commission, and my Department. But few bankruptcy cases are either large enough or dramatic enough to elicit this kind of attention and international cooperation.

"The second approach is to seek at least a bilateral bankruptcy treaty between the U.S. and Canada. This approach was recommended as long ago as 1905 by Mr. Justice Nesbitt of the Supreme Court of Canada in an address to the Universal Congress of Lawyers and Jurists in St. Louis, Missouri. It was also advocated more than 30 years ago by Professor Kurt Nadelmann, who was referring specifically to the United States and Canada. And it was recommended more recently in the Canadian Brankruptcy Report of 1970. But the final settlement of the terms of such a convention, because of the different policies in each country, is necessarily a complicated, controversial and slow process.

"While I strongly support any attempt to achieve a bilateral bankruptcy treaty between the United States and Canada, I view that as the long-term solution. In the meantime, as stated, my Department will advocate the enactment of flexible statutory provisions that will give a Canadian bankruptcy court broad discretion to permit coordination of insolvency proceedings in Canada with concurrent bankruptcy proceedings in another jurisdiction, particularly where the centre of gravity of the proceedings is in that other jurisdiction."

[75] (1976) 74 D.L.R. (3d) 87, 95 (Ont. H.C.) *per* O'Leary J. On the conflict of laws problem see Collins, *Floating Charges, Receivers and Managers and the Conflict of Laws* (1978) 27 Int'l & Comp. L.Q. 691; see also the United Kingdom report on the E.E.C. *Preliminary Draft, supra*, note 8 ss. 364-7.

[76] *Clarkson Co.* v. *Shaheen* 544 F. 2d 624 (2d Cir. 1976); *Cornfeld* v. *Investors Overseas Services, Ltd, supra*, note 61; *cf. Clarkson Co.* v. *Rockwell International Corp.* 441 F. Supp. 792 (N.D. Cal. 1977)

distribution of local assets — either in the local proceedings or through release of the funds to the foreign trustee, should the conditions of the case allow it.[77]

The marshalling of assets in cases of multiple proceedings is resorted to in both the United States and Canada, to secure equal distribution.[78] The principle has been spelled out in Canada since the remarkable decision in *Re Breakwater Co.*,[79] which followed *Banco de Portugal* v. *Waddell*,[80] the leading English case in this area of the law. In the United States the marshalling rule is statutory; the Bankruptcy Bill proposed in the Canadian House of Commons would make it statutory in Canada as well.[81]

The law in Canada and the United States with respect to bankruptcy and conflict rules varies considerably and unrelated domestic attempts to minimize differences will likely prove unhelpful. The consequences of treaty rules must be capable of anticipation with a fairly high degree of probability; preparatory comparative law work in this area is, consequently, indispensable.

The bankruptcy treaty between the United States and Canada has been promoted for solid, practical reasons. The new Canadian bankruptcy legislation and corrections on the American side must first be awaited before real progress can be made. At the same time, the proposed treaty should not be abandoned due to difficulties with the draft of 29 October 1979, which is of a preliminary nature and not sanctioned by the respective governments.

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[77] *Act of Nov. 6, 1978*, 11 U.S.C. §304 (Supp. II 1978). Among the "guides" given to the judge is "comity" in § 304(c)(5), which was added by Congress at the last moment: see 124 Cong. Rec. 17, 408 (1978) (statement of Sen. De Concini) and 124 Cong. Rec. H11-866 (daily ed. Oct. 6, 1978) (remarks by Rep. Edwards). See Nadelmann, *supra*, note 26, 34-5.

[78] See *Re Standard Insurance Co.* [1968] Queens. St. R. 118 (S.C.), an important Australian decision on marshalling. A New Zealand company was wound up in New Zealand. It had also done extensive business in Australia. Liquidations were opened in the states concerned and all liquidators agreed on a scheme of proceeding. Local priority claims would be paid and the surplus sent to New Zealand for general distribution. The Queensland and New Zealand liquidators asked the Queensland court for instructions. Under the *Queensland Company Acts*, 1931 to 1960, s. 339, local claims had priority on immovable property in Queensland. In proceedings in which all liquidators were represented it was held that the local claims should be given priority but that in the New Zealand distribution the payments would be handled as preferences, the beneficiaries having to wait until all other creditors had first received the same percentage of their claims. The Court noted that the *Queensland Company Act of 1961* no longer has the priority rule. *Cf.* E. Sykes & M. Pryles, *Australian Private International Law* (1979), 227. See also *Re Northland Services Pty Ltd* (1978) 18 Austl. L.R. 684 (S.C.N. Terr.)

[79] (1914) 33 O.L.R. 65 (H.C.).

[80] (1880) L.R. 5 App. Cas. 161 (H.L.)

[81] Bill C-60, s. 317.