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Conflict of laws in the discharge of debts in bankruptcy

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I. Introduction

The discharge of scheduled but unsatisfied debts in bankruptcy proceedings involving individuals, whether or not subject to conditions or to suspension and to statutory exceptions,[1] is an element of bankruptcy law in Anglo-Saxon jurisdictions generally,[2] and of many of the consumer insolvency laws introduced in Europe in the recent past. It is also inherent in arrangements and compositions, but these involve an element of consent arising from whatever voting procedures are applied. The question addressed in this article is under what circumstances a creditor whose claim against a debtor has been discharged in one jurisdiction can pursue the debtor on the same debt in another.

Conflict of laws questions of bankruptcy discharge have arisen more frequently in recent years with an increase in cross-border portfolio investment[3] and apparent efforts by foreign debtors to benefit from liberal US bankruptcy and exemption laws.[4] Whether a discharge will be recognised abroad may depend on the characterisation given to that discharge under the foreign legal system: *i.e.* whether it is considered to have worked an extinction of the debt as

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1 See Boshkoff, "Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings" (1982) 131 U Pa L Rev 69.

2 Among them: Bankruptcy Act 1966, sections 148–154 (Australia); Bankruptcy and Insolvency Act, sections 169–182 (Canada); Insolvency Act 1986, sections 278–281 (England and Wales); Bankruptcy Act 1988, section 85(3), (4) (Ireland); Insolvency Act 1967, sections 410–429 (New Zealand); Bankruptcy Amendment (Northern Ireland) Order 1980, articles 28–30; Bankruptcy (Scotland) Act 1985 (c. 66), section 54(1); Bankruptcy Code (11 USC) sections 727 (Ch 7), 1141 (Ch 11), 1228 (Ch 12), 1328 (Ch 13) (United States).

3 See *Ash* v *Corp of Lloyd's*, 1995 Ont CJ *LEXIS* 1224: "There is little doubt on the evidence that these calls, and the liabilities which have been incurred as a result of the inordinate losses sustained in the Lloyd's market in recent years have wreaked havoc on the lives and fortunes of these Names, and others who find themselves in similar positions. Many are in danger of losing their homes or, worse, are on the verge of bankruptcy." See also *Richards* v *Lloyd's of London*, 1995 US Dist *LEXIS* 6888; *Society of Lloyd's* v *Clementson* (1994) *The Independent*, 11 November, (CA) (investor-underwriters faced with crippling losses); *Lowen* v *Dayton Sec Assocs (In re Securities Group 1980)*, 124 BR 875 (Bankr MD Fla 1991); and *Lesser* v *A-Z Assocs (In re Lion Capital Group)* 44 BR 690 (SD NY 1984) (both failed tax shelters leaving investors facing large claims from bankruptcy trustees liquidating their partnerships).

4 See *infra* n 32.

a substantive matter or a procedural bar to action at law,[5] or effected a legal condition as a matter of personal status.[6] Unsurprisingly, common law courts have tended to approach the question from a territorial and jurisdictional point of view. Further, the overwhelming majority of reported cases comes from common law jurisdictions; with regard to civil law countries, in the absence of statute or case law there remains doubt as to whether a discharge will be recognised in favour of a person who would not be eligible for bankruptcy for want of "merchant" status or because no discharge is provided under local law.[7] Yet bankruptcy laws are in flux, influenced by consumer movements responding to the trauma of consumers enticed by easy credit and by homeowners trapped by negative equity; by economists concerned about the lack of entrepreneurial incentives on the part of, or the subterfuges imposed upon, undischarged and undischargeable debtors in countries without modern bankruptcy laws to address the debt problems of individuals; and by demarches on behalf of debtors facing cash calls from portfolio investments.[8]

Within the European Economic Area[9] Austria,[10] Denmark,[11] Finland,[12] France,[13] Germany,[14] Ireland,[15] Norway,[16] Portugal,[17] Sweden[18] and the United

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5 Compare the rules as to limitation of actions, and the arguments over their treatment as procedural or substantive; Lorenzen, "The Statute of Limitations and the Conflict of Laws" (1919) 28 Yale LJ 492.

6 For the concept of bankruptcy as establishing incapacity of the debtor (but rejected in French law), see 2 Batiffol and Lagarde, *Traité de droit international privé*, 7th edn (1983), §745, citing sources.

7 See, generally, 1 *Dalhuisen on International Insolvency and Bankruptcy*, Ch 2, "Recognition and Execution of Foreign Bankruptcies and Related Proceedings and their Extraterritorial Effect in General" (1986).

8 For example the sponsoring groups supporting the litigation cited in n 212 *infra*.

9 For a survey of consumer bankruptcy legislation see *Report on the operation of Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit*, European Commission, 11 May 1995, COM(95)11; Huls, *Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions* (1994), at 107–113.

10 Konkursordungsnovelle 1993, BGBC 974/1993; see Mayer and Pirker, "La faillite privée en Autriche: une solution curative avec un effet secondaire préventif" (1995) *Revue européenne de droit de la consommation* [Rev eur dr consomm] 3.

11 Konkurslov, Kap 27, section 208.

12 Adjustment of Debts of Private Individuals Act of 8 February 1993.

13 Law 85-98 of 25 January 1985, as amended by Law 94-475 of 10 June 1994, applying to merchants, farmers and artisans (per art 2). See 2 Ripert and Roblot, *Droit commercial* (1994), at section 3275: "Article 169 of the law of 1985 sets out one of the most surprising innovations of the new regime in enunciating the principle that the judgment closing the liquidation proceeding for insufficiency of assets shall not restore to creditors the right to pursue individually their rights of action against the debtor" [informal translation]. For historical reasons deriving from the application to the three departments of Alsace-Moselle of the German bankruptcy law of 1879, the French law of commercial insolvency with provision for discharge applies also to consumer debtors in those departments which are manifestly insolvent.

14 *Insolvenzordnung* of 5 October 1994, sections 286–314, *Bundesgesetzblatt*, 18 October 1994, No 70, at 2902–2907, in force from 1999; see Kemper, "The Coming Consumer Bankruptcy Scheme With the Release of the Residual Debt in Germany" (1995) 3 *Consumer LJ* 69; Reinhart, "Germany's Insolvency Bill" (1993) 2 IIR 29, at 40–42.

15 Bankruptcy Act 1988, section 85(7).

16 Debt Composition Act, 1992, in force 1 January 1993.

17 Decree-Law No 132/93.

18 *Skuldsaneringslag* (Debt Insolvency Act) 1994; see Lennander, "Debt Adjustment for Private Individuals" (1992) 35 *Scandinavian Studies in Law* 1991, at 127.

Kingdom[19] have provisions for the discharge of debts in excess of available assets for at least some classes of debtor, and Japanese law provides for the application by a bankrupt for discharge during the pendency of a bankruptcy proceeding.[20] The 1989 amendments to the French Consumer Code,[21] separate from the bankruptcy and insolvency provisions of the Commercial Code, do not provide for discharge of unpayable consumer debts; however, they allow judicial rescheduling for up to the lesser of five years or one half of the remaining repayment period of debts other than tax and parafiscal debts and those owed to social security agencies.[22] The progressive introduction of legislation affording relief for insolvent consumers removes the likelihood of a public policy objection to recognition of a foreign discharge. In the absence of a codified conflict of laws rule or a bilateral treaty provision relating to the effects of bankruptcy there is no basis for international consistency,[23] and, indeed, the conclusions of this study with respect to some jurisdictions can be tentative only. This represents a significant problem in an era of resurgent personal bankruptcy, coupled with increased cross-border personal mobility and, hence, forum shopping. The arguments of creditors notwithstanding, it is a valid question whether the data show any measurable cost to creditors for bankruptcy discharges above and beyond the much larger total of simply unpaid and uncollectible debts, and, thus, whether the real expense to creditors of the institution of discharge approaches in magnitude the social and economic cost of denying a fresh start.[24] In Europe this is a matter of disagreement between consumer groups and creditors' representatives.[25]

The cross-border validity of a discharge in bankruptcy or its equivalent granted to a debtor under circumstances where that debtor has voluntarily appeared in the proceeding may be rendered uncertain by the more limited scope of bankruptcy and insolvency laws in many civil law countries. In traditional English common law[26] and under the Rome Convention[27] the law governing the

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19 Insolvency Act 1986; Bankruptcy (Scotland) Act 1985; Bankruptcy Acts (Northern Ireland) 1857 to 1980; and Bankruptcy Amendment (Northern Ireland) Order 1980.

20 Law No 71, 25 April 1922, article 366-2; translation in Wood and Totty, *Butterworths International Insolvency Laws*, (1994), at 499; discussion of international aspects in Taniguchi, "International Bankruptcy and Japanese Law" (1987) 23 Stan JIL 449, at 468–469.

21 "Loi Neiertz", Law No 89-1010 of 31 December 1989 relative to the prevention of difficulties linked to overindebtedness of individuals and of families, *Journal Officiel*, 2 January 1990.

22 Law No 89-1010, article 12.

23 For example the EC Brussels Convention, article 1(2) excludes from its scope "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21 September 1968, as amended, in connection with the adhesion of new states to the European Community: 9 October 1978, 25 October 1982, 26 May 1989, codified version published in *Official Journal of the European Communities* [OJEC] 28 July 1990, C 189, at 2.

24 See Howard, "A Theory of Discharge in Consumer Bankruptcy" (1987) 48 Ohio State LJ 1047, citing studies.

25 See, *e.g.*, Domont-Naert, (ed) Final Report, *Le surendettement des consommateurs en Belgique*, Centre de Droit de la Consommation, Louvain-la-Neuve, April 1993.

26 Dicey and Morris, *Common law rule* 11th edn, rule 186 (1): "The effect of a contract, *i.e.* the rights and obligations under it of the parties thereto, is to be determined in accordance with the proper law of the contract. *Cf* rule 115, comment, specifying that a debt is situate in the country where the debtor resides.

27 OJEC, 9 October 1980, L 266, p 1. Article 10(1):

extinction of a debt, in the absence of contrary agreement between the parties, will be the same as that of the contract or the underlying transaction. There is substantial English and Scottish precedent, mostly ancient, and some US and Canadian decisions as to the effect of a foreign discharge on a debt governed by the law of the forum. The issue has received little attention in civil law jurisdictions, where the concept of discharge is, in any case, novel, and it is one of the aims of this article, by highlighting the problem and by reviewing the jurisprudence and the doctrine, to contribute to the formulation of rules.

II. Conflict in discharge and exemptions

The terms under which discharge is granted and exemptions afforded under US bankruptcy law and state opt-out provisions[28] can lead to conflict with foreign legal systems that reject the jurisdictional basis for the proceeding. A distinction is made between venue for a bankruptcy petition[29] and choice of law for exemptions;[30] furthermore, the exemption law of Florida, a forum of choice, requires actual residence, so that a debtor who is attributed to Florida by the venue rules, but who does not qualify for Florida exemptions under Florida law, is granted only Federal exemptions.[31] In the granting of the homestead exemption

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"The law applicable to a contract by virtue of articles 3 to 6 and 12 of this convention shall govern in particular ... (d) the various ways of extinguishing obligations, and prescription and limitation of actions ...". The Giuliano Report (OJEC 31 October, 1980, C 282, p 1) notes that the subparagraph must be applied "with due regard to the limited admission of severability (*dépeçage*) in articles 3 and 4". See also Plender, *The European Contracts Convention*, at 6.05-6.08 (*dépeçage*).

28 Under 11 USC section 522(b)(1), and, in particular, in states which afford substantial "homestead" protection to debtors. Such exemptions are institutionalised, for example, in the Florida Constitution, article X, section 4; Fla Stat section 222.01 *et seq.*; and the Texas Constitution, article 15, section 50; Tex Prop Code section (1995) section 41.002. See Haskins, "Homestead Exemptions" (1950) 63 Harv L Rev 1289; Schenk Koffler, "The Bankruptcy Clause and Exemption Laws: A Re-examination of the Doctrine of Geographic Uniformity" (1983) 58 NYU L Rev 22.

29 28 USC section 1408: "In the district ... in which the domicile, residence, principal place of business in the United States, or principal assets in the United States ... have been located for the longer portion of ... the 180-day period preceding the filing." See Epstein, Nickels and White, *Bankruptcy*, at section 12-6. As to the distinction between venue and domicile, and the effect of the 1952 amendments to the Act in establishing the language as relating to venue, see *Bass* v *Hutchins* 417 F2d 692 (5th Cir 1969); *Briney* v *Burley* (*In re Burley*), 11 BR 369, at 376–377 (Bankr CD Cal 1981). On venue in ancillary proceedings under 11 USC section 304, see *Evans* v *Hancock, Rothert and Bunshoft* (*In re Evans*) 177 BR 193 (Bankr SD NY 1995) (turnover action).

30 The applicable law for determination of exemptions is that of the "place in which the debtor's domicile has been located for a longer portion of such 180-day period than on any other place", 11 USC section 522(b)(2)(A). Domicile is fixed at the state level, *In re Hanson*, 107 BR 525, at 527 (Bankr WD Va 1989). *Cf In re Wilson*, 62 BR 43 (ED Tenn 1985) (upholding as "not clearly erroneous" given the dates of overt acts relevant to establishment of domicile bankruptcy judge's finding that debtor in involuntary proceeding was domiciled in Tennessee and not in Florida for the greater of the 180 days preceding filing). As to the choice between federal and state exemptions, where state exemptions are optional, see *John T Mather Mem Hosp* v *Pearl*, 723 F2d 193, at 194 (2d Cir 1983).

31 *In re Schultz*, 101 BR 301 (Bankr ND Fla 1989). ("Since this statute applies only to residents of the State of Florida, we find that it does not apply to prevent non-residents of this state who because of the venue provisions of 28 USC section 1408 are required to file in Florida from claiming the exemptions provided for under

bankruptcy courts defer to Florida law both as to the exemptions available to residents and to the criteria for establishing that residence. Florida denies the capacity to establish the requisite stability of residence to many non-immigrant aliens in the United States, including those present illegally and those with business or tourist visas.[32] In one curious case the Florida courts acknowledged the vesting of Florida real estate in the English trustee of a British citizen made criminally bankrupt in England in connection with value added tax evasion offences.[33]

Another source of possible conflict is the municipal legislation regarding property not part of the estate or otherwise unreachable by creditors. Such problems are illustrated by the cases leading up to *Patterson* v *Shumate*,[34] overturning a line of decisions in some circuits typified by *In re Ewald*[35] that refused exemption to Employee Retirement Income Security Act of 1974 (ERISA)-qualified pension assets. *In re Duckett*[36] represented an attempt by a trustee in bankruptcy to reach a debtor's contributions to the teachers' pension fund operated by the Ministry of Education, the debtor's rights under the plan being non-assignable,[37] and clearly sovereign immunity would have prevented an attack by a foreign trustee elsewhere than in the forum of the state managing the pension. Interests that are neither assignable nor subject to attachment or levy, and which can be reached only in the sense of attaching payments once received by the beneficiary, can be controlled only by restraining the movement of the beneficiary. At this point the human rights issues are joined.[38] The question of the law applicable to trusts, including those of the spendthrift and discretionary variety,[39] is

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section 522(d) of the Bankruptcy Code. To find that this debtor is not entitled to claim any exemptions would be contrary to the 'fresh start' policy of the Bankruptcy Code. Therefore, this debtor is entitled to claim the federal exemptions. However, he is not entitled to claim the Florida exemptions.") *Cf* Fla Stat section 222.20 (1994): "In accordance with the provision of section 522(b) of the Bankruptcy Code of 1978 (11 USC section 522(b)), residents of this state shall not be entitled to the federal exemptions provided in section 522(d) of the Bankruptcy Code of 1978 (11 USC section 522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes."

32 *In re Gilman*, 68 BR 378 (SD Fla 1986) (holder of B-1 business visitor visa denied homestead exemption); *In re Boone* 134 BR 979 (MD Fla 1991) (Canadian, expired E-2 treaty investor visa; denied homestead exemption); *Cooke* v *Uransky (In re Cooke)*, 412 So 2d 340 (S Ct Fla 1982) (answering in the negative question certified by the Fifth Circuit: "Does Florida allow foreigners visiting the United States as tourists to place a residence owned in the state beyond *the reach of creditors under the Florida Homestead Exemption?*"); *In re Cooke* 1 BR 537 (MD Fla 1979); *Cooke* v *Uransky* 643 F2d 277 (5th Cir 1982); *In re Cooke* 683 F2d 130 (5th Cir 1982) (denying exemption). "Legal residence" was defined in *Walker* v *Harris* 398 So 2d 955 (Fla Dist Ct App 4th Dist 1981).

33 *Bullen* v *Her Majesty's Government of the United Kingdom* 553 So 2d 1344 (Fla App 4th Dist 1989) (petition for review denied) 567 So 2d 434 (S Ct Fla 1990); enforcing judgment of proceeding reported at *R* v *Garner* [1986] 1 WLR 73. In the Florida proceeding there was no recourse by the defendant to US bankruptcy law.

34 504 US 753 (1992).

35 73 BR 792 (Bankr WD Tex 1987)

36 *Ex parte Minister of Education* v *McLeod* (*In re Duckett)* [1964] Ch 398.

37 See *Collier on Bankruptcy*, at 522.02.

38 European Convention on Human Rights and Fundamental Freedoms, 4th Protocol, article 2 (not ratified by the United Kingdom); Universal Declaration of Human Rights, article 13(2).

39 11 USC section 541(c)(2), referring to non-bankruptcy law; see *McLeod* v *Cooper* 88 F2d 194 (5th Cir 1937) (writ of garnishment cannot serve to seize a spendthrift trust benefiting a *debtor); In re Kelleher 12 BR 896 (Bankr MD*

particularly difficult for civil law jurisdictions,[40] notwithstanding efforts to resolve it by convention.[41] One can also envisage a determination of domicile or an appreciation of community property[42] and its effects in the insolvency context that conflicts with what might be forthcoming in the state where property is situated or in another state of plausible domicile or business establishment. The non-recognition of discharge and of the exempt status of property, and inconsistent treatment of property deemed "community" in one jurisdiction and "separate" in another, can lead to uncertainty.[43]

In adjudicating a defence of discharge the question may also arise as to the status of exempt property[44] and to the law applicable to alleged fraudulent transfers;[45] in the United States the issue will normally be determined according to state law.[46] Pre-bankruptcy planning, the subject of frequent and sometimes

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Fla 1981) (interest in spendthrift trust, although not exempt, is not property of the estate).

40 See, *e.g.* Dreyer, *Le trust en droit suisse* (Geneva, 1981); Jeghers, "La difficile intégration du trust anglo-saxon en droit civil belge" (1991) 117 Rev du notariat belge 311.

41 The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition, ratified as of 1 August 1993 by Australia, Canada, Italy and the United Kingdom (see "Information concerning The Hague Conventions on Private International Law", published annually in Netherlands ILR); Reymond, "Réflexions de droit comparé sur la convention de La Haye sur le trust" (1991) 68 Rev de droit international et de droit comparé, at7.

42 Compare 11 USC section 541(a)(2); but what constitutes community property in the United States depends on the law of domicile at the time of acquisition. In civil law countries it may depend on the marriage contract or on the law of the "marital domicile" (partial mutability). See Marsh, *Marital Property in Conflict of Laws* (1952), at 14, 103 *et seq.*; Castel, *Canadian Conflicts of Laws* (1986), 2nd edn, section 324; Rabel, 1 *The Conflict of Laws: A Comparative Study* (1958), "The Problem of Mutability: Change of Personal Law During Coverture" (at 380–391); Scoles, *Choice of Law in Family Property Transactions* (1929 II) 209 RADCI 13 at 28–35; Grodecki, "Intertemporal Conflict of Laws" (1976) 3 *International Encyclopedia of Comparative Law, Private International Law*, at 26–28. See also *Puente* v *Perez* (1904) 7 PRR 181; *Toppel* v *Toppel* (1983) 114 DPR 775 (Puerto Rican rule of partial mutability affirmed); *Home State Bank* v *Fuell* 654 F Supp 113 (DPR 1987); *In re Estate of Bach* (1989) 145 Misc 2d 945, 548 NYS2d 871 (Bolivian community property law applied).

43 However, the question may arise as to the status of community property and its treatment in bankruptcy, as well as the mutability of the community: whereas partial mutability is the general rule in the United States a change in marital regime requires a court order in most civil law jurisdictions.

44 This issue will usually arise with respect to US discharges as few foreign jurisdictions offer substantial exemptions.

45 Choice of law in fraudulent transfer actions remains unsettled and is beyond the scope of this article; for a discussion of "multiple-factor, 'interest analysis' or most significant relationships analysis exemplified by the Restatement (Second) of Conflict of Laws (1971)" see *In re Morse Tool Inc* 108 BR 384 (D Mass 1989), the analysis of Bankruptcy Judge Teel in *Dicello* v *Jenkins (In re International Loan Network)* 160 BR 1, at 17–18 (DC 1993), dicta in *Vanston Bondholders Protective Committee* v *Green* (1946) 329 US 156, at 161–162; as to the application of the "reasonableness test" of the Restatement (Third) of US Foreign Relations Law in cross-border cases compared with alternative doctrine, see *Maxwell Commun Corp* v *Barclays Bank plc* 170 BR 800 (Bankr SD NY 1994). Note that rules that may be workable in a federal setting may yield untoward results in a cross-border case: Du Bois, "The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions" (1933) 17 Minn L Rev 361; Ehrenzweig, "Interstate and International Conflicts Law: A Plea for Segregation" (1957) 41 Minn L Rev 717; Yntema, "The Historic Bases of Private International Law" (1953) 2 Am J Comp L 297; Batiffol and Lagarde, 8th edn (1994) sections 258–260; Vitta, "Interlocal Conflict of Laws" (1985) 3 *Encyclopedia of Comparative Law, Private International Law.*

46 11 USC sections 522(b)(2)(A); 522(d) (applicability of exemptions provided for under state law as an alternative to or in lieu of federal exemptions); section 544(b) (in addition to certain avoidance powers conferred by section 548, subrogating the bankruptcy trustee to the rights

inconsistent rulings,[47] where the issue is often merged with that of good faith,[48] could be attacked on an international level not only on account of the non-recognition of exemptions *per se* but for *fraude à la loi*[49] or for lack of jurisdiction by reason of non-recognition of the claimed domicile. At a purely domestic, US level, one can compare the judgment in *In re Carey*,[50] granting discharge:

> "Rendering a decision in this case is undoubtedly the closest call this court has yet had to make. Debtor employed legal counsel knowledgeable in bankruptcy law who undertook to extensively engage in an elaborate scheme of pre-bankruptcy planning. Every advantage the bankruptcy law could afford this debtor was utilised to the fullest extent possible."

Or compare *In re Breuer*:[51]

> "This court, without more, will not find from the fact of conversion alone that the conversion of non-exempt assets into exempt assets constitutes fraud on the creditors. Extrinsic facts and circumstances must be in evidence to prove that the conversion of the real property proceeds into life insurance was done with fraudulent intent."

with *In re Brown*,[52] where the debtor sought discharge of a medical malpractice claim, denying it on grounds of bad faith:[53]

> "Debtor is a capable doctor, a specialist, able to earn a substantial income ... Debtor, since the entry of the judgment against him, has transferred all the profits of his lucrative medical practice to himself and his wife as tenants by the entireties under the guise of rent ... Under the circumstances of this case, to grant Debtor the relief he requests will be an abuse of the Bankruptcy Code. The court finds that Debtor has filed his petition not in good faith."

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afforded any unsecured creditor under non-bankruptcy law, most relevantly state fraudulent transfer law).

47 See Huckfeldt, "Conversion of Non-exempt Assets to Exempt Assets Prior to Bankruptcy – A Question of Fraud?" (1991) 56 MLR 857 (discussing *Norwest Bank Nebraska, NA* v *Tveten (In re Tveten)* 848 F2d 871 (8th Cir 1988) and *In re Johnson* 880 F2d 78 (8th Cir 1989)).

48 Compare the English and Irish rule that a transaction sought to be defended as not in fraud of creditors must be both in good faith and for valuable consideration: *In re O'Neill* [1989] IR 544 (conveyance of property worth £65,000 to daughter for £48,000, reflecting pre-existing debt, held fraudulent).

49 The classic French case, refusing recognition to a German divorce on the grounds that the German naturalisation of a French citizen had been solely motivated by the desire to evade the French application of "personal law" based on citizenship (at a time when French law had no provision for divorce) is *Princesse de Bauffremont* v *Prince de Bauffremont* Cass civ, 18 March 1878, Sirey, *Recueil général des lois et arrêts* [Sirey] (1878), at 193, reprinted in Ancel and Lequette, *Grands arrêts de la jurisprudence française de droit international privé*, 2nd edn (1992), at 42. The concept of *fraude à la loi* is discussed briefly in Mosconi, "Exceptions to the Operation of Choice of Law Rules" (1989 V) 217 *Recueil des Cours de l'Academie de Droit International* [RCADI] 9, at 166, and in depth in the treatise of Professor Audit, *La fraude à la loi* (1974).

50 96 BR 336, at 338 (Bankr WD Okla 1989).

51 68 BR 48, at 50–51 (Bankr ND Ia 1985), citing *In re Johnson*, 8 BR 650, at 654 (Bankr D SD 1981).

52 88 BR 280, at 284–285 (Bankr D Hawaii 1988).

53 See Ponoroff and Knippenberg, "The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy" (1991) 85 Nw UL Rev 919.

In *In re Campbell*,[54] discharge was denied because, due to the "*obvious clever planning*" by the debtor, his petition "makes a farce of the Bankruptcy Code". Outside the United States, exemptions in bankruptcy are few, and attacks on pre-bankruptcy planning are more likely to consist of avoidance of transfers claimed to be void as against the estate.

The English Insolvency Act 1914 excluded from an estate in bankruptcy (1) property held by the bankrupt on trust for another; and (2) tools of the trade, necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the aggregate, the amount being increased to £250 only in 1976.[55] Section 283(2) of the Insolvency Act 1986 excludes from the estate:

> "(a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;
> (b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family . . ."

Section 283(2) has the following proviso:

> "308. – (1) Subject to the next section, where –
> (a) property is excluded by virtue of section 283(2) (tools of trade, household effects, etc.) from the bankrupt's estate, and
> (b) it appears to the trustee that the realisable value of the whole or any part of that property exceeds the cost of a reasonable replacement for that property or that part of it,
> the trustee may by notice in writing claim that property or, as the case may be, that part of it for the bankrupt's estate."

Article 67 of the Canadian Bankruptcy and Insolvency Act provides that:

> "The property of a bankrupt divisible among his creditors shall not comprise
> (a) property held by the bankrupt in trust for any other person,
> (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides."[56]

For Ontario, article 2(2) of the Execution Act RSO 1990, Ch E-24 states:

> "1. The following chattels are exempt from seizure under any writ issued out of any court:
> . . .
> 2. The household furniture, utensils, equipment, food and fuel that are contained in and form part of the permanent home of the debtor not exceeding $2,000 in value.

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54 124 BR 462, at 464–465 (Bankr D Md 1991).

55 *Insolvency Law and Practice* [the Cork Report] Cmnd 8558, pp 251–258 (1982, reprinted 1994).

56 As to Quebec see *Croteau* v *Roy* [1960] Que SC 501. Citations to all provincial statutes and to leading cases appear at 2 *Canadian Encyclopedic Digest, Ontario*, 3rd edn (1995), Title 15, "Bankruptcy and Insolvency", section 343, n 25.

3. In the case of a debtor . . . tools and instruments and other chattels ordinarily used by the debtor in his business, profession or calling not exceeding $2,000 in value."

III. The basis for recognising foreign discharges

Aside from statutory dispositions within composite states[57] there may be several plausible bases for the recognition of a foreign judgment discharging a debtor from unpaid debts:

(1) The court ordering the discharge has subject-matter jurisdiction over the debt based on the choice of law rules of the jurisdiction in which payment of that debt is subsequently claimed notwithstanding the purported discharge.
(2) The court had personal jurisdiction over the parties, by domicile, residence or the conduct of business; or jurisdiction based on the presence of assets.
(3) The creditor filed proof of claim in the bankruptcy proceeding, thus appearing voluntarily: a *res judicata* defence.
(4) Certain bilateral and multilateral conventions provide for exclusive jurisdiction and for recognition of judgments.

Added to the question of recognition of a discharge as such is that of alternative defences that may be available in one but not another forum:

(1) recoupment and set-off;[58]
(2) sovereign[59] or statutory civil[60] immunity in the jurisdiction otherwise appropriate for hearing the claim;

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57 Insolvency Act 1986, section 426(1) ("An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in any other part").

58 See Allen, Annotation: "Claim Barred by Limitation as Subject of Setoff, Counterclaim, Recoupment, Cross Bill, or Cross Action", 1 ALR2d 630; and note particularly a line of later Florida cases including *Allie* v *Ionata* 503 So 2d 1237 (S Ct Fla 1987) and *Johnson* v *Allen*, 621 So 2d 507 (Fla App 2d Dist 1993) confirming that state and common law causes of action which constitute compulsory counterclaims may be asserted without regard to any time bar and without limit as to amount. In ancillary administration there is no automatic stay, the foreign representative being dependent upon injunctive relief; furthermore, issues of fraudulent conveyances and set-off are likely to be left to the foreign forum: see *In re Culmer*, 25 BR 621 (Bankr SD NY 1988) ("the validity of the claims of set-off asserted by Chase and Bankers Trust as well as BTI's unliquidated claim for $600,000 should properly be determined in the Bahamian liquidation").

59 Foreign Sovereign Immunities Act, 28 USC section 1602; (UK) State Immunity Act 1978.

60 Lloyd's Act 1982, section 14, but as to the immunity, if any, attributable to government instrumentalities and to entities to which government regulatory power has been delegated see *First Nat'l City Bank* v *Banco Para el Comercio Exterior de Cuba* 462 US 611, at 626–627; "governmental instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such". As to the undermining of US securities law protection by enforcement of forum selection clauses in investment contracts, see Paden, Casenote: "Choice of Forum, Choice of Law, and Arbitration Clauses Override US Security Rights: *Riley* v *Kingsley Underwriting Agencies Ltd*" (1993) 6 *Transnational Law* 432 (case involving enforcement of arbitration clause).

(3) public policy,[61] *fraude à la loi*,[62] *forum non conveniens*.[63]

The claimant may thus be reluctant to subject himself to ambush in a more lenient (usually US) forum;[64] forum selection clauses may be ignored in a bankruptcy proceeding[65] under circumstances where they would not in a non-bankruptcy case.[66] The best arguments to be made on behalf of an individual debtor in a proceeding under the US Bankruptcy Code is that whereas corporations do not benefit from discharge,[67] individuals have a statutory (although not a constitutional[68]) right to a "fresh start";[69] that the counterclaim is an asset of the estate;

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61 For a general discussion of these exceptions see Mosconi, "Exceptions to the Operation of Choice of Law Rules" (1989 V) 217 RCADI 9, at 166; on the public policy exception see Paulsen and Sovern, " 'Public Policy' in the Conflict of Laws" (1956) 56 Colum L Rev 969.

62 Abusive forum shopping, usually by contriving to qualify for jurisdiction; *supra* n 49.

63 See, *e.g.*, *Howe* v *Goldcorp* 946 F2d 944 (1st Cir 1991); *cert. denied* 502 US 1095 (1992), following the principle of *Piper Aircraft Co* v *Reyno* 454 US 235 (1981).

64 *Katchen* v *Landy* 382 US 323 (1966) (filing proof of claim as consent to jurisdiction; but reservations about the constitutionality of the *Katchen* decision were expressed by the plurality in *Northern Pipeline Const Co* v *Marathon Pipe Line Co* 458 US 50, at 79, n 31 (1982); *Cf Granfinanciera* v *Nordberg* 492 US 50 (1989) (abstention from filing proof of claim as preserving right to jury trial of fraudulent transfer question). Practice is not consistent among districts: Shapiro, "Issues In Litigation", *Norton Bankr L Advisor* 8, at 11 (March 1989).

65 Forum selection clause in a contract between creditor and debtor was held unenforceable in view of creditor's failure to establish that it was in the interest of justice for the bankruptcy court to abstain from hearing the proceeding in *In re Banque Française du Commerce Extérieur* v *Rio Grande Trading Inc* 17 BR 134 (SD Tex 1981); but compare *In re Diaz Contracting Inc* 817 F2d 1047 (3d Cir 1987) (forum selection as between New York and New Jersey on collateral matter) and *Coastal Steel* v *Tilghman Wheelabrator Ltd* 709 F2d 190 (3d Cir 1983) (forum selection of English court enforced in tort claim allied to contract notwithstanding that firm against which claim was made had filed proof of claim in bankruptcy).

66 The *Bremen* v *Zapata Off-Shore Co* 407 US 1 (1972) (salvage contract); *Shearson/American Express Inc* v *McMahon*, 482 US 220 (1987); *Rodriguez de Quijas* v *Shearson/American Express Inc* 490 US 477 (1989) (enforcement of arbitration clauses for the adjudication of security law claims of investors). Note especially *Carnival Cruise Lines* v *Shute* 499 US 585 (1991) (enforcement of forum selection clause in fine print on the back of a cruise ticket); similarly for forum selection clause in a bill of lading, *Galaxy Export* v *Hektor* (1983) AMC 2637 (SD NY); and in employment contract written in German, which plaintiff did not speak or understand, *Gaskin* v *Stumm Handel GmbH*, 390 F Supp 361 (SD NY 1975). See Dougherty, Annotation: "Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought", 31 ALR4th 404. For comparable Brussels Convention cases, see *Powell Duffryn plc* v *Petereit*, [1992] ECR I-1745 (forum selection clause in corporate statutes held to confer exclusive jurisdiction); *Elefanten Schuh GmbH* v *Jacqmain* [1981] ECR 1671 (employment contract in foreign language enforceable).

67 11 USC section 727(a)(1); *In re Goodman* 873 F2d 598 (2d Cir 1989).

68 *United States* v *Kras* 409 US 434 (1973) (filing fees requirement held constitutional; but see *United States* v *Merritt (In re Merritt)* 186 BR 924 (SD Ill 1995), n 1: "Pursuant to Congress' directive, the Judicial Conference of the United States instituted a three-year pilot programme beginning October 1 1994, to study the effect of waiving bankruptcy fees for individual Chapter 7 debtors who are unable to pay such fees in instalments. See Pub L No 103–121, section 111(d), 28 USC section 1930, Statutory Notes, Report on Bankruptcy Fees. The Southern District of Illinois was selected as one of six judicial districts to participate in the fee waiver program").

69 *Local Loan Co* v *Hunt* 292 US 234, 244 (1934): "One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' *Williams* v *Fidelity & G Co* 236 US 549, 554, 555. This purpose of the act has been again and again emphasised by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future

and that it is a core proceeding within the holding of the *Northern Pipeline* case,[70] and specifically 28 USC section 157(b)(2)(O), which includes within the definition of core proceedings "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims".

One might note here, in passing, the theoretically possible but perverse application of section 304 of the Bankruptcy Code to defeat such jurisdiction whereby a creditor holding an English claim could bring an involuntary insolvency proceeding in England against a US-based debtor under Insolvency Act 1986, section 264(1)(a), with the English trustee petitioning in the United States for the court to order:

> "(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
> (3) order other appropriate relief."

while, pursuant to section 306, entering only a limited appearance:

> "An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303, 304, or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303, 304, or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court."

It can only be assumed that such a strategy would be rejected by the US forum under section 304(c) and section 305(a)(1)[71] as an abuse of the ancillary bankruptcy process.[72] Yet, conceptually, a choice of law clause in any contract,[73] valid

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effort, unhampered by the pressure and discouragement of pre-existing debt". *Northern Pipeline Const Co* v *Marathon Pipe Line Co* 458 US 50, 71 (1982), plurality decision: "But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right', but the latter obviously is not".

70 See Epstein, Nickels and White, section 12-1; Campbell, Annotation: "Action for Breach of Contract as Core Proceeding in Bankruptcy Under 28 USCS section 157(b)" (1995) 123 ALR Fed 103.

71 11 USC section 305(a): "The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if – (1) the interests of creditors and the debtor would be better served by such dismissal or suspension . . ."

72 Compare *In re Brierley (Headington Invs)* 145 BR 151 (Bankr SD NY 1992) (denial of motion for summary judgment dismissing ancillary proceeding in support of effort by receivers of Maxwell Group to take discovery in the US); see Morales and Deutcsh, "Bankruptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Tyranny of Comity" (1984) 39 Bus Law 1573 (supporting section 304 as a means of protecting the interests of US creditors).

73 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, OJEC, 9 October 1980, L 226,

to make such law the "proper law" of the transaction and being the law of a country which did not afford discharges to the class of person concerned, could make a debt immune to cross-border discharge. In the common law, "[w]hen the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention, in general, determines the proper law of the contract."[74] The Rome Convention offers the same respect to party autonomy: a contract is governed by the law chosen by the parties.[75]

IV. Conflict of laws of common law jurisdictions in the discharge of debts

There are significant differences in the way discharge is granted in various common law countries. In England the law provides for judicial discretion, including the attachment of conditions or a period of suspension:

> "Where the court is satisfied on the application of the official receiver that an undischarged bankrupt in relation to whom subsection (1)(b) applies has failed or is failing to comply with any of his obligations under this Part, the court may order that the relevant period under this section shall cease to run for such period, or until the fulfilment of such conditions (including a condition requiring the court to be satisfied as to any matter), as may be specified in the order."[76]

Similarly in Canada:

> "On the hearing of an application of a bankrupt for a discharge, the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to his after-acquired property."[77]

The Canadian statute provides certain criteria by which the court shall refuse, suspend or make conditional a discharge, including that "the assets of the bankrupt are not of a value equal to 50 cents in the dollar on the amount of his unsecured liabilities, unless he satisfies the court that [this] fact . . . has arisen from circumstances for which he cannot justly be held responsible."[78]

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p 1, article. 3 (party autonomy); article 5 (excepting certain consumer contracts); Giuliano Report, OJEC, 31 October 1980, C 282, p 1, at 15, tracing the rule back to the French Cour de Cassation case *American Trading Co* v *Québec Steamship Co* (5 December 1910), (1911) 7 *Revue du droit international privé*, 395, (1912) 39 *Journal du droit international privé*, (Clunet) 1156; Sirey 129 (1911); Ancel and Lequette, *Grands arrêts de la jurisprudence française de droit international privé*, 2nd edn, No 11).

74 Dicey and Morris, 11th edn, (1987) rule 180, sub-rule 1.

75 Dicey and Morris, 12th edn, (1993) rule 175(1).

76 Insolvency Act 1986.

77 Bankruptcy and Insolvency Act, section 172(1).

78 *Ibid*, section 173(1)(a); see *Re Spooner* 12 CBR (NS) 75 (Sask QB 1968) (extravagant lifestyle). Numerous other cases are cited in *Canadian Encyclopedic Digest, Ontario*, "Bankruptcy and Insolvency", section 1102, n 57.

The Cork Committee had recommended alternative forms of collective procedure, "liquidation of assets" and "bankruptcy".[79] Liquidation of assets was to seek a rapid realisation of assets, coupled with payments from future income "in cases where there is nothing to suggest that the debtor deserves to be declared bankrupt". In bankruptcy the Committee felt that

> "the onus should always be upon the bankrupt to apply for his discharge and to prove that this is warranted. To this extent the new system will be more onerous than at present. We believe that this is justified if bankruptcy is reserved for those who merit it; in such serious cases we do not consider that an automatic discharge will be appropriate."[80]

The Insolvency Act 1986 as enacted retained the automatic discharge in ordinary cases:

> "Subject as follows, a bankrupt is discharged from bankruptcy –
> (a) in the case of an individual who was adjudged bankrupt on a petition under section 264(1)(d) [criminal bankruptcy order] or who had been an undischarged bankrupt at any time in the period of 15 years ending with the commencement of the bankruptcy, by an order of the court under the section next following, and
> (b) in any other case, by the expiration of the relevant period under this section.
> (2) That period is as follows –
> (a) where a certificate for the summary administration of the bankrupt's estate has been issued and is not revoked before the bankrupt's discharge, the period of 2 years beginning with the commencement of the bankruptcy, and
> (b) in any other case, the period of 3 years beginning with the commencement of the bankruptcy."[81]

During the period between the presentation of the petition and the grant of a discharge, certain professional activities including that of Member of Parliament[82] and of solicitor[83] are closed to the debtor.

The disparity between the entrenched English view of discharge as a privilege, and the US view of discharge as a right, given full disclosure and relinquishment of non-exempt assets, could not be more clear. In the US concept, discharge is "the legal embodiment of the idea of the fresh start; it is the barrier that keeps the creditor of old from reaching the wages and other income of the new."[84]

> "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is allowed under section 502 of this title."[85]

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79 Cork Report, at 139.
80 *Ibid*, at 143.
81 Insolvency Act 1986, section 279.
82 *Ibid*, section 427.
83 Practising Certificate Regulations 1976, as amended by SI 1986/2001.
84 Epstein, Nickels and White, at section 7–16.
85 Bankruptcy Code, section 727(b).

In the United States, social and political compromise is achieved by excluding certain debts from discharge, while maintaining the exemption of certain assets, whether under state opt-out or alternative provisions or under section 522(d) of the Code. Withholding of discharge is reserved for bad faith or misconduct in the course of the proceeding. The Canadian statute achieves social balance by granting discretion to the court:

> "(1) On the hearing of an application of a bankrupt for a discharge, the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to his after-acquired property.
> (2) The court shall on proof of any of the facts mentioned in section 173
> (a) refuse the discharge of a bankrupt;
> (b) suspend the discharge for such period as the court thinks proper;
> or
> (c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct."[86]

In Canada, it was said in *In re Sager*:[87]

> "There is well established authority that the bankruptcy process should not be used to avoid a judgment debt which arises out of improper conduct of the debtor. The courts have said on many occasions that a discharge should only be granted if there is a substantial payment to the creditors."

An obvious source of conflict is the attempt by a debtor to discharge in one country a debt that would be non-dischargeable in another. Two Canadian cases have issued conflicting decisions in response to debtors' applications to discharge student loans guaranteed by the US Government: *In the matter of Bialek*[88] where,

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86 Bankruptcy and Insolvency Act, section 172.

87 52 CBR (NS) 309 (Ont HCJ), citing in support *Kozack* v *Richter* (1973) 20 CBR (NS) 223, (1974) SCR 832; 36 DLR (3d) 612 (Sask) ("In the present case, respondent's bankruptcy was precipitated by his condemnation to pay damages to the appellant. This being due to a finding of 'wilful and wanton misconduct' on his part, certainly his financial predicament cannot be said to have arisen 'from circumstances for which he cannot justly be held responsible' "). See also *In re Chodos*, (1992) Ont CJ *LEXIS* 55 (conditional discharge in case of lawyer's misconduct with wife of client and subsequent refusal to pay damage award): "[T]he bankruptcy system would fail completely in its objective of striking a balance of fairness among the interests of the bankrupt, the creditors and the public if in the circumstances of this case Mr Chodos was not required to devote some of his considerable earning power for the next few years to the relief of his creditors". The court deemed that certain property of the debtor, including exempt property and the matrimonial home which "is and always has been in his wife's name" might be "regard[ed] as being available to him" for payment of part of his debts. "All things considered, I am of the view that an appropriate condition for discharge is a consent to judgment in the sum of $100,000."

88 (1994) 25 CBR (3d) 271, (1994) Ont CJ *LEXIS* 2137.

notwithstanding the refusal of the US Government to file proof of claim and to appear, the court said:

> "The US authorities oppose on the basis that their loans got him the education that enables him to earn an exceptional income and that the principles applied in this court to Canadian student loans should apply equally to them.
>
> I can see no reason why the student loans should not receive the same consideration as similar loans by Canadian student lenders. In such cases the court takes into account whether the earning capacity of the bankrupt has been enhanced for the future by the education paid for by the loans."[89]

The court in *In re Taylor*[90] reached the opposite result, based on the refusal of the student loan creditor to file an appearance or proof of claim.

V. Common law practice in the recognition of foreign discharges

A. Discharge and the proper law of the contract

Dicey and Morris assert that "There can be no doubt that, in modern law, the general principle is that a discharge under a foreign bankruptcy law, like the discharge of contracts generally, is governed by the law applicable to the contract".[91] Several English and Scottish cases attest to the non-recognition of foreign and colonial discharges where the law applicable to the contract differed from the law of the discharge.

Folliott v *Ogden*[92] (1789): "The plaintiff having neglected to make use of the provision offered him in America, is precluded by his negligence from having an action in England . . . But as the contract was made in a foreign State, the laws of that State must be the measure of justice between the parties."

Smith v *Buchanan*[93] (1800): "[I]t rests solely on the question, whether the law of Maryland can take away the right of a subject of this country to sue upon a contract made here, and which is binding by our laws? This cannot be pretended: and therefore the plaintiffs are entitled to judgment".

Philpotts v *Reed*[94] (1819): based on the particular terms of the statute, 49 Geo 3, Ch 27, section 8, providing that an insolvent's certificate issued in Newfoundland "shall be a bar to all suits and complaints for debts contracted within the island of Newfoundland, and on the islands and seas aforesaid, and on the banks of

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89 *Ibid*, at 5.

90 (1988) 68 CBR (NS) 93 (PEI SC).

91 Dicey and Morris, comment following rule 172 (12th edn) (footnote omitted). Rule 172: "A discharge from any debt or liability under the bankruptcy law of a foreign country outside the United Kingdom is a discharge therefrom in England if, and only if, it is a discharge under the law applicable to the contract" (reflecting the Rome Convention terminology in substitution for "proper law"; compare 11th edn, rule 169). Discharge of a non-contractual debt, such as of damages in tort, is attributed to the law of the jurisdiction under which the liability arose. *Cf* Nygh, *Conflict of Laws in Australia*, 6th edn (1995) p 536 (similar rule).

92 1 H Bl 127, 133–134; 126 ER 75, at 81.

93 1 East 6, 12; 102 ER 3, at 5.

94 1 Brod & B 294; 129 ER 735.

Newfoundland, and in Great Britain or Ireland, prior to the time when he or she was declared insolvent". The defendant was held discharged in relation to an English debt, although the common law would not have so provided.

Potter v *Brown*[95] (1804): "The plaintiffs declared as payees of a bill of exchange drawn by the defendant at Baltimore . . . As to the first count he pleaded, that by a certain Act of the Congress of the United States of America of the 2d of December 1799, intitled An Act to Establish an Uniform System of Bankruptcy throughout the United States, it was enacted, that after 1 June 1800, if any merchant or other person residing within the US actually using the trade of merchandise, etc. by buying and selling, etc. should do certain acts (enumerating them,) every such person should be deemed a bankrupt; . . . the promise was in effect this, to pay the money in America if it were not paid here. Then the bill having been refused acceptance here, the implied promise to pay the money arose in America, and consequently the defendant's certificate is a bar to the demand".

Lewis v *Owen*[96] (1821): "A bill of exchange drawn by defendant in Ireland, and accepted and paid by plaintiffs in England, is a debt contracted in England, and cannot, therefore, be discharged by a certificate under an Irish commission of bankruptcy".

Sidaway v *Hay*[97] (1824): "A debt contracted in England by a trader residing in Scotland is barred by a discharge under a sequestration issued in conformity to the statute of 54 Geo 3, Ch 137, in like manner as debts contracted in Scotland . . . [T]he question must turn entirely upon the construction and effect of the statute".

Rose v *M'Leod*[98] (Scotland 1825): "In 1811 M'Leod came to England, where a commission of bankruptcy was issued against him . . . Rose, however, did not prove his debt against M'Leod's estate, but adopted measures for recovering it in the colony of Berbice, before the courts of which he obtained a decree finding him to be a creditor of M'Leod and Bethune for £3,833.19s.10d . . . as the debt in question had been incurred, and was secured and payable in the colony of Berbice, Rose could not be affected by the certificate which M'Leod had obtained in England".

Phillips v *Allan*[99] (1828): "The defendant in this case was not discharged pursuant to the provisions of that Act of Parliament [54 Geo 3, Ch 157]. He was discharged on making a *cessio bonorum*, which, by the law of Scotland, operates as a discharge of the person in respect of debts contracted in Scotland. . . . It seems to me that the debt is a subsisting debt, and that the plaintiff, an English creditor, is not prevented from enforcing payment of it in an English Court of Justice".

Ellis v *M'Henry* (1871):

> "[T]he first count was on a judgment obtained by the plaintiff against the defendant in the Court of Queen's Bench for Upper Canada; the original cause of action having arisen upon a contract which was made in Upper Canada, and was to be

95 5 East 124, at 131–132; 102 ER 1016, at 1019.
96 4 B & Ald 654; 106 ER 1076.
97 3 B & C 12; 107 ER 639.
98 (1825) 4 S 311.
99 8 B & C 477, at 482, 484; 108 ER 1120, at 1122.

wholly performed there. There is no provision in the Bankruptcy Act for giving notice of the bankruptcy to colonial creditors, and they ought not therefore in justice to be barred . . . the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country . . .[100]

The *first* action, however, is upon a judgment which was recovered after the deed was completed. In the view which we take of this case, the deed might have been set up as a defence to the action brought in Upper Canada; and it is averred, as a matter of fact, in the third replication, and not denied, that it might have been so pleaded. The question then arises, whether it can now be brought forward in the proceedings as an answer to the judgment.

When a party having a defence omits to avail himself of it, or, having relied upon it, it is determined against him, and a judgment is thereupon given, he is not allowed afterwards to set up such a matter of defence as an answer to the judgment, which is considered final and conclusive between the parties."[101]

Pollock QC, arguing for the plaintiff, cited Story[102] for the proposition that "The general rule is that a defence or discharge good by the law of the place where the contract is made, or is to be performed, is to be held of equal validity in every other place where the contract is to be litigated", and also *Kent's Commentaries*[103] and *Ogden* v *Saunders*,[104] holding that a discharge under the bankruptcy laws of one state did not affect a contract made and to be performed in another. *Ellis* v *M'Henry* remains good law in England. Later cases are consistent with the principle that foreign bankruptcy does not affect actions brought in England on English contracts, absent statutory derogation or voluntary appearance.[105] The

100 (1871) LR 6 CP 228, at 232–234.

101 *Ibid*, at 238.

102 *Commentaries on the Conflict of Laws* (1834), section 331.

103 Volume. ii, p 393.

104 25 US (12 Wheat) 213 (1827).

105 *Burrows* v *Jemino* (1871) 2 Strange 733, 93 ER 815 (cause determined by the local law of the place where a bill of exchange was negotiated, in this case Leghorn; judgment of a Leghorn court is conclusive upon the Court of Chancery in England); *Gardiner* v *Houghton* (1862) 2 B & S 743, 121 ER 1247 (defendant resident in Victoria where he was discharged, debts contracted within the Colony of Victoria; that plaintiff was resident in England did not give the English court jurisdiction; citing *Hunter* v *Potts* (1791) 4 TR 182, 100 ER 962: "what is a discharge of a debt in the country where it was contracted is a discharge everywhere"); *Cape Copper Co* v *Comptoir d'Escompte* (1890) 6 TLR 454 (French law of bankruptcy did not affect action brought in England on English contract); *In re Hermanos* (1890) 24 QB 640 (that a prior bankruptcy had been commenced in a foreign country, not shown to be the country of domicile of the debtors, constituted no grounds for staying proceedings in England); *Gibbs* v *Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 (a party to a contract made and to be performed in England not discharged by a foreign discharge under the law of his domicile); *New Zealand Loan and Mercantile Agency Co* v *Morrison* [1898] AC 349 (PC 1897) (appeal from the Supreme Court of Victoria; held: the Joint Stock Companies Arrangement Act 1870 does not apply to the colonies; an arrangement sanctioned by an English court cannot be pleaded in a Victorian court as a defence to an action by a non-assenting Victorian creditor); *Cooke* v *Charles A Vogeler Co* [1901] AC 102, at 107–109 (1900) (two Americans trading in Baltimore, carrying on business in England through a branch managed by an agent; held: "English legislation is primarily territorial"; relying on *In re Crispin* (1873) LR 8 Ch 374 ("an act of bankruptcy must be a personal act or default, and it cannot be committed through an agent"; a conveyance executed by a domiciled foreigner in his own country cannot be an act of bankruptcy within the meaning of the English statute; defendant not a debtor within the

most elaborate justification of the principle that a discharge good in the country where the cause of action accrued is good everywhere appears in the judgment of the Court of Demarara in *Odwin* v *Forbes*,[106] applying Roman-Dutch law. The judgment recognised the iniquity in conceding the vesting of assets in a foreign representative without giving force to the resulting discharge:

> "[T]he Dutch courts were in the practice of giving effect to foreign judgments, when the same comity was exercised with respect to theirs.[107]
>
> That the confirmation of the English certificate by the Lord Chancellor, was, in fact, a judgment in this respect[108] ... The effect given in England to the Dutch bankrupt laws, was further shewn by the observation which fell from Lord Mansfield in the case already mentioned of *Ballantine* v *Golden* who stated that he recollected the case of a *cessio bonorum* in Holland having been held to operate as a discharge in England ...[109]
>
> But the principle of giving effect to the foreign judgment, or certificate of discharge, seemed still clearer from the opinion of the most eminent Dutch lawyers, who had laid down the same doctrine as Lord Mansfield on this point, and almost in the same words.[110]
>
> ...
>
> [O]n the principle of comity and reciprocity ... and still further on the grounds that the effect of the certificate ought in justice to be co-extensive with the assignment, and that if foreign courts allowed the assignees under the English commission to strip the debtor of his foreign property, by giving effect to the assignment in their jurisdiction, they were bound in justice to give equal effect to the certificate, and not leave him liable to the actions of the foreign creditors, on which, and on other grounds noted in the judgment, the president pronounced the unanimous opinion of the court to admit the certificate as a discharge."[111]

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meaning of the Bankruptcy Act 1883)); *Galbraith* v *Grimshaw* [1910] AC 508 (dealing with a peculiarity of the Bankruptcy Act 1883 (46 & 47 Vict, Ch 52), section 117: a judgment creditor having attached property in England prior to the Scottish sequestration, the Scottish court had no jurisdiction to defeat his claim); *In re Nelson* [1918] 1 KB 459 (a certificate of discharge issued under Irish Bankrupt and Insolvent Act 1857 (20 & 21 Vict, Ch 58), sections 2, 58, 64 did not extend to England, and was not a defence to proceedings brought in England by an English creditor for a debt incurred and payable in England).

106 1 Buck Bankr Cases 57 (PC 1817), affirming decision of Jabez Henry at the Court of Criminal and Civil Justice of Demerara and Essequibo (Guyana), reported by Henry as *Judgment of the Court of Demerara, in the Case of Odwin* v *Forbes, on the Plea of the English Certificate of Bankruptcy in Bar in a Foreign Jurisdiction* (London, 1823); discussed by Nadelmann in "Some Historical Notes on the Doctrinal Sources of American Conflicts Law", (1959) *Ius et Lex – Festgabe zum 70. Geburtstag von Max Gutzwiller* 263, reprinted in *Conflict of Laws: International and Interstate* (1972), 1, at 10.

107 1 Buck Bankr Cases at 61.

108 Citing *Solomons* v *Ross* 1 H Bl 131; (1770) 126 ER 79; (1764) Wallis 59; *Jollet* v *Deponthieu* 1 H Bl 132; (1769) 126 ER 80; and *Potter* v *Brown* 5 East 124; (1804) 102 ER 1016; the reporter noting that the decision in *Royal Bank of Scotland* v *Cuthbert (In re Stein)* 1 Rose Bankr Cases 462 (title to all property wherever situated vested in assignees in English bankruptcy, precluding Scottish creditors from attaching Scottish property by sequestration), had not been known in Demerara.

109 *Supra* n 107, at 61.

110 *Supra* n 107, at 62.

111 *Supra* n 107, at 64.

A recent Irish High Court case addressed the question of discharge from a different aspect. The defendants in *Dyer* v *Dulan*[112] had, while domiciled in Massachusetts, filed joint petitions under Chapter 7. Shortly thereafter, the plaintiff in that case had filed an objection to discharge, alleging fraud, false pretences and false representations; but by then the defendants had resettled in Ireland without leaving a forwarding address with the Bankruptcy Court in Massachusetts nor, it would appear, their lawyer. In due course and in default of opposition a decree of non-dischargeability was entered which the defendants in the Dublin case sought to attack by alleging absence of domicile and hence of jurisdiction. The Irish court, finding for the plaintiffs on the debt of $937,000, held assertion of jurisdiction based[113] on the original petition to be no absence of "natural justice" and no grounds to deny enforcement based on a pending appeal in Massachusetts. There was no suggestion that, had the discharge been granted in Massachusetts, it would not have been recognised, the proper law of the debt apparently being American.

B. Appearance by the creditor in a foreign proceeding

Several cases cited in the treatises suggest that the justification for non-recognition of a discharge granted at the place of debtor's domicile is remoteness and poor communications; perhaps this is less justifiable in the modern era. In a few cases the result can be accounted for by an accident of statutory drafting. Given the disposition of courts to enforce foreign judgments in other areas where there is adequate notice and basic fairness[114] the result would seem, today, anomalous. Where the creditor has appeared, and especially where he has received a dividend, he is generally deemed bound by his voluntary conduct:

Nicholson v *Binks* (1832): "The appearance in the Irish courts seems to me to make all the difference in the world. The debt has no locus. The creditor followed his debtor to Dublin – threw him into prison there by force of the laws of Ireland, and brought him within the scope of the Irish Insolvent Act; he also took the assignation for the purposes of the Act, all as provided by the statute. And when the prisoner gets a discharge under the statute specially applicable to the debt of the charger, the charger is barred by personal exception from imprisoning upon that debt in Scotland."[115]

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112 High Court 1992 No 1474 (Transcript), in *LEXIS IRELAND* library.

113 *Ibid*, citing *Rainford* v *Newell-Roberts* [1962] IR 95, at 100 for the principle that a foreign judgment may only be enforced if the judgment resulted from the adjudication of a court of competent jurisdiction, and asserting that this is a matter which must be determined in accordance with Irish Conflict of Law rules.

114 *Cf* the *International Shoe* principle (*International Shoe Co* v *Washington* 326 US 310 (1945)) and *Schibsby* v *Westenholz* (1870) LR 6 QB 155 (action on French judgment in a case where, although defendant was out of the jurisdiction, an English court would have had the power to order service out of the jurisdiction). For a foreign judgment to be enforced in England (absent applicability of the Brussels Convention) the foreign court must have had jurisdiction in the sense of English rules of conflict of laws (Dicey and Morris, 11th edn, rule 35, Comment).

115 (1832) 11 S 153, at 157 (Scotland).

Cathcart v *Blackwood*[116] (1765): "The respondent was creditor of the company, and had ranked on the estate, and received his dividends [in England] . . . but in the hope of enforcing payment of his claims, the respondent raised the present action [in Scotland]". The court held that it was "not proved" that the defendant had been guilty of fraudulent concealment of assets, and that under the statute of 5 Geo II, Ch 30, section 70 the English discharge protected him in Scotland.

Frith v *Wollaston*[117] (1852): the plaintiffs having proved the amount of their debt and received a dividend of ls. 6d. in the pound in the Cape of Good Hope did not act as a bar to an action in England because "[t]he law [of the Cape of Good Hope] as set out merely stays the proceedings upon the judgment for the purpose of protecting the estate of the debtor in the hands of the officer of the Insolvent Court in the colony; but it does not enact that it shall be taken to operate as a satisfaction and discharge of the estate or the person of the debtor".

Seligman v *Huth*[118] (1877): an action in trover. The defendants, bankers in London, provided credit for the trading business in cotton of Kaufman and Co, merchants in New York, who maintained two separate accounts, one of which was in credit and the other in debit when the merchants filed for bankruptcy in New York. The defendants had proved their debt in New York. The plaintiffs, New York bankers and trustees in the bankruptcy, sued for the credit balance. Quain J, citing *Phillips* v *Allan*, held that "proving for an English debt under bankruptcy proceedings abroad operated as a discharge", and denied the right of set-off. On appeal, the Court of Appeal affirmed, noting:

> "The defendants, before the commencement of this action proved in New York, in the bankruptcy of Samuel Kaufman and Co., against their estate for the sum of 8342*l.* 7s. 9d. . . . They claim to set off the remainder of their debt against the plaintiff's claim. There can be no set-off by way of mutual credit, even were the bankruptcy an English one, because the transactions under accounts A. and B. were entirely different, with different rates of commission payable under each account. The transaction must be one and the same for mutual credit or right of set-off to apply. Courts of equity will not set off mutual disconnected debts."

The principle of *res judicata* could be said to apply, following Dicey and Morris, rule 37: ". . . a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition . . . [i]f the judgment debtor, being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings" and, further, by way of comment:

> "Appearance as plaintiff or counter-claimant. It is obvious that a person who applies to a tribunal himself is bound to submit to its judgment, should that judgment go against him, if for no other reason than that fairness to the defendant

116 (1765) 2 Paton 150.
117 7 Ex 194, at 196–197; 155 ER 913.
118 (1875) LT Jo 122; *aff'd* (1877) 37 LT 488.

demands this. It is no less obvious that a plaintiff exposes himself to acceptance of jurisdiction of a foreign court as regards any set-off, counterclaim or cross-action which may be brought against him by the defendant. By the same token, a defendant who resorts to a counterclaim or like cross-proceeding in a foreign court clearly submits to the jurisdiction thereof."[119]

The principle, and the case law, holding that a claimant in a foreign bankruptcy proceeding may be bound by the discharge, has been noted by only one commentator;[120] indeed, it has been ignored by an authority on Scottish bankruptcy law.[121] In one Canadian case the creditor was allowed to sue on a note despite having filed proof of claim in a prior US bankruptcy proceeding involving the debtor, but that outcome seems to have turned on the fact that immovable property of the debtor located in Ontario, a summer home, had been unaffected by the US proceeding.[122]

C. US law on the cross-border validity of discharge

The US jurisprudence starts from the same pre-nineteenth century common law precedent enunciated by Story, clearly implying a preference for domestic creditors:

"And, certainly, the priorities and privileges, annexed by the laws of particular states to certain classes of debts contracted therein, are not generally admitted to have the same pre-eminence over debts contracted in the country, which is called upon to enforce them. Nor are the courts of any state under any obligation to give effect to a discharge of a foreign debtor, where, under its own laws, the creditor has previously acquired a right to proceed against his property within its own territory."[123]

Story then discusses the problem presented by the Constitutional prohibition on the passing of laws by the states that would impair the obligation of contracts, interpreted in *Ogden* v *Saunders*.[124] Thus, in 1812, a discharge from debts under the Insolvent Act of Rhode Island, is no discharge of a contract, which was made and to be executed in a foreign country[125] and, in 1819, in *Sturges* v *Crowninshield*[126] and

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119 11th edn, at p 441.

120 Smart, *Cross-Border Insolvency* (1991), at 165.

121 McBryde, *Bankruptcy*, (Edinburgh, 1995), at §18-58.

122 *Marine Trust Co* v *Weinig* [1935] Ont WN 150 (Ont HC 1935) (an action on a promissory note made in, and payable at, Buffalo, New York, citing *Macdonald* v *Georgian Bay Lumber Co* 2 SCR 364 (1878) for the principle that a foreign court and proceeding have no effect upon immovables located in Canada). *Cf In re Kooperman* [1928] WN 101 (Belgian curator appointed receiver by the English court with power to sell leaseholds located in England); William Binchy, *Irish Conflict of Laws* (1988), at 478 : "Irish courts have for long adhered to the doctrine of universality, whereby all moveable property, wherever situated at the time of the assignment by foreign law, passes to the trustee. This doctrine does not extend to immovables situated in Ireland, although the Irish court may exercise its discretion to permit a foreign trustee to dispose of Irish immovables for the benefit of the bankrupt's creditors" (footnotes omitted).

123 Story, §337.

124 25 US (12 Wheat) 213 (1827).

125 *Van Reimsdyk* v *Kane* 28 Fed Cas 1062 (Cir Ct D RI 1812).

126 17 US (4 Wheat) 122 (1819).

McMillan v *McNeill*[127] state bankruptcy and insolvency laws discharging debtors were deemed repugnant to the Constitution of the United States, irrespective of whether the law preceded the contracting of the debt. Furthermore, in *McMillan*, where the debtor had obtained discharges under Louisiana and English law, it was held that a "discharge under a foreign law was no bar to an action on the contract made in this country", the claim being on custom house bonds issued in South Carolina.

There is a clear tension between discharge, as a negation of vested property rights, and bankruptcy's function of rationalising and maximising debt collection.[128] Social and economic changes, the relative anonymity of modern debtor-credit relationships, the disappearance of shame and fault as concomitants of bankruptcy, and, latterly, a view of access to discharge as a fundamental right, have opened to question the appropriateness of the contractarian model. In any case, bankruptcy as a solution for personal financial embarrassment competes with alternative solutions: to the traditional spendthrift trust may be added asset protection trusts, family limited partnerships, securitisation and intermediation of assets and similar modern creditor-repellent devices.[129] The increased sophistication of the bankruptcy and of the estates and trusts bar has assured that debtors with the expectation of future assets can arrange to keep those future interests out of reach of creditors.[130]

If it is true that legislators do not often give serious thought to the private international law implications of their work,[131] this is particularly so with respect to the effects of bankruptcy law. United States practice with respect to cross-border validity of discharge remains a matter of common law, tempered only by later

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127 17 US (4 Wheat) 209 (1819).

128 Jackson, *The Logic and Limits of Bankruptcy law* (1986), at 253 ("an independent substantive goal of bankruptcy law designed to override non-bankruptcy entitlements"). *Cf* Hill, "Bankruptcy, Contracts and Utilitarianism" (1991) 56 MLR 571 ("the utilitarian paradigm represents the most appropriate philosophy for achieving justice in bankruptcy law").

129 See Rothschild, "Asset Preservation: Legal and Ethical Strategies", *New York Law Journal*, 11 March 1994, at 1; Gibbs, "Asset and Tax Protection: The Foreign Trust as a Solution" (February 1993) 32 *Trusts & Estates*, at 10. Keeping assets as well as beneficiaries and controlling persons away from hostile jurisdictions is an obvious post-discharge strategy, and the potential for evasion of local law through the use of trusts has been a factor in their rejection by many civil lawyers.

130 See *Mann* v *Kreiss (In re Kreiss)* 72 BR 933 (Bankr ED NY 1987) (Status of debtor, who had lost a large amount of money in an investment in rabbit-fur slippers, as residual beneficiary and trustee did not vitiate trust; legal interest in second trust not being alienable it would be excluded from estate. Testamentary trust was deemed spendthrift trust under state law and thus outside of the estate). In this peculiar case the father of the debtor provided a gift of $200,000 to the debtor's sister to buy the debtor's home at a court-sanctioned sale; but no attack was launched for the benefit of the estate on the testamentary trust established by the debtor's father (who died during the period leading up to the bankruptcy) as might have been done pursuant to New York State New York Estates Powers and Trusts Law section 5-1.1 (granting a right of election to the surviving spouse: the debtor's mother died six days after the debtor's father). That debtor's brother had joined a religious sect and lost touch with his family complicated the evaluation of interests in one of the trusts since until his appearance late in the proceeding it was unclear whether he remained alive. Some allied issues, including the right of disclaimer, are addressed in Hirsch, "The Problem of the Insolvent Heir" (1990) 74 Corn L Rev 587.

131 Dicey and Morris, 12th edn, at p 16, n 69 and accompanying text.

views of comity, equity and *forum non conveniens*. An annotation published in 1919 reviewed the case law up to that early date;[132] it concluded that "the weight of authority is to the effect that a discharge of a bankrupt under a bankruptcy act of the United States operates as a bar to the maintenance of an action in its courts by a foreign creditor".[133] *Morency* v *Landry*[134] held that the claims of a creditor residing out of the United States, when properly scheduled, are included in a discharge under the Bankruptcy Act of 1898.

Ball v *Cohen*[135] was an action brought in 1970 by a Canadian creditor with notice of the bankruptcy proceedings who had failed to file proof of claim on a debt incurred by the debtor while resident in Canada. The state court dismissed, citing *Marine Harbor Properties Inc.* v *Manufacturers' Trust Co*[136] for the rule that federal bankruptcy power is paramount and supreme so as to exclude every competing or conflicting proceeding in state or federal courts; and *Ruiz* v *Eickerman*:[137]

> "The discharge, in bankruptcy is valid, in the absence of fraud, in whatever court of the United States a suit is brought . . ."
>
> [D]espite the notice of the bankruptcy proceedings in this state and country, the plaintiff chose to wait until the defendant had received his final discharge in the bankruptcy court, and then attempt to enforce his claim of right in the State that had granted the discharge of the defendant in bankruptcy."[138]

The court in *Ball* noted that in the case cited by the claimant, *McDougall* v *Page*,[139] the Canadian debt in question had not been scheduled and the plaintiff had not had actual notice and had not participated in the proceeding. As the court in *Morency* had stated: "Neither does the law undertake to make the discharge effective against the creditor in proceedings brought at his place of residence in Canada. It merely places him on an equality with our own citizens in proceedings in our courts."[140] Whether the discharge is effective in Canada would be a matter for Canadian, not US law.[141]

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132 Annotation: "Discharge in Bankruptcy as Bar to Debt Due to Foreign Creditors" (1919) 9 ALR 127.

133 *Ibid*, citing *Zarega's Case* 1 NY Legal Obs 40, 30 F Cas 18,204 (1842); *Ruiz* v *Eickerman*, 2 McCrary 259, 5 F 790 (Cir Ct ED Mo 1881).

134 79 NH 305, 108 A 855, 9 ALR 123 (1919).

135 128 Vt 577, 269 A2d 27 (S Ct Vt 1970).

136 317 US 78 (1942).

137 2 McCrary 259, 5 F 790 (Cir Ct ED Mo 1881) (claim of alien non-resident plaintiff held barred by defendant's discharge).

138 269 A2d at 29.

139 55 Vt 187 (1882).

140 108 A at 857.

141 There have been few reported decisions pertaining to foreign claimants taking exception to the US discharge of a debtor, perhaps because such cases do not raise novel points of law but turn, instead, on the facts of non-dischargeable debt, fraudulent concealment or the validity of exemptions. In two recent unreported cases involving US citizens domiciled in the United States who scheduled English debts (*In re Kissell*, Bankr ND Ill, 92B16589 and *In re Scheinuk*, Bankr ED La, 93B11134), the English creditor, Lloyd's, utilised rule 2004 examination to ascertain the value of the estate and the susceptibility to attack of the exemptions; in the first case an undisclosed settlement was reached; in the second, proof of claim was filed (on rule 2004 see Stevenson, "Discovery Under the Federal Rules of Bankruptcy Procedure" (1993) 9 Bankr Dev LJ 643).

Canadian law, following the English rule, holds that a "discharge in bankruptcy under the law of a foreign country, which is the proper law of the contract, operates as a discharge from liability under the contract in Canada. It will not, however, be a discharge for a liability incurred in Canada."[142] The leading Canadian case, *International Harvester Company of Canada Limited* v *Zarbok*,[143] involved a domiciliary of North Dakota, there granted a discharge under the US Bankruptcy Act. The defendant was sued on three notes, two made at and while domiciled in Saskatchewan and the other at and while domiciled in North Dakota. The court granted judgment for the plaintiff on the two Canadian notes, notwithstanding that the consideration for one of them was four US notes that had been extinguished in the US bankruptcy; it held the US note sued on extinguished. There was, at the time, no Canadian bankruptcy legislation and the law of North Dakota then provided that the moral obligation on a discharged debt was sufficient consideration to support a new promise to pay.

An earlier Canadian case is cited for the rule that lack of notification to the creditor is no bar to the recognition of a foreign discharge valid under the proper law of the debt. In *Ohlemacher* v *Brown*[144] the plaintiff sued in Canada on a US judgment, and during the course of the suit the defendant secured a discharge in bankruptcy from the District Court for the Northern District of Ohio, subsequently pleading this discharge as a plea *puis darrein continuance.*

> "The evidence of plaintiff, as to defendant residing at Middle Island, is not sufficient to avoid the discharge. The cause of action appears to have been a promissory note made at Put-in-Bay, in the United States, and the evidence shewed that a carrying on business for six months in the United States would be sufficient, whether the debtor was or was not a citizen."[145]

A recent Ontario case, *Paulin* v *Paulin*,[146] a suit by a father against his son grounded in fraud and claiming that certain sums owing had for that reason not been discharged in the son's prior bankruptcy in Arizona, was dismissed on the basis that neither the fraud nor the amounts were proven, and that although a discharge had not been pleaded the court found it significant that the purported debts had not been claimed in the bankruptcy. The case is of little precedential value notwithstanding that some at least of the debts claimed might have had a Canadian situs. However, it does illustrate the problem evident in many lower-court adversarial proceedings, mostly unreported, the ease with which fraudulent transfers and nondischargeability are alleged, and the difficulty with which they are proved.

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142 Houlden and Morawetz, 2 *Bankruptcy and Insolvency Law of Canada*, 3rd edn (1995), H section 24.1. See also Castel, *Canadian Conflicts of Laws* (1986), section 139; Duncan and Honsberger, *Bankruptcy in Canada*, 3rd edn (1961), at 783.

143 [1918] 3 WWR 38, 11 Sask LR 354 (KB).

144 (1879) 44 UC QB 366, at 370–371.

145 *Ibid*, at 371.

146 1994 Ont CJ *LEXIS* 3445 (1994).

The issue that remains to be appreciated is the treatment to be accorded in US courts of the defence of foreign discharge of a debt. The question may be of limited concern since discharge in the United States is more generous in terms of exemptions and in terms of speed of procedure than similar relief in other common law jurisdictions. A foreign debtor feeling at risk could seek the commencement of a full US proceeding if he or she qualifies by reason of domicile, residence or assets. An ancillary proceeding under 11 USC section 304 would not yield a discharge;[147] furthermore such an action would be at the discretion of the foreign representative and any injunctive relief at the discretion of the US bankruptcy court. Absent a US proceeding the defence to a suit in the United States could be premised on *res judicata* if the claimant had appeared in the foreign proceeding, on *forum non conveniens*, and comity if the forum granting the discharge had subject-matter jurisdiction over the debt and, particularly, if it had or could have had personal jurisdiction, perhaps by way of domicile, over the foreign claimant.

Yet if the contract, and hence the debt, have a US situs, and if an "interest analysis" would justify non-recognition of a foreign discharge, the debtor may be held to the consequences of his failure to file bankruptcy concurrently in the United States. That is implicit in the decision in the 1962 case, *Bank of Buffalo* v *Vesterfelt*[148] which held that "[t]o grant comity to the Canadian bankruptcy proceedings in this case would jeopardize the rights of a local creditor".[149] The court referred back to Story, Kent and Ehrenzweig,[150] and cited *McMillan* v *McNeill*,[151] *Ogden* v *Saunders*,[152] *Green* v *Sarmiento*[153] and *Phelps* v *Borland*.[154]

Green v *Sarmiento*[155] considered a plea of discharge in Tenerife against a claim in debt on a contract of uncertain applicable law.

> "First, the rule is that the law of the country where a contract is made, is the law of the contract, wherever performance is demanded; and the same law which creates the charge will be regarded if it operates a discharge of the contract. The laws of one country can have in themselves no extraterritorial force except so far as the comity of other nations may extend to give them effect; and where is the nation that will or ought to acknowledge the validity of foreign laws, legislating over

147 See Finister, "1988 Developments and the Conflicts Arising Under Section 304" (1989) 6 Bankr Dev J 345, at 357, citing *In re Goerg*, 844 F2d 1563, at 1567 (11th Cir 1988).

148 36 Misc 2d 381; 232 NYS2d 783 (County Ct Erie Co 1962) (defendant resided in Canada, working there for a Canadian corporation. He borrowed money from a Buffalo, New York bank and failed to repay the loan; the bank entered a judgment against him in Erie County. Two months after the judgment he made a voluntary assignment to a trustee in bankruptcy under the Canadian Bankruptcy Act in which he scheduled this debt. The New York bank did not appear there; instead, about two months after the bankruptcy assignment the bank garnisheed his salary by means of a garnishment served by the Sheriff of Erie County upon the Buffalo office of the defendant's employer. The questions addressed by the court were the effectiveness of the discharge in New York State and the legality of the garnishment).

149 *Ibid*, at 785.

150 *A Treatise on the Conflict of Laws* (1962), at §50.

151 17 US (4 Wheat) 209, 213 (1819) ("a discharge under a foreign law, was no bar to an action on a contract made in this country").

152 25 US (12 Wheat) 213, 272 (1827).

153 10 F Cas 1117; 3 Wash CC 17; Pet CC 74 (Cir Ct D Pa 1810).

154 103 NY 406; 9 NE 307 (CA 1886).

155 10 F Cas 1117; 3 Wash CC 17; Pet CC 74 (Cir Ct D Pa 1810).

> persons not within the jurisdiction of such foreign country, and affecting contracts entered into elsewhere and with a view to other laws? It is said that France acknowledges the binding force of foreign bankrupt laws to discharge the foreign debtor from all his contracts wherever made. If this be so, I can only say that the comity of that nation is marked by a whimsical and I think an irrational opposition to that which obtains in most other countries."

Ruiz v *Eickerman*[156] involved a Spanish plaintiff who had followed his debtor to the United States and argued against the validity of a US discharge:

> "The plaintiff in this suit had a cause of action against the defendant. The plaintiff was a non-resident and citizen of Spain, and as such could have recovered judgment. But the defendant availed himself of provisions of the bankrupt act under which the plaintiff could, by proper proceedings, have proved his demand and shared in dividends made. He elected not to do so, and therefore his demand is discharged as to this defendant, so far as the United States law operates; that is, within the territorial limits of the United States. The discharge in bankruptcy is valid, in the absence of fraud, in whatever court of the United States a suit is brought, although it may not protect the defendant from a suit brought in a foreign jurisdiction, if he should be found therein."

LeRoy v *Crowninshield*[157] is of less significance as an authority on bankruptcy discharge, since its holding concerns the procedural status of a sister state's statute of limitation in contract disputes, rather than because it is a scholarly analysis by Joseph Story who borrows from the writings of Huber, Voet, Pothier and the other Continental writers whose ideas permeate his *Commentaries* and who, in dictum, finds a parallel in bankruptcy discharge:

> "What is the right of a contract, when the remedy is extinguished in perpetuity? That a debt, barred by the statute of limitations, is not so utterly gone, as that it may not be revived by a new promise, is admitted. And in this respect, it is exactly in the same predicament, as a debt discharged by a certificate of bankruptcy. The right is just as much extinguished in the one case as in the other, and no more. Indeed, a discharge in bankruptcy is but an extinction of all future remedy against the person and effects of the debtor."[158]

Story cites *Decouche* v *Savetier*,[159] *Van Reimsdyk* v *Kane*[160] and older cases,[161] declaring: "In this class of cases it has been uniformly decided that as the discharge does not touch the right under the contract, but merely removes one local remedy, leaving all others in force, there is no ground to relieve the defendant from the

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156 5 F 790; 2 McCrary's Cir Ct Rpts 259 (Cir Ct ED Mo 1881).

157 15 F Cas 362; 2 Mason 151 (Cir Ct D Mass 1820); see also *Sturges* v *Crowninshield* 17 US (4 Wheat) 118 (1819).

158 15 F Cas 362, at 369.

159 3 Johns Ch 190, 218 (NY 1818).

160 *Van Reimsdyk* v *Kane* 28 F Cas 1062, 1 Gallison 371 (Cir Ct D RI 1812).

161 Including *James* v *Allen* 1 US (1 Dall) 188 (Pa 1786).

effect of any process issuing according to the law of any foreign country, where he may be sued."[162]

In re Shephard[163] involved the interpretation of the Bankruptcy Act of 1867[164] and the establishment of the national scope of bankruptcy authority – whether a creditor from another district could prove his claim. The court held that "the fact that the creditor's remedy for his debt, by suit in New York, is barred by the statute of limitations, does not prevent the proof of such debt or bar his right to oppose the discharge of the bankrupt", and, in justifying that conclusion, the decision notes:

> "The English statute of limitation operating throughout the whole of England, and it being there held that a foreign creditor (one whose debt was contracted and to be paid elsewhere than in England, whether in the United States, France, Germany, or an English or foreign colony) would not, even when suit for its collection was brought in an English court, be barred by a discharge in bankruptcy granted in England, unless the foreign creditor voluntarily made himself a party to the proceeding (*Eden*, Bankr Law 422, 423; *Smith* v *Buchanan* 1 East, 6), there is much reason for the adoption of the English rule there which does not apply here.
>
> Our own courts hold that a bankrupt's discharge in a foreign country does not discharge a debt made in and with reference to the laws of the country (*Green* v *Sarmiento* [Case No. 5,760]; *Zarega's Case* [Case No. 18,204]), agreeing in this respect with the English doctrine."

Phelps v *Borland*[165] concerned a bill of exchange drawn on a Liverpool firm and accepted by the firm, but unpaid. After the London firm was granted an English discharge in bankruptcy in a proceeding at which the plaintiffs appeared, filed proof of claim and received a dividend, the plaintiffs sued the drawer of the note in the United States:

> "A foreign discharge in bankruptcy is not a defence to an action brought here, upon a debt or obligation of the bankrupt, by a citizen who was not a party to, and did not appear in the bankruptcy proceedings, although such debt or obligation was contracted under the law of the jurisdiction of the Bankruptcy Court, and was to be there paid . . .[166]
>
> . . . If property of the bankrupt should be found in our jurisdiction, the plaintiffs were at liberty to proceed against it by attachment and collect their debt out of such property, and the foreign bankruptcy proceedings would neither prevent nor stand in the way, for the sufficient reason that their only force in our jurisdiction comes from our consent, and we have chosen thus to limit that consent."[167]

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162 15 F Cas 362, at 366.

163 21 F Cas 1250 (D ND NY 1868).

164 14 Stat 517.

165 103 NY 406; 9 NE 307 (CA 1886). See also *Johnstone* v *Johnstone*, NY LJ, 6 October 1937, at 1014, col 7 (S Ct NY Co), a suit for alimony under an English separation agreement in which the court declared "the defense of the English discharge in bankruptcy is no bar to this suit".

166 103 NY, at 406.

167 *Ibid*, at 409.

Ehrenzweig's *Treatise*[168] observes that with the exception of decedents' estates[169] federal pre-emption of bankruptcy means that conflict of laws issues are primarily international, and he postulates that in the absence of statutory or treaty interference courts will adhere to the Supreme Court's denial of recognition to a foreign discharge in *McMillan* v *McNeill*. Finding a distinction between the public policy of discharges oriented towards giving debtors a fresh start and compositions having their emphasis on creditors' interests, Ehrenzweig acknowledges Nadelmann's suggestion that the creditors might be entitled to greater cross-border respect.[170] Finally, Ehrenzweig notes that the question appears settled that a creditor's participation in foreign proceedings, and especially his acceptance of a dividend, will bind him as to the judgment.[171]

VI. **Recognition of discharges in civil law jurisdictions**

That there is little case law and doctrinal analysis in civil law jurisdictions on the validity of foreign discharges reflects an obsolete and fading approach to bankruptcy that predates the internationalisation of consumer and private investment transactions and the economic integration of Europe. Indeed, it is the purpose of this paper to affirm the need for juridical rules based on analogy to other extinctive provisions in these jurisdictions, the evolving consensus regarding consumer protection laws and the implications of cross-border freedom of establishment. In the absence of rules of private international law one is left to analogy from other extinctive provisions, such as that of prescription. This does not always provide a satisfactory solution since, in the presence of *renvoi*, conflicts with unpredictable outcome can occur,[172] but it at least highlights the problem and the risks for those concerned.

The Swiss Private International Law code[173] changed, with effect from 1988, the prior law based on the territorial principle that would have refused cross-border recognition to the effects of a bankruptcy proceeding. Under article 166 of the Code a bankruptcy or arrangement proceeding in the foreign jurisdiction of the debtor's domicile will be recognised in Switzerland; article 170 deals with the legal effects of that recognition on assets located in Switzerland.[174] The recognition of the effects of foreign proceedings by Scandinavian countries prior to the

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168 §50.

169 As to which, see Nadelmann, "Insolvent Decedents' Estates" (1951) 49 Mich L Rev 1129.

170 Nadelmann, "Compositions – Reorganizations and Arrangements – in the Conflict of Laws" (1948) 61 Harv L Rev 804, at 819–823.

171 *Clay* v *Smith* 3 US (28 Pet) 411 (1830); *Eustis* v *Bolles*, 150 US 361 (1893).

172 See *Malherbe* v *Marine Service Ltd*, Cour d'appel de Paris, 16th Ch, 23 January 1975, (1976) 65 *Rev critique du droit international privé* [RCDIP] 97 and, generally, Hage-Chahine, "La prescription extinctive en droit international privé" (1995) RCADI (not yet published).

173 Loi fédérale sur le droit international privé, 18 December 1987, RS 292; see Gilliéron, *Les dispositions de la nouvelle loi fédérale de droit international privé sur la faillite internationale* (Lausanne, 1991).

174 In other respects "[t]he principle of territoriality governs the [Swiss] law of bankruptcy ... But, more and more, case law and doctrine call into question the principle of territoriality in bankruptcy (ATF 95 III 83; 100 Ia 18; 102 III 71)", (Vischer and Volken, *Loi fédérale sur le droit international privé* 355 (1978)).

enactment of new consumer bankruptcy laws was inconsistent,[175] Danish jurisprudence holding that a foreign arrangement might be binding on Danish creditors if it originates in the country of domicile;[176] but Finnish,[177] Norwegian,[178] and Swedish[179] cases have held otherwise. In Belgium, which has no provision for relief of individual debtors and which reserves *réhabilitation* for "the bankrupt who shall have fully acquitted the principal, interest and expenses of all sums due by him",[180] the status of a foreign discharge is uncertain. In common with those in several other countries[181] the consumer movement in Belgium has sought the enactment of statutory relief for consumer debtors;[182] that the Luxembourg and Belgian consumer credit markets are largely merged creates an immediate need for attention to the cross-border implications of any statutory formulation. Yet cases are few and the doctrine uncertain; and at least as regards obligations within the scope of the Brussels and Rome Conventions the exclusion of bankruptcy matters from the former and the attribution by the latter of the governing law of the contract to the question of extinction suggests an outcome that, like the practice in common law systems, will view discharge as a dual event: an extinction of the debt if its governing law is the same as that of the discharge and, in any event, a procedural bar to recovery within the jurisdiction granting the discharge.

In the meantime, differing perceptions of the function that bankruptcy should perform can lead to anomalies, and to doubt. The problems posed by conflicting definitions of what constitutes bankruptcy, obsolescence of existing bilateral treaties, and inconsistent rules of personal and subject-matter jurisdiction are illustrated by a 1993 decision of the French Cour de Cassation[183] in an appeal against a decision by the High Court of Paris accepting the application by the liquidator of a firm of architects seeking the opening of an associated involuntary insolvency procedure against the former joint manager of the firm, Mr Erdul Ergur, a Belgian citizen domiciled[184] in Belgium, although as a non-merchant

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175 See Bogdan, "International Bankruptcy Law in Scandinavia" (1985) 34 Int'l & Comp LQ 49, at 81.

176 Gomard, *Skifteret*, 2nd edn (1969), at 425, cited in *supra* n 175, at 74.

177 Palmgren, "Den nordiska konkurskonventionen" (1935) Tidskrift, utgiven av Juridiska Föreningen i Finland, 162, cited in *supra* n 175, at 74.

178 Hagerup, *Konkurs og akkordforhandling*, 4th edn (1932), 382–383 and *Petersen, Møller & Hoppe* v *D'Auchamp* UfR 1867, at 977, cited in *supra* n 175, at 74.

179 Landsover- samt Hof-og Standsret; *Stockholms Enskilda Bank* v *Knös* NJA 1897, at 28 (Supreme Court); *Morrison & Co* v *Ekengren*, NJA 1905, at 146 (Supreme Court), cited in *supra* n 175, at 74–75.

180 Article 586, Law of 18 April 1851 on bankruptcy, criminal bankruptcy and suspension (*Moniteur belge*, 24 April 1851), reprinted with annotation to Cour de Cassation decisions in Pierre Dembour, *Les faillites et la Cour de Cassation* (1974).

181 Huls, *Overindebtedness of Consumers*, Ch 6.

182 See Domont-Naert, "Un pas vers l'introduction d'une procédure de règlement collectif des dettes en droit belge" (1995) Droit de la consommation/Conumentenrecht, No 28; Draft law on the prevention and combating of overindebtedness, Parliamentary documents, Senate, 1994–95, No 1393/1.

183 Cass (1st Ch civ), 24 March 1993, decision No 530, case No 91-15.272 (in Téléconsulte and *LEXIS PRIVE* library, CASSCI file).

184 In the Belgian sense, which is largely dependent upon registration with the commune. In the United States establishment of domicile by registration exists in Louisiana and registration of domicile in Florida, but those procedures are facultative; they are a rarity in common law jurisdictions because common law domicile

Mr Ergur could not have been made bankrupt in Belgium:

> "[W]hereas in Belgian law [insolvency] procedures have maintained an exclusively commercial character the French legislator has extended them to incorporated bodies whether or not commercial ... in French law the non-merchant director of an incorporated private-law non-merchant body can be the object, as in this case, of the opening of an insolvency (*redressement judiciaire*) procedure based on article 182 of the Law of 25 January 1985, it being further noted that the director of a professional firm is held jointly and severally liable for the debts of the firm (Law of 29 November 1966, article 16(1)) ... [T]he action brought against Mr Ergur based on article 182 of the Law of 25 January 1985 falls, therefore, within the jurisdiction of the High Court of Paris in application of articles 1 and 10 of the French-Belgian Convention, and in any case, from the extension on an international basis of the rules of internal territorial jurisdiction of article 163 of Decree No 85-1388 of 27 December 1985 ..."[185]

The French Cour de Cassation has recognised the rights of the trustee in an English bankruptcy, notwithstanding that the non-merchant debtor could not have been subjected to insolvency proceedings in France.[186] It has been suggested that a German court would recognise a French reorganisation of an insolvent firm even though the procedure as such is unknown in German law, because similar powers to restrict the disposal of assets are available to the German court.[187] A German court has ruled barred a debt that a German creditor had failed to prove in the French bankruptcy procedure of a French debtor, notwithstanding a German forum selection clause.[188] Such an outcome can result from the view of bankruptcy and discharge as a matter of personal status, or from a universalist approach that looks to the place of domicile or centre of interests.

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depends on intent, and actions are merely evidence of such intent: "There must be a declaration before the judge of the parish from which the party removes, as well as that where he intends to reside. When not made, proof of his intention will depend on circumstances". (*Leonard's Tutor* v *Mandeville* 9 Mart OS 489 (La 1821)). Succession of Lombardo, 205 La 261, 17 So 2d 303 (1944). Florida: Florida Statutes, Title XV, "Homestead and Exemptions", section 222.17, "Manifesting and evidencing domicile in Florida".

185 Informal translation.

186 *Leewarden* v *Cole*, Cour d'Appel d'Aix en Provence, 8th Ch, 29 June 1964 (1965) 54 RCDIP 138; *Weiss* v *Howell* Cass, 1st Ch civ, 29 June 1971, 100 Clunet 383 (1973), comment by Trochu (numerous prior proceedings cited in latter report).

187 Grasmann, "Effets nationaux d'une procédure d'exécution collective étrangère (redressement ou liquidation judiciaires, faillite, concordat)", (1990) 79 RCDIP 421, at 475, discussing the Vergleichsordnung, sections 12, 58/59.

188 Saarbrücken, 31 January 1989, 1989 Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis [ZiP], 114; Entscheidungen zum Wirtschaftsrecht [EWiR], Konkursordnung, section 237, January 1989, at p 1023, criticised by Grasmann at (*supra* n 187 at 476) for inadequately addressing the question of applicable law, and whether French law could extinguish a debt subject to German law. The court based its ruling on article 42(2) of the French Law of 13 July 1967 (now article 53(3) of the Law of 25 January 1985), concerning discharge.

VII. The implications of section 304 for US recognition of foreign discharges

In re Toga Mfg[189] suggests a changed attitude represented by the provision for ancillary administration, notwithstanding the absence of any mention of discharge: "Section 304 of the Code, 11 USC section 304, embodies the universal theory of conflicts of laws with some qualifications; this theory requires that a judgment rendered in the domicile of the debtor be recognised in all other jurisdictions" (citing Story, at section 403–405). Yet the judgment goes on to reject, in that case, the equivalence of the Canadian remedy because the claimant creditor would not have the benefit of "distribution of proceeds of such estate substantially in accordance with the order prescribed by this title" mandated by section 304(c) of the Bankruptcy Code.[190] It concedes, however, that the result would have been different if the proposed draft United States of America-Canada Bankruptcy Treaty (1979) were adopted,[191] but protests that "this Court must protect United States citizens' claims against foreign judgments inconsistent with this country's well-defined and accepted policies".[192] That attitude is quite different from that shown in *In re Culmer*[193] and in the *Salen* cases:[194] "the public policy of the United States would be best served by recognising the Swedish proceedings and thereby "facilitat[ing] the orderly and systematic distribution of the assets of Salen."[195]

In the case of proceedings involving individuals there must be concerns about whether *any* foreign bankruptcy system could satisfy the last three of the six requirements of section 304;[196] one could also envisage conflict with the state homestead and exemption laws particularly to the extent that they are effective

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189 28 BR 165 (ED Mich 1983), at 167.

190 11 USC section 304(c). This outcome is criticised in the decision of *In re Axona Int'l Credit & Commer Ltd* 88 BR 597 (Bankr SD NY 1988), at 611: "The limited focus in *Toga* on the minor substantive differences between Canadian and US law prevented the court from considering the full scope and procedural fairness of Canadian law. This case is simply an example of 'the court's paramount concern with the protection of the rights of US creditors' ... Note at 566). The result of the *Toga* decision was that the US creditor was entitled to a disproportionate piece of the estate, to the detriment of all other creditors. This decision is out of line with the modern need for flexibility in the construction of comity".

191 28 BR at 170.

192 *Ibid.*

193 25 BR 621 (Bankr SD NY 1982).

194 *Victrix SS Co SA* v *Salen Dry Cargo AB* 825 F2d 709 (2d Cir 1987); *Cunard SS Co* v *Salen Reefer Services AB* 773 F2d 452 (2d Cir 1985), *aff'g* 49 BR 614 (Bankr SD NY 1985); see Booth, "Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts" (1992) 66 Am Bankr LJ 135, at 179–182.

195 *Cunard*, 773 F2d 452, at 459; *Victrix*, 825 F2d 709, at 714.

196 (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with —
(1) just treatment of all holders of claims against or interests in such estate;
(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
(3) prevention of preferential or fraudulent dispositions of property of such estate;
(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
(5) comity; and
(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

outside of bankruptcy law. Yet if section 304 proceedings are *in rem*,[197] discharge may be outside their scope. One is left with the anomaly of English insolvency law pointed out by Dicey and Morris and by Cheshire and North that a bankrupt's English assets might be turned over to his foreign trustee, yet he might not be discharged in England from his obligations.[198] The essential question must be whether, notwithstanding cases in the line of *In re Waite*[199] and of *Fincham* v *Income from certain trust funds of Cobham (In re Cobham's Will)*,[200] rights of individuals in property will be determined without regard to the bankruptcy policy of the forum, and whether the answer would be different if the debtor or other interested party opened a separate bankruptcy proceeding there.[201]

In *Waite* the court accepted an appearance by the debtor, domiciled in New York but engaged in business in England, in an English proceeding first in composition and then in bankruptcy, as sufficient contact to recognise the transfer under English law of title to property of the debtor:

> "From all these cases the following rules are to be deemed thoroughly recognised and established in this State: (1) The statutes of foreign States can in no case have any force or effect in this State *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2) But the comity of nations . . . allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognised and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also, that such titles are not in conflict with the laws or the public policy of our State. (3) Such foreign assignees can appear and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with, or withhold the property of the bankrupt."[202]

Cobham concerned an English bankruptcy proceeding in which the trustee in an English bankruptcy claimed title to income from a New York testamentary trust established under the will of the deceased wife of the bankrupt: "[The foreign trustee in bankruptcy] asserts a title to property of the bankrupt located here, and although the title he asserts is one which he got under a foreign statute, he is, in essence, a foreign assignee whose title it is our policy to uphold."[203] The rule is

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197 Booth *supra* n 194, at 159.

198 Dicey and Morris, 12th edn, rule 172, Comment, referring to *Armitage* v *Attorney-General* [1906] P 135 (courts of England will recognise the binding effect of a decree of divorce obtained in a state where the husband was not domiciled, if the courts of the country or state of his domicile would recognise the validity of that decree), for a possible exception where the law applicable to the contract would recognise the discharge; Cheshire and North, 12th edn (1992), at 918. The rule is similar in Ireland: Binchy, *Irish Conflict of Laws* (1988), at 481.

199 99 NY 433; 2 NE 440 (CA NY 1885).

200 193 Misc 363; 81 NYS2d 356 (S Ct NY Co 1948).

201 See also *Bullen* v *Her Majesty's Government of the United Kingdom*, *supra* n 33.

202 2 NE, at 449.

203 81 NYS2d, at 358–359.

not materially different in England:

> (1) English courts will not question the jurisdiction of a Scottish or Northern Irish court to adjudicate a debtor bankrupt;
> (2) recognise that the courts of any other foreign country have jurisdiction over a debtor if –
> (a) he was domiciled in that country at the time of the presentation of the petition; or
> (b) he submitted to the jurisdiction of its courts, whether by himself presenting the petition or by appearing in the proceedings."[204]

Recognition of the effects of the proceeding on the title to property does not, however, imply recognition of any discharge.[205]

VIII. Conclusion

The interests of creditors and the state interest in the orderly liquidation of estates can collide not only with the public policy[206] of other states concerned with affording a fresh start to their residents, but with paramount national interests such as those involving competition policy,[207] wrongful death,[208] mass torts[209]

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204 Dicey and Morris, rule 164, citing *In re Blithman* (1866) LR 2 Eq 23 (domicile: debtor, having a vested reversionary interest in an English trust, became insolvent in Australia, and there died; held if domicile was Australian, insolvency assignees were entitled to the fund, if English, his executrix was entitled); *In re Davidson's Settlement Trusts* (1873) LR 15 Eq 383 (debtor adjudicated insolvent in Australia, died in England intestate; assignee in insolvency held entitled to reversionary interest in trust fund); *In re Hayward* [1897] 1 Ch 905 (life interest of domiciled Englishman under testamentary trust, terminable on bankruptcy, held not forfeited by New Zealand adjudication in bankruptcy subsequently annulled: "no question respecting the operation of an assignment in bankruptcy can arise unless the assignment is under the law of the country of the debtor's domicile"); *In re Anderson* [1911] 1 KB 896 (debtor, domiciled in England and there entitled to reversionary interest in trust, adjudicated bankrupt in New Zealand and, later, bankrupt in England; held New Zealand trustee in bankruptcy entitled to the fund); *Catling* v *Esson (In re Craig)* (1917) 86 LJ Ch 62 (debtor, adjudicated bankrupt in Western Australia, entitled to reversionary interest in English trust; by law of Western Australia movables of debtor wherever situated vested in trustee; held assignees of the reversionary interest had good title in England irrespective of the domicile of the bankrupt); *King* v *Terry (In re Burke)*, (1919) 54 LJ 430, 148 LT Jo 175 (presenting petition: debtor had filed a petition with the Court for the Relief of Insolvent Debtors in 1866 and died in 1873 without having received a discharge, leaving a widow and three children; his father died in 1874 bequeathing a sum of money to his son; held *In re Davidson's Settlement Trusts* governs); *Bergerem* v *Marsh* (1921) 6 B & CR 195 (appearance: domiciled Englishman declared bankrupt in Belgium; Belgian trustee sought declaration from English court of vesting of bankrupt's English property; held that by instructing counsel to appeal Belgian decree, Englishman had submitted to the jurisdiction of the Belgian court, so that his movables in England had vested in the Belgian trustee).

205 See text at *supra* n 106. The various approaches to recognition of foreign judgments generally are discussed, for example, in Scoles and Hay, *Conflict of Laws*, 2nd edn (1992), at section 24.3–24.4.

206 See *Felixstowe Dock and Ry Co* v *United States Lines Inc* [1988] 2 All ER 77 (refusing to give effect to United States restraining order).

207 *British Airways Bd* v *Laker Airways Ltd* [1985] AC 58 (HL), *rev'g* [1984] QB 142 (CA) (where foreign court was the only jurisdiction competent to determine claim of a plaintiff, English court could intervene only if the claim was unconscionable and an injustice); and *Midland Bank Plc* v *Laker Airways Ltd* [1986] QB 689 (CA) (where plaintiffs were not yet parties to US antitrust proceeding injunction would be

and product liability,[210] environmental damage,[211] insurance,[212] financial services regulation, racketeering,[213] intellectual property,[214] export control[215] and national security matters.[216] Blocking statutes such as the United Kingdom's Protection of Trading Interests Act 1980[217] and comparable French[218] and Swiss[219] statutes have been raised as a defence before European tribunals with mixed success on several occasions, some in proceedings related to insolvency. Constitutional rights and public policy have been asserted as bars to enforcement of foreign judgments.[220] The lack of mutuality and the concern over inconsistent effect of bankruptcy in different countries has been an obstacle in the past to

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granted to prevent exposing plaintiffs to "processes which, on the facts, might be quite unwarranted").

208 Symposium; "The Bhopal Tragedy: Social and Legal Issues" (1985) 20 Tex Int'l LJ 267.

209 For example, *In re Johns-Manville Corp* 36 BR 727 (Bankr SD NY 1984); *In re Eastern & Southern Dists Asbestos Litig* 772 F Supp 1380 (ED & SD NY 1991); *Celotex Corp* v *Hillsborough Holdings Corp (In re Hillsborough Holdings Corp)* 176 BR 223 (Bankr MD Fla 1994).

210 *Lindsey* v *Dow Corning Corp (In re Silicone Gel Breast Implants Prods Liab Litig)* (1994) US Dist *LEXIS* 12521 (ND Ala 1994); 837 F Supp 1123 (1993) (earlier proceeding in same case).

211 *Midlantic National Bank* v *New Jersey Department of Environmental Protection* 474 US 494 (1986), *reh'g denied*, 475 US 1090 (1986). The decision of the European Court of Justice in *Bier* v *Mines de Potasse d'Alsace* [1976] ECR 1735, granting jurisdiction under the Brussels Convention to courts of the country where the effects of environmental damage are felt, coupled with the absence of any accord on bankruptcy jurisdiction, leaves the way open to uncertainty and conflict.

212 In particular the Lloyd's litigation: see *Leslie* v *Lloyd's of London* 1995 US Dist 15380 (SD Tex 1995) (disregarding forum selection clause on public policy and other grounds); *Royal Bank of Canada* v *Darlington* (1995) Ont CJ *LEXIS* 1224 (rejecting fraud defence in suit on letters of credit). Many of the investors, and many of the agents that recruited and managed their investments, have declared themselves to be insolvent.

213 *Société Commerciale de Réassurance* v *Eras Int'l Ltd (No 2)* [1995] 2 All ER 278 (QB) (holding that English court had jurisdiction to grant injunction against proceeding with an Illinois action; that Brussels and Lugano Conventions applied to the proceedings for an anti-suit injunction; and that it must be shown that England was the natural forum for the dispute and that foreign proceeding constituted unconscionable vexation; under the circumstances application for anti-suit injunction dismissed).

214 *Remington Rand* v *Business Sys Inc* 830 F2d 1260, 1273 (3d Cir 1987) (trade secrets case: "The district court should bade fealty to the doctrine of comity and recognise the Dutch bankruptcy proceedings, but only if and to the extent that the Dutch court is willing to recognise the American judgment in its proceedings").

215 In a non-bankruptcy context, *Dresser Indus* v *Baldridge* 549 F Supp 108 (D DC 1982); "UK Statement and Order Concerning the American Embargo with Regard to the Soviet Gas Pipeline" (1982) 21 ILM 851; Comment, "Extraterritorial Application of United States Law: The Case of Export Controls" (1984) 132 U Pa L Rev 355.

216 *In re McLean Indus* 74 BR 589 (Bankr SD NY 1987) (refusal to waive restriction on sale of US vessels to non-US entities (Merchant Marine Act, 46 USC section 961(f), now 46 USC section 31329) with respect to certain ships arrested in Singapore and Hong Kong).

217 *British Airways Bd* v *Laker Airways Ltd, supra*, n 207.

218 Law 80-538 of 16 July 1980; see *Partenreederei M/S "Heidberg"* v *Grosvenor Grain and Feed Co* [1993] 2 Lloyd's Rep 324 (unsuccessful invocation of Article 1 *bis* of the French statute to quash discovery).

219 Article 273 of the Swiss Penal Code; see *FTC* v *Compagnie de Saint-Gobain-Pont-a-Mousson* 636 F2d 1300 (DC Cir 1980); Cohen-Tanugi, "Les juridictions américaines face aux lois étrangères interdisant la communication des renseignements économiques" (1983) 72 RCDIP 213; and Miller, "International Co-operation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube" (1965) 49 Minn L Rev 1069, at 1075–1086 (service of documents, and art 271 of the Swiss Penal Code).

220 See *Bachchan* v *India Abroad Publications*, 154 Misc 2d 228, 585 NYS2d 661, FT Law Reports, 14 May 1992 (Sup Ct NY Co 1992); *Restatement (Second) Conflict of Laws*, at section 117, comment *c*; Dicey and Morris, 12th edn, rule 44 ("A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition would be contrary to public policy"); see Herzog, *Constitutional Limits on Choice of Law* (1992 III) 234 RCADI 239.

multilateral recognition of collective proceedings. Chapters 11 and 13 arrangements in the United States, individual voluntary arrangements under Part VIII of the Insolvency Act 1986 and proposals under Part III of the Canadian Bankruptcy and Insolvency Act have little in common with the plan of reorganisation envisaged in article 18 of the French Law of 1985.[221] The proposed United States of America-Canada Bankruptcy Treaty (1979), unratified,[222] foundered on problems of such incompatibility[223] and on unresolved choice of law issues.[224] None of the actual or proposed bankruptcy conventions,[225] nor the Model International Insolvency Co-operation Act[226] of the International Bar Association based loosely on article 304 of the US Bankruptcy Code, nor the Model Insolvency Treaty proposed at a 1989 colloquium,[227] will resolve some of the thorny problems discussed in this article such as the recognition of the vesting of property in favour of a foreign representative without the concomitant recognition of a discharge granted in the same foreign proceeding, and the unpredictability of the allowance for foreign taxes scheduled by the debtor or incurred as a result of liquidation ordered in the proceeding. Failure to address such problems can only lead to exactly the sort of self-help and race-to-the-courthouse problems that collective procedures are intended to avoid, and, further, to the compromising of the interest that the state of habitual residence has in the rehabilitation of the debtor.

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221 A foreign arrangement has effect in France only upon the grant of exequatur: Cass 1st Ch civ, 21 July 1903; (1903) *Recueil périodique et critique Dalloz 594*, comment by Lyon-Caen, (1904) 31 Clunet 138; (1903) Sirey 449, comment, Procureur général Baudoin; 2 Batiffol and Lagarde, 7th edn (1983), at section 746 (arrangements) and section 747 (execution on property). See also Nadelmann, "Compositions – Reorganizations and Arrangements – in the Conflict of Laws" (1948) 61 Harv L Rev 804.

222 See *In re Toga Mfg Ltd* 28 BR 165, at 169 (ED Mich 1983).

223 Prior, *Bankruptcy Treaties*, at 7.

224 Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 Am Bankr LJ 457, at 484.

225 On the history of bankruptcy conventions, see Nadelmann, "Bankruptcy Treaties" (1944) 93 U Pa L Rev 58, reprinted in Nadelmann, *Conflict of Laws: International and Interstate* (1972), at 299; Lipstein, "Early Treaties for the Recognition and Enforcement of Foreign Bankruptcies", in Fletcher, (ed), *Cross-Border Insolvency: Comparative Dimensions*, (1990) at 223; Jitta, *La codification du droit international de la faillite* (1895). On more recent conventions, see Volken, "L'harmonisation du droit international privé de la faillite" (1991 V) 230 RCADI 343; Güneysu, "The New European Bankruptcy Convention" (1991) 11 Yb Eur L 295 (concerning the Council of Europe convention, which is reproduced with background and summary at (1991) 30 ILM 165).

226 Reprinted in Barrett and Powers, "Proposal for Consultative Draft of Model Insolvency Cooperation Act for Adoption by Domestic Legislation With or Without Modification" (1989) 17 Int'l Bus Law 323.

227 Totty, "Proposal For a Model International Bilateral Insolvency Treaty, With Capability For Adoption by the EEC" in *Comparative Dimensions* (*supra* n 225), at 271.