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Recommended Citation

Susan Block-Lieb, *Turnaround: Reflections on the Present Day Influence of Negotiations on International Bankruptcy at the Fifth Session of the Hague Conference on Private International Law in 1925*, 9 *Brook. J. Corp. Fin. & Com. L.* 1 (2014)

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TURNAROUND: REFLECTIONS ON THE PRESENT DAY INFLUENCE OF NEGOTIATIONS ON INTERNATIONAL BANKRUPTCY AT THE FIFTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW IN 1925

*Susan Block-Lieb**

In 1925, the British government sent a delegation to the Fifth Session of the Hague Conference on Private International Law. The Hague Conference had met sporadically since 1893,¹ but this was the first time the British government sent a delegation to The Hague to discuss the possibility of a diplomatic convention to reach international agreement on uniform rules on what continental Europeans called “private international law”—matters of jurisdiction, applicable law and procedure.

The British delegation held limited authority from the Home Office: it could participate only in deliberations on a possible convention on bankruptcy law, and then only along the instructions provided to it. Given these narrow directions, it is perhaps not surprising that the British delegation left the 1925 conference before it ended and without agreement on a bankruptcy convention.² It is, however, surprising today to realize that conversations about conflicts of law rules in international bankruptcies have been going on for almost 90 years. It is even more surprising that the contours of that discussion contain lessons that remain timely.

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1. See Hans Van Loon, *The Hague Conference on Private International Law*, 2 HAGUE JUST. J. 3–12 (2007) (generally discussing the Hague Conference on Private International Law); see *Preface* to C. C. A. Voskuil, *THE INFLUENCE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: SELECTED ESSAYS TO CELEBRATE THE 100TH ANNIVERSARY OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW* (Martinus Nijhoff Publishers 1993), reprinted in NETH. INT’L L. REV. XI, XIX (1993).

2. After its limited participation in the Hague Conference on Private International Law in 1925, Great Britain did not return to these Hague Conferences for nearly thirty years. Susan Block-Lieb & Terence Halliday, *Contracts and Private Law In the Emerging Ecology of International Lawmaking*, in *MAKING GLOBAL MARKETS WORK: CONTRACTS, PRICES AND INSTITUTIONS IN THE LONG TWENTIETH CENTURY* (Gregoire Mallard & Jerome Sgard eds., forthcoming). Nor was the UK involved in negotiating the terms of a diplomatic convention or other international instrument concerning insolvency law until negotiations on the draft EU Convention began in the 1970s. See *THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE* (Ian Fletcher, Gabriel Moss & Stuart Isaacs eds., 2d ed. (2009)). This draft European Union convention would not get effectuated until 1999, when the European Union’s Regulation on Cross-Border Insolvency first came into effect. *Id.* Currently, both the EU Regulation and UNCITRAL’s Model Law have been implemented into British law. See, e.g., *In re Collins & Aikman Corp. Group*, [2005] EWHC (Ch) 1754.

This Article reviews the history of the 1925 Hague Conference proceedings on bankruptcy. My goal is both to reveal this history and to consider it in light of more recent transnational instruments coordinating cross-border bankruptcy proceedings, including the EU Regulation, UNCITRAL's Model Law on Cross-Border Insolvency, and current proposals pending before the UN's Commission on International Trade Law to consider the drafting of an international instrument to address certain conflicts of law rules applicable in cross-border insolvency proceedings. The paper proceeds in four parts.³

Part I provides a brief history of the beginnings of the Hague Conference on Private International Law, including Britain's reticence to participate in this Conference. Part II discusses several initiatives on the topic of international bankruptcy presented before and by the International Law Association (ILA), especially a paper presented at the ILA's 1924 session by an influential British solicitor, E. Leslie Burgin. Burgin's efforts are emphasized because he seemed to have succeeded in convincing His Majesty's Government to attend the Hague Conference on the topic of international bankruptcy law. Part III details preparations for participation in the 1925 conference by Great Britain's Board of Trade. Part IV considers the proceedings of this Hague Conference on bankruptcy. A final section reflects, with the passage of time, on important lessons learned in this experience, with emphasis on the importance of the form of uniform rules on conflicts of law in this context.

I. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference held its first meeting on questions of private international law in 1893. These were ad hoc diplomatic conferences hosted by the Dutch government to consider questions of procedure, jurisdiction and applicable law. The first four sessions of this conference—in 1893, 1894, 1900, and 1904—were chaired by T.M.C. Asser, a Dutch academic who was awarded the Nobel Peace Prize in 1911 for this work.⁴ Proposals considered there emanated from a variety of sources, including especially the International Law Association, a private organization established in 1873.⁵

Attendance at these Hague Conferences was largely European;⁶ Great Britain declined to attend until 1925, and even then attended only briefly for

3. This Article was researched while on sabbatical and living in London. Many of the documents were found in the National Archives of the United Kingdom (UKNA). For the UKNA website, see NAT'L ARCHIVES, <http://www.nationalarchives.gov.uk/> (last visited Nov. 15, 2014).

4. See Voskuil, *supra* note 1.

5. For discussion of the origins of the ILA, see *About Us*, INT'L LAW ASS'N, http://www.ila-hq.org/en/about_us/index.cfm.

6. See, e.g., Voskuil, *supra* note 1.

purposes of considering a single treaty—on bankruptcy.⁷ When these negotiations on a convention on bankruptcy law broke down, the British delegation left the conference. Great Britain did not send another delegation to Hague Conferences on Private International Law until the 1950s, when delegations negotiated the terms for reconstituting the Hague Conference on the ashes that remained after World War II (WWII). Great Britain did not become a member of the Hague Conference until 1953, and the Conference's constitutive statute entered into force in 1955.

While these diplomatic conferences at The Hague focused exclusively on private international law, private international law was not the only focus of international lawmaking at the time. Two important peace conferences had been held in The Hague in 1899 and 1907, in an attempt to negotiate reductions in armaments and reach other diplomatic agreements on the law of war.⁸

Moreover, diplomatic conferences occurred outside The Hague. The Belgian government hosted a series of conferences on topics of international maritime law in the late nineteenth and early twentieth centuries, including one held in Brussels in 1924 to negotiate the terms of an international convention regarding uniform rules on bills of lading.⁹ The Swiss and Uruguayan governments also hosted diplomatic conferences in Geneva and Montevideo on various topics.¹⁰

By 1925, when the Hague Conference first met after the end of World War I (WWI), the League of Nations had come into existence. Seeking to regularize the conference system, the League had begun its own work on the codification of international law¹¹ and on preparations for an international conference on uniform rules of bills of exchange and similar instruments of international payment.¹² In that year, Italy first proposed the creation of an International Institute for the Unification of Private Law

7. The US also declined to attend these conferences until the 1950s. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211 (2005); Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rule of Private Law*, 102 U. PA. L. REV. 323 (1954).

8. A. PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES* (Cambridge Univ. Press 1909).

9. Ironically perhaps, this convention would come to be known as The Hague Rules because the final diplomatic conference for consideration of its terms was held in The Hague. The Hague Rules entered into force in 1924, with nearly 100 countries eventually acceding to their terms. See A. N. Yiannopoulos, *The Unification of Private Maritime Law by International Conventions*, 30 J.L. & CONTEMP. PROB. 370 (1965).

10. See, e.g., Dubinsky, *supra* note 7; Nadelmann, *supra* note 7.

11. See Block-Lieb & Halliday, *supra* note 2.

12. *Id.*

(now commonly referred to as UNIDROIT), which was originally intended as a League of Nations entity.¹³

Neither Great Britain nor the United States participated in these early sessions of the Hague Conference on Private International Law.¹⁴ These common law nations were also reluctant to participate in diplomatic conferences seeking to negotiate uniform rules on substantive private law issues; for example, neither participated in the League's conference to consider a convention on bills of exchange.¹⁵ Common law countries' reticence to become parties to procedural and other private law instruments was grounded in concerns that these national actors were constitutionally unable to commit to subject matter areas governed either by the common law (and, thus, an independent judiciary) or, in the case of the United States, by state law. Resolution of these issues would slowly evolve, but not until after WWII.¹⁶

Bankruptcy law, however, had been a matter of national regulation in the United Kingdom (and in other common law countries). Participation in an international convention on bankruptcy proceedings was, at least, plausible.

II. A TALK BY E. LESLIE BURGIN AT THE 1924 MEETING OF THE ILA

Although the ILA had drafted a proposal on international bankruptcy as early as 1879,¹⁷ and the Hague Conference of 1904 had worked on a draft

13. Italy withdrew its sponsorship of the Rome Institute in 1939, and the League of Nations ceased to exist in 1946. By 1951, the Institute had reconstituted as an independent international organization, much like the Hague Conference did in the same year. *Id.*

14. See Harold Cooke Gutteridge, Seventeenth Lecture of the David Murray Foundation at the University of Glasgow: The Codification of Private International Law (May 11, 1950); Dubinsky, *supra* note 7; Nadelmann, *supra* note 7. The United States did not become a member of the Hague Conference and UNIDROIT until late 1963. See Block-Lieb & Halliday, *supra* note 2.

15. See Block-Lieb & Halliday, *supra* note 2.

16. *Id.* See also Nadelmann, *supra* note 7.

17. Memorandum from E. Leslie Burgin on Conflict of Laws Relating to Bankr. and the Liquidation of Companies and the Need for a Special Tribunal to the Int'l Law Ass'n in Stockholm, Sweden, at 2, (1924) app. to letter from E. Leslie Burgin to Inspector-General of Bankruptcy, Bd. of Trade (May 13, 1925) [hereinafter Burgin Memorandum] (describing 1879 ILA Resolution regarding international bankruptcy, drafted by Msr. Clunet of Paris) (copy of memorandum and letter on file with the *Brooklyn Journal of Corporate, Financial & Commercial Law*). The ILA Resolution provided as follows:

It concerns the mercantile interest that treaties regulating international relations in the matter of bankruptcy be concluded upon the following principles:

1. Unity and universality of bankruptcy.
2. Unity of jurisdiction and administration in the country of the domicile [sic] of the bankrupt.
3. Sufficiency in all the contracting countries of an adjudication in bankruptcy in one of them.

bankruptcy convention,¹⁸ Great Britain's involvement in negotiations on a possible bankruptcy convention did not begin in earnest until a London solicitor, E. Leslie Burgin, gave a talk on the topic at the International Law Association's meeting in Stockholm in 1924.¹⁹

Burgin was director of Legal Studies to the Law Society in London, and an expert in the resolution of transnational decedent estates.²⁰ As a result of this focus on cross-border decedents' estates, Burgin became well known for his knowledge of private international law on this and other topics. So much so, that by 1937, he was one of two co-editors of a revised edition of Dicey's treatise on conflicts of law.²¹

1. AN INFLUENTIAL SPEECH BEFORE THE ILA

Burgin's speech before the International Law Association, entitled "Conflict of Laws Relating to Bankruptcy and the Liquidation of Companies and the Need for a Special Tribunal," argued that British and other European rules of private international law applicable to bankruptcy and the liquidation of companies were something of a failure and in need of improvement.²² The importance of these laws could not be understated "as a result of the War, and of the economic conditions arising out of it," argued Burgin, since "[a]t any time of trade depression there is an increase in the list of failures."²³ And yet, he argued, neither British nor foreign laws

4. Inquiry only into the extrinsic validity of the judgment by the Courts of a country in which execution is sought to be enforced.

5. Equality of treatment between creditors, without distinction of nationality.

6. Appointment by each treaty of an arbitral tribunal to interpret, if necessary, the treaty.

Id.

18. See Gutteridge, *supra* note 14.

19. There are two extant versions of this speech. One was published by the International Law Association in their report of the conference. See E. Leslie Burgin, *Bankruptcy and the Liquidation of Companies and the Need of an International Convention*, 33 INT'L L. ASS'N REP. 458 (1924). Another, longer version of Burgin's thoughts was sent to the Board of Trade and included in the records maintained at the Kew National Archive. See Burgin Memorandum, *supra* note 17. Because the latter contains a more complete version of Burgin's argument, I refer to it more extensively.

20. E. LESLIE BURGIN, ADMINISTRATION OF FOREIGN ESTATES (1913).

21. E. LESLIE BURGIN & ERIC FLETCHER, THE STUDENTS' CONFLICT OF LAWS: AN INTRODUCTION TO THE STUDY OF PRIVATE INTERNATIONAL LAW, BASED ON DICEY (6th ed. 1937). When Burgin gave his speech at the International Law Association, Dicey's was considered the definitive British text on the topic of conflicts of law. Burgin and Fletcher was a revised edition published subsequent to Dicey's death. Importantly, Dicey's remains the definitive text on the topic of British conflicts of law.

22. See Burgin Memorandum, *supra* note 17, at 1 ("Whenever the rules of Private International Law appear to fail to provide for a state of affairs which constantly recurs and which, under present conditions, arises in a very pronounced degree, it would seem worth while [sic] to take the trouble to ascertain whether or not some improvement could be introduced.")

23. *Id.*

provide for the contingency of a foreign element or, if they do, provide for it “inadequately.”²⁴

His paper carefully traced English and continental European bankruptcy laws and practices to find the source of these inadequacies. The governing English statute at the time, the English Bankruptcy Act of 1914, would have permitted the bankruptcy of foreign debtors,²⁵ noted Burgin. It also “treats creditors upon an equal footing whatever nationality, domicile or residence of the particular creditor we may have.”²⁶ But while he had “no doubt” that “an Englishman can, in many instances, be made a bankrupt in France, in Belgium, in Italy or any other country in which he deals and incurs debts to local creditors,”²⁷ the treatment of foreign creditors, he remarked, might differ depending upon the bankruptcy law at issue, as not all Continental bankruptcy laws extended equal treatment to foreign and local creditors.²⁸

These statutory differences were compounded by distinct practices. Burgin considered first an English trader “possessing business interests in several European countries, and who becomes bankrupt” in England. Under English law, noted Burgin, the trustee in bankruptcy “will consider himself entitled to the whole of the assets wherever situate, and whether movable or immovable.”²⁹ But enforcing this extraterritorial assertion of jurisdiction depended upon application of conflicts of law rules.

Burgin’s comprehension of the conflict of law rules applicable in bankruptcy was centered on the general rule of *lex fori concursus*, that is, the rule that the procedural law of the forum state generally should govern a dispute.³⁰ He viewed application of this general rule as far from simple, however.³¹ Where the dispute concerned the debtor’s bankruptcy, Burgin argued, “abstruse questions [arise] as to where the provisions of Substantive Law end and mere Procedure begins.”³²

As a prime example of the confusing results that followed from application of this basic conflicts rule, Burgin raised the question of creditors’ priorities in distributions from a bankruptcy estate.

For instance, under English Bankruptcy Law certain creditors are entitled to preferential payment. Is not this a provision of the *lex fori*? Does not

24. *Id.*

25. *Id.* at 2 (“Those whose business it is to follow the lists of insolvencies in the country, will have been struck for years past with the large preponderance of debtors of foreign name, foreign nationality, foreign extraction and parentage.”).

26. *Id.* at 3.

27. *Id.* at 4 (“This depends simply upon whether the local municipal law of these countries is sufficiently wide to enable a foreign debtor to come within its reach.”).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 3 (“How far the entire system of Bankruptcy Law of a country is merely procedure, and therefor [sic] governed by *lex fori* is far from clear.”).

this involve the result that a foreign creditor whose debt came with the clause to which the English law would give preference would be entitled in the Courts of this country to receive that preference, even although it was a preference to which he would not be entitled by any local law which governed his usual legal relations with his neighbors? On the other hand, the converse appears to be equally true. A creditor entitled by the Law of his own country to some preference, meaning thereby a preference given to him as a matter of Substantive Law, and not a mere provision of foreign *lex fori*, would, it seems be entitled to claim that same priority in the administration of the Bankruptcy estate in the English courts.³³

But these results cannot both hold true.

Where bankruptcy proceedings were open in two different countries, Burgin contended that coordination between the two proceedings could occur if the court of one country (say, France) recognized the trustee appointed by the second (for example, England), but that the propriety of this recognition was to be resolved solely by the law of the first (that is, France) because it was a question of procedure.³⁴ Moreover, the effects of recognition were themselves subject to conflicts of law rules, which differed depending on the nature of the property the foreign trustee sought to recover against.

In the case of immovable property (real estate), Burgin agreed that an English trustee could recover the debtor's immovable property located in France (or any other country) only by obtaining from the French (or other relevant) court "some form of an extension of the powers given by the English Courts, and which will thus enable him to have jurisdiction over that immovable property."³⁵

Enforcement against movable property "locally situate[d] abroad" might also present difficulty, argued Burgin.³⁶ Although the English rule of private international law was that "movable property is deemed to follow the person of its owner, that is that the movable property is by a fiction of law regarded as being situate in the country in which the owner has his domicile," in practice this rule was often ignored.³⁷ Despite the English trustee's theoretical reach, Burgin noted that in practice the movable property "may be held by third parties in the foreign country in question who will decline to recognize the Trustee in Bankruptcy, decline to hand over the property, and will yield to nothing but an Order of the Courts of the country in which the property is situate."³⁸

33. *Id.*

34. *Id.* at 4.

35. *Id.* ("Whether we call that extension of the powers, ancillary bankruptcy, is immaterial.")

36. *Id.* at 5.

37. *Id.*

38. *Id.*

This problematic result is most likely to arise, argued Burgin, where the assets are located in a country in which the bankrupt English debtor also had local creditors.³⁹ Although these local creditors were entitled under English law to prove their claims and stand on equal footing with English creditors, local creditors might instead resort to their own court for assistance. Whether local creditors would receive this assistance was “a pure question of the local municipal law.”⁴⁰ As a result, Burgin claimed,

[i]t may well be, therefore, that the French Courts would allow a French creditor to institute and prosecute [sic] proceedings against an English Bankrupt, and might enable the French creditor to obtain judgment, and to put that judgment to execution against French assets, and by so doing entirely disregard the Bankruptcy in England, and, in fact, enable the foreign creditors to be paid in full out of what might be in an extreme case practically the only assets available for the creditors as a body.⁴¹

Indeed, Burgin argued, an English creditor might also, based on skilled advice received in France, “commence proceedings in the French Courts against the assets locally situate in France.”⁴² While this English creditor could not also recover against the English bankruptcy estate, “there is at present time,” argued Burgin, “no adequate machinery to render the bankruptcy of the trader a condition of affairs which receives the same treatment in the different countries.”⁴³

Burgin then considered the obverse situation, that is, “the case of the foreign bankruptcy with creditors in England.”⁴⁴

First, he posited the case of English creditors who commence proceedings against the French Bankrupt before English courts and who “seek to obtain judgment and to put that judgment to execution against the assets of the French Trader in England.”⁴⁵ As a pure matter of private international law, argued Burgin, insolvency, as “a question of status,” should be governed by the law of domicile, that is, “French law in the case given should apply, and the English Courts upon the principle of the comity of nations should give effect in England to the powers enjoyed by the Trustee in Bankruptcy under the laws of France.”⁴⁶

39. *Id.*

40. *Id.*

41. *Id.* at 5–6.

42. *Id.* at 6.

43. *Id.* (arguing further that “there may still be ‘an unseemly rush to issue a Writ,’ . . . on the part of creditors who have special knowledge or special means of ascertaining that the Courts of one particular country are more accessible, give some greater priority or are otherwise preferable to those of some other country.”).

44. *Id.*

45. *Id.*

46. *Id.* at 7.

But the purity of this legal doctrine might well be diluted in practice, contended Burgin, referring to the case of *In re Artola Hermanos*.⁴⁷ There, Burgin explained, “a firm having its head offices in Paris and a branch establishment in England . . . was declared bankrupt in Paris under the law of France”⁴⁸ When an English court subsequently entered a receiving order, the French syndic applied to discharge the receivership and stay all further proceedings.⁴⁹ On appeal from the English court’s refusal to discharge the receiving order, the court, through Justice Coleridge, held that the fact that the prior bankruptcy had been commenced in a foreign country was not alone grounds for staying all proceedings in England.⁵⁰ The court explained, “The only cases in which the Courts intimate that they would do this, if necessary, . . . are where there were two bankruptcies going on, and one of them was going on in the country of the domicile of the bankrupt.”⁵¹

But in this case there had been no evidence as to the domicile of the members of the firm; moreover, the English proceeding involved a receiving order and not a bankruptcy.⁵² As a result, the English court declined to recognize the authority of the French syndic and declined to stay the receivership.

Burgin next considered the possibility of a foreign trustee in bankruptcy wanting to claim assets located in England, and argued that the foreign trustee should receive an order from an English court “to give him ancillary powers over the property within their jurisdiction.”⁵³ He doubted, however, whether such an order would, as a matter of course, be forthcoming from the courts of England. Burgin also discussed “the question of discharge,” and argued that English courts should enforce a foreign court’s discharge where the contractual obligations pertaining to the discharge were made or performed in the country granting the debtor a discharge.⁵⁴ Although he was certain that the effect of a discharge should extend beyond the jurisdiction of the discharging court, Burgin doubted whether English courts had followed this rule consistently.

2. THE EFFECTS OF BURGIN’S SPEECH

Burgin’s speech prompted the International Law Association (of which Burgin was a member) to approve a proposal to appoint a “special sub-committee for the purpose of investigating international bankruptcy and

47. *Id.* (referring to *Ex parte Chale (In re Artola Hermanos)*, (1890) 24 Q.B.D. 640).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 8 (quoting Coleridge).

52. Burgin also discusses *In re Stein’s Case*. *Id.* at 8–9 (referring to *Ex parte Royal Bank of Scot.*, (1815) 34 Eng. Rep. 532 (Ch.)).

53. *Id.* at 9.

54. *Id.* at 9–11.

preparing a draft international convention upon this subject.”⁵⁵ The subcommittee worked quickly, and by February 1925, had agreed on six general principles that it thought should “frame” any such convention:

That the court of the Bankrupt’s Commercial Domicile should be regarded as the principal court in respect of all matters arising in the Bankruptcy.

That so far as possible the analogy of an executor should be followed, i.e., that the principle of the Courts of one country giving effect to a decree of administration made in another country should be followed.

That there should be no interference with any question of procedure and therefore none with regard to local rules of priority in administering local assets.

That no distinction should be recognized between the bankruptcy of traders and non-traders.

That an International Bankruptcy Clearing House should be established.

That in the liquidation of insolvent companies the same rules *mutatis mutandis* should apply as in the bankruptcy of an individual.⁵⁶

Burgin was also a member of the Chamber of Commerce. In his memorandum appended to his letter to the Board of Trade, Burgin notes that the London, British and International Chambers of Commerce (ICC) had debated for years the question of international bankruptcy. At its spring 1925 meeting, the ICC had adopted a resolution calling for the conclusion of an international convention on the topic of bankruptcy.⁵⁷ According to Burgin, bankers in attendance at the ICC’s conference in Paris “stressed the importance of the establishment of something in the nature of an International Clearing House for Bankruptcy.”⁵⁸

55. Memorandum from E. Leslie Burgin Outlining Proposals of the Int’l Law Ass’n, at 1, (1925) app. to letter from E. Leslie Burgin to Inspector-General of Bankruptcy, Bd. of Trade (May 13, 1925) (copy of memorandum and letter on file with the *Brooklyn Journal of Corporate, Financial & Commercial Law*).

56. *Id.* (quoting from ILA resolution).

57. *Id.* at 3 (noting that the ICC’s resolution further specified that “one of the main principles” of any such convention “should be that, in every bankruptcy, the trustee in bankruptcy . . . or other official appointed by the Courts of the country in which bankruptcy takes place should be given facilities for obtaining powers in any other country in which assets of the debtor are locally situated.”).

58. *Id.* at 4 (“The problem presents itself wherever there is a failure in more than one country and more assets in any given country than is required to meet the claims of purely local creditors. It would obviously be disastrous if in addition to the normal troubles of a bankruptcy where many nations are concerned there was added the additional complication of a contest between rival trustees for the same funds . . .”).

III. BRITAIN'S PREPARATION FOR THE 1925 HAGUE CONFERENCE

Whether due to Burgin's influence or for other reasons, an investigation into the wisdom of an international bankruptcy convention ensued within His Majesty's Board of Trade (BOT).⁵⁹ A meeting was scheduled for May 21, 1925 at the BOT offices. The files of the Chief Bankruptcy Clerk at the BOT are thereafter replete with correspondence from various accountants and attorneys proffering their experiences in foreign bankruptcies. Example after example is provided in cases which the (often) English trustee is prevented or delayed in obtaining the remainder of an English debtor's foreign assets until after local creditors have been paid in full. These examples include cases from Argentina, South Africa, Colombia, Italy, France and Morocco. There is also discussion of a foreign trustee's failure to obtain the assistance of English courts in similar circumstances.

S. W. Hood, Chief Bankruptcy Clerk of the Board of Trade, appointed an Informal Committee on International Bankruptcy, which met during the summer of 1925; in early July, the Informal Committee submitted their report on the policy to be adopted "by His Majesty's Government at the forthcoming International Conference on Private International Law, so far as relates to bankruptcy and companies liquidation"⁶⁰

The Informal Committee's "Draft Instructions to Delegates" to be sent to The Hague Conference in 1925 begins ominously.

It does not appear that Great Britain could be a party to any general convention for the mutual recognition of bankruptcies the benefits of which could be claimed by any country that purported to assume the obligations it imposed. It would be extremely difficult to draft such a convention, since it would be necessary to define precisely the cases in which it would operate (what is an act of bankruptcy, what courts are to have jurisdiction, what debts and what assets are included, what are the powers of a trustee, and so on): and even then there would be no assurance that a country with a less highly developed commercial code would interpret the various terms in the sense in which we understand them.⁶¹

This did not mean, however, that the Committee was recommending against attending the conference or that it thought no agreement on a convention could take place. Instead, it recommended accession to a narrow

59. The materials made available by the National Archives contain the complete records of S.W. Hood regarding preparation in the Board of Trade for participation in the 1925 Hague Conference on Private International Law. S.W. Hood, *Collected Materials Regarding Preparation in the Bd. of Trade for Participation in the 1925 Hague Conference on Private Int'l Law (1924–1925)* [hereinafter *Collected Materials*] (provided by the Kew National Archives) (copy on file with the *Brooklyn Journal of Corporate, Financial & Commercial Law*).

60. Report of Informal Comm. on Int'l Bankr. to Bd. of Trade (1925) (copy on file with the *Brooklyn Journal of Corporate, Financial, & Commercial Law*).

61. *Id.*

convention concluded between “such states as were satisfied that their procedure in bankruptcy was sufficiently similar to make it possible for each to give effect to adjudications in the other, if not to allow of assets in the one being administered by a trustee in the other.”⁶²

The Committee made this recommendation although it had “little evidence of any serious difficulty” when considering “the recovery of assets abroad of a debtor adjudicated bankrupt” in England or Wales.⁶³ The Committee was less certain that the trustee of a foreign bankrupt could recover assets located in England or Wales, however, admitting that “[t]he real problem is that of cases where there are considerable local debts, and possible concurrent bankruptcies.”⁶⁴ In this regard, the Informal Committee remarked that “it is difficult to avoid the conclusion that assets in each country should, so far at any rate as concerns the payment of debts owed in that country, be administered according to that country’s laws, and that there should be access to the local courts for that purpose.”⁶⁵ In the end, “[g]reat as are the advantages of a single administration of a bankrupt’s assets,” the Committee concluded that the delegates “must preserve the right of a British Court to apply the provisions of the British Bankruptcy Act in cases where considerable British interests are at stake.”⁶⁶

British interests, thought the Committee, involved more than simply the incremental intrusion to judicial sovereignty that a broad convention would entail. Their report also noted that, owing to the nature of Britain’s foreign trade, “in which imports of goods largely exceed exports of goods, more debts are at any given time owed by British traders than are owed to them.”⁶⁷ This empirical hunch led them to surmise that “the cases in which foreign creditors will wish to share in the assets of a British bankrupt will be more numerous than the converse.”⁶⁸

In the end, the Committee thought it could assent to a model convention providing:

1. Where a Debtor adjudged bankrupt in one country the adjudication shall be a ground for instituting bankruptcy proceedings in the other.

62. *Id.*

63. *Id.* The report does not purport to speak for Scotland. However, it was forwarded on September 17, 1925 to the Secretary for Scotland, together with a copy of a translation of the Provisional Questionnaire “drawn up and circulated by the Dutch Government,” less than two months before the Hague Conference was scheduled to convene. Collected Materials, *supra* note 59.

64. The Informal Committee noted that, while “[t]he laws of most civilised countries make no distinction between native and foreign creditors,” nonetheless “there may in practice be various ways in which local creditors get an advantage.” Report of Informal Committee, *supra* note 60.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The Committee reached this conclusion, although there are no references in the files to such cases.

2. Such proceedings may be instituted by the trustee appointed in the first country.

3. Where the debtor is adjudged bankrupt in the second country on the ground of his bankruptcy in the first, the trustee in the first country shall be trustee in the bankruptcy in the second country also, unless it appears to the courts of that country that, having regard to all the circumstances of the case (including the situation of the assets and the countries of residence of the creditors), a separate trustee should be appointed.

4. In the administration and distribution of the estate no creditor shall be preferred or receive any advantage on the ground of his nationality of domicile.⁶⁹

IV. CONSIDERATION OF A DRAFT BANKRUPTCY CONVENTION AT THE 1925 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Delegates from twenty-two European nations attended the Hague Conference on Private International Law when it reconvened in 1925, including for the first time a delegation from Great Britain.⁷⁰ Although Britain had come to participate only in deliberations on a convention on bankruptcy law, the Conference also covered other topics.⁷¹

The First Commission on bankruptcy (*faillite*) met for seven days to discuss a draft convention on bankruptcy that previously had been discussed in the last Hague Conference in 1904. The British delegation, led by M.H.F. Carlill, Inspector General with the Ministry of Commerce, spoke little during these meetings.

Mid-way through the proceedings, at the conclusion of the third day of deliberations, the British delegation entered a statement (or *déclaration*) into the record.⁷² This statement is brief. It remarked, first, that Great Britain could not enter into a convention where “the effects of a bankruptcy declared in one country are extended to the other country ipso facto and without qualification.”⁷³ The statement went on to note that the British

69. Because “[m]uch the same considerations apply to companies liquidation,” the Committee report also specified nearly identical language regarding treatment of “the compulsory winding [up] of a company” involving cross-border effects. *Id.*

70. See Gutteridge, *supra* note 14.

71. For discussion of topics covered in earlier Hague Conferences on Private International Law, see Voskuil, *supra* note 1.

72. Actes et documents de la Conférence de la Haye de Droit International Privé (1925) [hereinafter Actes de la Cinquième session]. Although proceedings at the Hague Conference were at that time conducted solely in French, the statement filed by the British delegation was written in English. It is the only document in a language other than French that is included in the record of the Conference proceedings. The statement entered into the record of the proceedings by the British delegation was subsequently translated into French for the benefit of the other delegations in attendance; the *déclaration* and its *traduction* are both included in the proceeding records.

73. *Id.* at 46 (“Owing to the differences which appear to exist between the English Bankruptcy law and those of other countries in regard, for example, to such matters as the relation back of the

government had been “impressed with the desirability of facilitating, as far as possible, the collection in one country of the assets of a debtor declared bankrupt in the other and the administration of the estate for the benefit of all creditors alike, whatever their nationality.”⁷⁴

Consistent with its directions from the British Board of Trade, the delegation indicated in this statement that Britain could agree to be a party to an international convention on the subject of bankruptcy law if it were more limited than as considered by the Commission. The statement indicated that Britain could envision a system in which the bankruptcy of a debtor in one country would “be in itself a ground for declaring him bankrupt in the other” and that “where such a course did not appear to involve practical inconveniences, the trustee in the first country should be trustee in the second also,” but no more.⁷⁵

The British proposal was very different from the draft convention being discussed in The Hague. Although the Hague Conference had been deliberating since 1900 on the possibility of “an arrangement under which there would be only one bankruptcy in the two countries” implicated by a debtor’s financial distress, the British delegation instead proposed a regime in which “there would be a concurrent bankruptcy in the second country, in aid of that in the first, the administration under which would be coordinated so far as practicable and all creditors treated on an equal footing.”⁷⁶

Discussions resumed the following day.⁷⁷ On this, the fourth day of deliberations, the German and Spanish delegations also submitted their own extended *déclarations* for inclusion in the record.⁷⁸ These separate statements by the German and Spanish delegations favored, in the words of the Spanish delegation, “the grand principal of the unity and universality of bankruptcy” (*le grand principe de l’unité et de l’universalité de la faillite*) and implicitly rejected the proposal that had been proffered by the British government in the previous day.⁷⁹ In its statement, the German delegation

trustee’s title (*report de la faillite*) and the extent to which property acquired by the debtor subsequently to the bankruptcy vests in the trustee, it seems doubtful whether it would be practicable for Great Britain to be party to a convention under which the effects of a bankruptcy declared in one country are extended to the other country ipso facto and without qualification.”)

74. *Id.*

75. *Id.*

76. *Id.*

77. After filing this *déclaration*, the British delegation seems to have left The Hague and returned to London. In the sessions that followed, there are no interventions by the British delegation. Indeed, in the sessions that followed, there were no interventions about the statement provided by the British delegation to the commission’s deliberations on the draft bankruptcy convention.

78. Actes de la Cinquième session, *supra* note 72, at 64–65, ann. I, ann. II. Both submissions are published in French, without translation from the native language of these delegations.

79. *Id.* at 64, 65. This support for universalism in bankruptcy was contradicted by the territorial nature of their then-current domestic bankruptcy laws. For example, the Spanish delegate expressly refers to Spanish bankruptcy law as inspired by “the principal of plurality.” *Id.* at 65.

admitted that the “view of the universality of bankruptcy proceedings was not an ideal that would be realized easily,”⁸⁰ referring in this regard to the problem of preferential debts (*créances privilégiées*), particularly debts entitled to priority for reasons related to the public order, such as tax privileges.⁸¹ Germany’s vision of a universal international bankruptcy regime was a practical one, which sought to accommodate local interests. The German delegation remarked in its statement that while one could contemplate as a general rule that the law of the state of the opening of the bankruptcy should govern these privileges, nonetheless “exceptions are needed,” including especially an indication that rights in rem would be governed by the law of their origin.⁸²

Deliberations continued in The Hague for several days. After these sessions discontinued, the Commission’s Chair issued a report on the sessions’ revised draft convention on international bankruptcy.

The Chair noted that during this session the Commission had come to a kind of fork in the road, by which he meant that the “international regulation of bankruptcy” could take one of two directions. The first, involving the unity and universality of bankruptcy, would aim, more or less broadly, to make the bankruptcy of one country effective in another.⁸³ The other alternative, he remarked, would “admit of the plurality” of proceedings and look instead to “establish between them a certain consistency” of treatment regarding the causes of bankruptcy, the selection of a trustee, and so on.⁸⁴

The Chair concluded that, while the Commission’s revised draft did not follow the principles of unity and universalism in bankruptcy “with absolute logic,”⁸⁵ the draft was, he thought, predominately universal in its focus.⁸⁶ Indeed, Article 4 of the draft conventions states broadly that “[t]he effects of bankruptcy declared in one country by a court competent within the provisions of Article 2 extend to the territory of all other contracting states.”⁸⁷ This statement of automatic recognition would unify bankruptcy, at least between contracting states.

80. *Id.* at 64.

81. *Id.*

82. *Id.*

83. *Id.* at 87.

84. *Id.*

85. *Id.*

86. *Id.* (noting that this approach was followed, although the British delegation could not subscribe to this project or participate in the discussion of the draft convention, and without attempts by the Commission to design a system for coordinating among multiple bankruptcies).

87. *Projet d’une Convention sur la faillite*, art. 4, Proceedings at 91 (“The trustee may, therefore, take any protective measures or administration and perform all activities as a representative of the bankrupt or the estate. The trustee cannot, however, proceed with sale of buildings or with acts of forced execution if the bankruptcy order has been invested with *exequatur*.”) (translation by author with assistance of Google translate).

In addition, the draft convention expressly refers, in several provisions, to the law applicable in this “universal” bankruptcy. For example, Article 6 provides that the avoidance law of the forum state “governs the annulment of acts of the debtor by virtue of the declaration of bankruptcy, as well as the non-enforceability of these acts,”⁸⁸ although it allows for the possibility that another contracting state might refuse to recognize such an avoidance “on the grounds that the local law would not admit it.”⁸⁹ Articles 10 to 15 refer to the law applicable to “general liens,” to rights in rem, to maritime liens, and to “fiscal claims” asserted by a government of a contracting state.⁹⁰ The general rule stated within the draft convention is, overall, strongly universal, however.⁹¹

V. CONCLUDING OBSERVATIONS

Two aspects of deliberations on a draft bankruptcy convention in the 1925 Hague Conference on Private International Law seem perplexing on first examination. First, the statements entered into the proceedings by the British and German delegations appear to contradict current understanding of their national positions in the early twentieth century. The conventional story of the development of international insolvency law posits common law countries, particularly the courts in the United Kingdom, as early promoters of the doctrine of comity and of the wisdom of universalism in transnational bankruptcy practice,⁹² and civil law countries, especially Germany, as applying an insular brand of territorialism that often declined recognition of foreign bankruptcy proceedings.⁹³ And yet the record of the 1925 proceedings at The Hague and of the preparatory reports and meetings at His Majesty’s Board of Trade clearly reveal the British delegation as unwilling to ascribe to an ideal of unity and universalism in bankruptcy, and willing at most to agree to coordinated administration of multiple proceedings. This record also unexpectedly shows the German and Spanish delegations to the Hague Conference as strong proponents of the ideal of

88. *Id.* art. 6.

89. *Id.*

90. *Id.* arts.10–15.

91. *Id.* art. 9 (“Throughout the bankruptcy, foreign creditors who are nationals of Contracting states are entirely assimilated to national creditors.”).

92. *See, e.g.,* IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES* 17–22 (2d ed. 2006).

93. Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 *AM. BANKR. L.J.* 485, 531 n.6 (1996) (“While German courts acknowledged the principle of universality for bankruptcies opened in Germany, for many years they held that foreign bankruptcy proceedings had only territorial effects, i.e. that they did not affect the foreign debtor’s assets situated in Germany. It was not until 1985 that the Federal Court of Justice (Bundesgerichtshof) departed from these principles by extending the principle of universality to foreign insolvency proceedings and developed rules for the recognition of such proceedings in Germany. *See* Judgment of July 11, 1985, 95 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 256.”).

universalism in bankruptcy. Second, the draft convention emerging from these proceedings contains few rules on conflicts of law (that is, private international law), although deliberations on this draft occurred in the Hague Conference on Private International Law.

On reflection, both puzzles are easily explained. First, the British courts' aspiration for bankruptcy universalism beginning in the early nineteenth century⁹⁴ was only ever an ideal.⁹⁵ In addition to Burgin's speech, the BOT's report provides counter-examples of British courts behaving if not badly then at least territorially. More importantly, British national economic interests undoubtedly influenced the British delegation's position at the Hague Conference deliberations on bankruptcy. Burgin and the BOT both refer in their preparatory reports to Britain's interwar economic interests in bankruptcy law.⁹⁶ Both regard British traders as more likely to be exporting to foreign buyers than importing from foreign sellers, which means that Britain perceived itself to be a creditor rather than a debtor nation when arriving at The Hague.⁹⁷ Creditors may well prefer a territorial bankruptcy regime, especially where their territory of origin unilaterally asserts jurisdiction and influence throughout the globe.

On the other hand, although German insolvency law was well known to be strictly territorial in application,⁹⁸ Germany faced incredible economic hardship following World War I: post-War hyperinflation in Germany undoubtedly made bankruptcy commonplace among its traders.⁹⁹ The German delegation to The Hague proceedings in 1925 would have felt enormous pressure to counter this economic situation. An international agreement to recognize the effects of German insolvency proceedings would have been consistent with these interests.

Second, the draft convention's failure to articulate conflict of law rules is also easily understood in light of the modified brand of bankruptcy universalism promoted through the 1925 draft convention. Conflicts of law rules are unnecessary in either a purely universal or a purely territorial regime. In either pure setting, there is no need to coordinate among different country's insolvency laws. In a universal regime, a single case is governed by the bankruptcy law of that single forum. In a territorial regime, multiple

94. See, e.g., *Odwin v. Forbes*, (1817) 1 Buck 57 (P.C.). For discussion of this early opinion, see FLETCHER, *supra* note 92, at 18–20.

95. See Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 566 (2001) (detailing and critiquing “universalism’s excessive ambition”).

96. Burgin Memorandum, *supra* note 17, at 1; Report of Informal Comm. on Int'l Bankr. to Bd. of Trade, *supra* note 60.

97. Report of Informal Comm. on Int'l Bankr. to Bd. of Trade, *supra* note 60.

98. See Balz, *supra* note 93.

99. See, e.g., Michael Fior, *Financial Instability in Transition Economies During the 1920s: The European Reconstruction and Credit-Anstalt Insolvency*, in HISTORY OF INSOLVENCY AND BANKRUPTCY FROM AN INTERNATIONAL PERSPECTIVE (Karl Grazer and Dieter Stiefel eds., 2008).

cases each are governed by the bankruptcy laws of those respective locations. Only in a so-called modified universal or modified territorial setting, where the law looks to coordinate among multiple proceedings, do rules of private international law become important.

Indeed, the importance of conflicts of law rules to the success of a regime of modified universalism explains the current push for such rules. UNCITRAL's Model Law on Cross-Border Insolvency contains no provisions on questions of what law (or whose law) governs.¹⁰⁰ The Guide to Enactment indicates that this was intentional because delegates could not reach agreement on the content of such rules, and not because they viewed these sorts of rules as unnecessary.¹⁰¹ UNCITRAL's insolvency working group has begun to study the possibility of drafting a convention on the topic of cross-border insolvency, which could broach international agreement on questions of applicable law, but these conversations are preliminary and may never result in any firm proposal.¹⁰²

Overall, the story of the 1925 Hague proceedings on bankruptcy emphasizes the risk of all or nothing proposals. Given the choice between the status quo and some untested international ideal, countries chose to stick with the status quo, especially where economic conditions are insufficiently dire to motivate sharp change. Conventions present all or nothing options to national actors; as a result, states and international organizations can devote great swaths of time to negotiating the terms of a draft instrument, only to find that the convention has not entered into force.¹⁰³ The draft bankruptcy convention that formed the subject of Burgin's attention in 1924 was first put forward at the Hague Conference in the late nineteenth century and not finally dropped until this interwar session; more than thirty years of work led nowhere. Similarly, much later in the twentieth century, more than thirty years of work within Europe on a draft convention on cross-border insolvency was also nearly lost as a result of British pique over trade disputes concerning beef and the small Island of Gibraltar.¹⁰⁴

100. See U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014).

101. *Id.* at 25.

102. See U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), *Report of the Fourth International Insolvency Law Colloquium*, 47th Sess., July 7–18, 2013, U.N. Doc. No. A/CN.9/815 (noting that, “with respect to choice of law, it was suggested that clear and predictable rules would assist in the administration of cross-border bankruptcy cases in a world where harmonization of bankruptcy procedures is incomplete, and where important local policy choices are influenced by commercial activity”).

103. Susan Block-Lieb & Terence Halliday, *Settling and Concordance: Two Cases in Global Commercial Law*, in *TRANSNATIONAL LEGAL ORDERS* 75, 108 (Terence Halliday & Gregory Shaffer eds., 2014) (“Because conventions generally are understood to present to states a binomial option—accede to all or none of its terms—states may take a considerable amount of time before deciding whether to ratify a convention.”).

104. See FLETCHER, *supra* note 92.

By contrast, the history of UNCITRAL demonstrates the flexibility and effectiveness of incremental reform through soft-law instruments.¹⁰⁵ Since its inception in 1968, UNCITRAL has promulgated a combination of hard law (conventions) and soft law (model laws, legislative guides, and so on) products.¹⁰⁶ Both sorts of legal technologies have influenced reform of global norms of trade and commercial practices, but increasingly soft law products predominate.¹⁰⁷

Whether conflict of law rules must be found in multilateral treaties negotiated over lengthy periods remains an open question, although it is an open question that too few are asking. Since the late nineteenth century, international efforts to coordinate conflict of law rules have been limited to efforts to draft international conventions.¹⁰⁸ Since 1925, much has changed about bankruptcy law and the coordination of cross-border bankruptcy proceedings. The question is whether the form of international coordination on the law applicable in these proceedings can change as well.¹⁰⁹

When and if UNICTRAL returns to the question of what law ought to apply in cross-border insolvency proceedings,¹¹⁰ the Commission should consider whether the form of this work must be a convention. Its record in drafting softer international instruments—model laws, legislative guides and the like—suggests that reaching international agreement on choice of law might better occur through some softer format.¹¹¹

105. Susan Block-Lieb & Terence Halliday, *Incrementalisms and Global Lawmaking*, 32 *BROOK. J. INT'L L.* 851 (2007).

106. *Id.* at 862.

107. Block-Lieb & Halliday, *supra* note 2.

108. *See generally id.* *See also* John H. Coyle, *Rethinking the Commercial Law Treaty*, 45 *GA. L. REV.* 343 (2011); Dubinsky, *supra* note 7.

109. SUSAN BLOCK-LIEB & TERENCE HALLIDAY, *GLOBAL LEGISLATORS*, ch. 6, *Formal Strategies* (draft in author's possession).

110. For discussion of just such a project, see *Report of the Fourth International Insolvency Law Colloquium*, *supra* note 102.

111. *See* Susan Block-Lieb & Terence Halliday, *Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law*, 42 *TEX. INT'L L.J.* 475, 512–13 (2007) (“Reliance on a legislative guide format gave [UNCITRAL] the flexibility to be salient to the entire world, while also integrating constructively—perhaps even transcending—the previous efforts of potential rivals. The flexibility of a legislative guide enabled UNCITRAL to be competitive with other international organizations and ultimately to emerge with a global standard to which its potential rivals acceded.”).