

This is a late draft of an article composed in 1993 on conflict of laws in fraudulent transfer and Paulian actions. It was submitted to, and preliminarily accepted by, Prof. Buxbaum, editor of the American Journal of Comparative Law but rejected by his peer reviewer without much comment.

I went on to other things and neither revised it nor submitted it elsewhere. As it's come to my attention that nobody else has addressed the topic since, I am putting it in the public domain for what it is worth. I think this is the final version, for cite checking.

I encountered Prof. Buxbaum in the hallway of Boalt Hall in 2016, and he remembered the article. I was on my way to the new library, and he directed me.

So much for that.

Conflict of laws in fraudulent transfer and Paulian actions

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Introduction

Judicial proceedings for the revocation of transactions undertaken in fraud of creditors and for the fixing of liens on the objects of such transactions exist as an adjunct to insolvency proceedings, as a protective measure pending litigation and as an aid in execution of judgment in some form in most legal systems. This study reviews the operation of choice of law rules with respect to common-law fraudulent conveyance proceedings and their statutory successors in and out of bankruptcy, and civil law *action paulienne*¹ (in Louisiana, revocatory action²), *action en*

¹ C. CIV. art. 1167 (Fr.). Application of this provision requires either conveyance without value or complicity on the part of the transferee, Cass. civ. 1re, 1984 Bull. civ. I, No. 211. See 2 PLANIOL & RIPERT, TREATISE ON THE CIVIL LAW [Planiol] (11th ed. La.St.C.Inst. trans. 1959), § § 296-336, at 178-96 (West 1959). For comparison with the German *Einzelanfechtung*, see Moritz von Campe, *Insolvenzanfechtung in Deutschland und Frankreich* 77-84 (1997)

² LA. CIV. CODE ANN. art. 2036-2044 (Revocatory action and oblique action); see also art. 2025-2028 (simulation); art. 2029-2035 (nullity) (West 1996). See *Traina v. Whitney Nat'l Bank*, 109 F.3d 244 (5th Cir.

*déclaration de nullité*³, *action en déclaration de simulation*⁴ and *action oblique*⁵. Civil law systems also possess the doctrine of *fraude à la loi*, leading to the refusal to recognize legal status created as an artifice to avoid application of forum law.⁶

Such foreign laws might be brought into consideration in a United States action through a foreign ancillary proceeding in bankruptcy, by reference in § 544(b) of the Bankruptcy Code to "applicable law" or by ordinary choice of law principles in or out of bankruptcy. A particular source of conflict is in the determination of the applicable statute of limitations, which may be complicated by *dépeçage*⁷ or by the characterization of statutes of limitations as procedural⁸.

1997) (turning on definition of pre-existing debt; citing cases and doctrine).

³Law of Jan. 25, 1985, art. 107; Claude Colombet, *De la règle que l'action paulienne n'est pas reçue contre les paiements*, 1965 *Revue trimestrielle de droit civil* 5, 18 F. LAURENT, *PRINCIPES DE DROIT CIVIL* [Laurent] § § 526-553 (3d ed. 1878).

⁴16 LAURENT § § 497-499, 2 HENRI DE PAGE, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL BELGE* [De Page] § § 639-646 (3d ed. 1964); 3 DE PAGE § § 257-260.

⁵C. CIV. art. 1166 (exercise by creditors of rights and causes of action belonging to a debtor except those exclusively personal); see Paul Delnoy, "Pour une vision nouvelle de l'action oblique", 14 *ANNALES DE LA FACULTÉ DE DROIT DE LIÈGE* 437 (1969).

⁶BERNARD AUDIT, *LA FRAUDE À LA LOI* (1974).

⁷Willis L.M. Reese, "Depeçage: A Common Phenomenon in Choice of Law", 73 *COLUM. L. REV.* 58 (1973); ALBERT A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW, GENERAL PART*, 119-21 (1974); *Ruiz v. Blentech Corp.*, 89 F.3d 320 (7th Cir. 1996).

⁸See, e.g., *Federal Deposit Insurance Corp. v. Nordbrock*, 102 F.3d 335 (8th Cir. 1996) (Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821 (1994)).

Conflicts problems also derive from the definition of assets subject to clawback, differences in burden of proof⁹ and in jurisdictional matters. The interplay of nonbankruptcy fraudulent transfer statutes with § 548 and their evocation by § 544(b) has been thoroughly considered¹⁰ although few reported cases have lingered over the matter of *which* state (or foreign) law should apply. Regrettably, neither the case law nor the doctrine has put forth a consistent theoretical framework for analysis of the choice of law issue in the bankruptcy context or otherwise. The aim of this article is to take some steps in that direction.

Section 548 of the U.S. Bankruptcy Code makes no allowance for conflicting foreign interests; its application must depend upon the limits of the bankruptcy court's jurisdiction and powers asserted elsewhere by means of ancillary proceedings. Section 544(b), granting the trustee avoidance powers "under applicable law", implies the type of analysis undertaken here. A court's coercive powers end at its jurisdictional boundaries and are limited to its legislative grant; creditor actions predictably bring their actions in the jurisdiction or jurisdictions where property -- or the persons having control over it -- may be found. That a court may have equitable powers over property elsewhere has rarely merited discussion in reported cases except in English cases considering proposed "worldwide Mareva" injunctions¹¹. These extraterritorial protective measures are reserved by the courts for situations where there is reason to expect the *situs*

⁹Field v. Mans, 116 S.Ct. 437 (1995).

¹⁰4 COLLIER ON BANKRUPTCY ¶ 544.01-544.03 (15th ed. rev. 1996); 1 DAVID G. EPSTEIN ET AL., BANKRUPTCY, § 6-60 (1992).

¹¹Derby & Co. Ltd. v. Weldon (No. 6) [1990] 1 W.L.R. 1139; *and see infra*, note 138 and accompanying text.

jurisdiction to provide assistance in freezing assets. In the United States it has been in bankruptcy and in federal tax proceedings, where the court has nationwide jurisdiction, that inter-jurisdictional fraudulent transfer conflict of laws issues have been most commonly addressed. Similar questions of applicable law have, however, arisen in trust litigation: in *First National Bank in Mitchell v. Daggett*¹², a fraudulent conveyance action, the court invalidated the provision of a trust purporting to apply Georgia law based on the absence of contacts with that state by the parties, the real estate involved or the trust itself.

The protection of creditors¹³ from debtors who may abscond or seek a safe haven for assets is of current relevance in the light of recent experience including the Maxwell¹⁴ and BCCI¹⁵

¹² 497 N.W.2d 358 (Neb. 1993).

¹³ The petitioner must have a valid claim; thus if a claim is barred by a statute of limitations, nonclaim statute or otherwise it may not form the basis for a fraudulent transfer action: *Jahner v. Jacob*, 515 N.W.2d 183 (N.D. 1994); *State of Rio de Janeiro v. Rollins & Sons, Inc.*, 299 N.Y. 363, 87 N.E.2d 299 (1949); *Heffron v. Duggins*, 115 F.2d 519 (9th Cir. 1940); *Cohen v. George*, 101 S.E. 803 (S. Ct. Ga. 1920); see Annotation, 14 A.L.R.2d 598; 1 GARRARD GLEN, FRAUDULENT CONVEYANCES AND PREFERENCES [Glen], § 88 at 150 (Rev. ed. 1940). See also *Weisenburg v. Cragholm*, 97 Cal. Rptr. 862, 489 P.2d 1125, 5 Cal. 3d 892 (1971) (original judgment, used as basis for fraudulent conveyance action, subsequently reversed). See discussion of debtor's right to intervene in fraudulent conveyance suit against stakeholder, *RCA Corp. v. Tucker*, 696 F.Supp. 845, 849-50 (E.D.N.Y. 1988).

¹⁴ Including *Macmillan Inc. v. Bishopsgate Trust (No. 3)*, [1996] 1 W.L.R. 387 (C.A.); *Maxwell Commun. Corp. v. Barclays Bank plc*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

¹⁵ Including *Re Bank of Credit and Commerce International S.A. (No. 9)*, [1994] All E.R. 764 (worldwide Mareva injunction at issue).

litigation, the popularization of cross-border investment and the development of new instruments for shielding personal assets¹⁶. It is worthwhile to consider the reason why any legal system might see fit to impede the application of the provision most generous to the creditor. In fact, apart from differences in perception as to debtors' rights in bankruptcy, this may be due to conflict in characterization of the transaction: what, for example, in England might be viewed as a simple claim in debt could, in the United States, be seen as a securities and consumer law issue¹⁷.

In bankruptcy, the doctrinal view appears to be that U.S. bankruptcy courts should be free to determine applicable law¹⁸, although in fact they tend to apply the law of the situs of property¹⁹

¹⁶ See Charles M. Bruce et al., *Protection of Assets Trusts: Fallout From Litigation Explosion*, N.Y.L.J., Sept. 13, 1991, at 1; Gideon Rothschild, *Asset Preservation: Legal and Ethical Strategies*, N.Y.L.J., Mar. 11, 1994, at 1; Larry W. Gibbs, *Asset and Tax Protection: The Foreign Trust as a Solution*, TR. & EST., Feb. 1993, at 10.

TRUSTS

¹⁷ *Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir. 1997). Collectibility is not, of course, relevant to the matter of judgment: "this court bound to proceed in accordance with settled principle and is not to be fettered by speculative regard to how its judgment may be received abroad", *Society of Lloyd's v. Leighs*, 1996 Folio Nos. 2042, 2047, 2055, unreported judgment, Court of Appeal (Eng.), July 31, 1997, at p. 260.

¹⁸ The "more supportable" view, COLLIER, ¶ 544.02, citing 1A MOORE'S FEDERAL PRACTICE, ¶ 0.322(1) (2d ed.), Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953); Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66; note, 68 HARV. L. REV. 1212 (1955).

¹⁹ *Duck v. Wells Fargo Bank, N.A. (In re Spectra Prism Indus., Inc.)*, ~~8 C.B.C.2d 325~~ (9th Cir. B.A.P. 1983); *Friederich v. Kockery*, 209 F.2d 677 (8th Cir. 1954); *Maguire v. Gorbaty Bros.*, 133 F.2d 675 (2d Cir. 1943); *In re Rogal*, 112 F. Supp. 712 (S.D. Cal. 1953).

28 B.R. 397

or the *lex fori*²⁰. While less obvious it is no less arguable that courts, whether in a bankruptcy, enforcement of judgment or fraudulent conveyance context, should weigh the relative rights accruing to creditors, debtors and possessors under applicable statutes of limitations, exemptions and adverse possession rules. The extreme case, recognizing the vesting of local property in a foreign trustee in bankruptcy and ignoring all competing interests²¹, would be credible only under circumstances where the forum has demonstrably no interest in the matter.

The "interest" of governments²² (and the whole postwar "crisis" in conflict of laws²³) is relevant here insofar as governments have strong and conflicting public policy interests in matters of party autonomy, the enforcement of obligations, the relief of debtors and consumers and the security of tenure. The most obvious differences in the anti-fraud statutes relate to issues of prescription, good faith on the part of the transferee, value given in exchange, and the validity of a

²⁰ *Elgin Sweeper Co. v. Melson, Inc.*, 884 F. Supp. 641 (N.D.N.Y. 1995).

²¹ *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). Indeed the blind application of foreign law could impose hardship on innocent purchasers for value, a category of possessor now widely protected by statute from the common-law rule of relation back; *see In re Gunsbourg*, [1920] 2 K.B 426 (C.A.) applying Bankruptcy Act 1914, § 37 (repealed); *cf.* Bankruptcy Act 1986 § 284(4) (protecting transferee in good faith, for value and without notice). *Cf.* Collier ¶ 70.62.

²² Brainerd Currie, *On the Displacement of the Law of the Forum*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, at 3 (1963); Patricia A. Carteaux, *Conflict of Law and Successions: Comprehensive Interest Analysis as a Viable Alternative to the Traditional Approach*, 59 *TULANE L. REV.* 389 (1984).

²³ Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL [R.C.A.D.I.]* 95 (1964 II).

discharge or an exemption (including a homestead exemption) applicable under the law of the situs of property or the domicile of the debtor²⁴. A more subtle difference relates to the possibility of counterclaims and to the limitation period, if any, separately applicable to property alleged to have been fraudulently conveyed and *ordre public*²⁵. The effects of choice of law can be particularly dramatic in the context of a Chapter 11 proceeding where § 546 of the Bankruptcy Code extends the time to file any action deriving from § 544²⁶, as such powers may be extended until two years following the appointment of a trustee or the case is closed or dismissed, whichever occurs later.²⁷ The issue of choice of law is not to be confused with that of venue, which in a cross-border fraudulent transfer case may influence, if not determine, the outcome²⁸.

²⁴ See Andrew Grossman, *Conflict of Laws in the Discharge of Debts in Bankruptcy*, 5 INT'L INSOLVENCY REV. 1 (1996).

²⁵ The Roman law *Ælia Sentia* prohibited the freeing of slaves in fraud of creditors under the principle of *qui in fraudem creditorum manumittit nihil agit*. Compare *Greenwood v. Curtis*, 6 Mass. 358 (1810) and *The Antelope*, ^{23 US} (10 Wheat.) ~~66~~ (1825); see also LOUIS SALA-MOLINS, *LE CODE NOIR, OU LE CALVAIRE DE CANAAN* (1993) (French slave laws of 1685).

²⁶ 11 U.S.C. § 544(b), attributing to the trustee fraudulent transfer rights of a creditor holding an allowable unsecured claim.

²⁷ Gerald K. Smith & Frank R. Kennedy, *Fraudulent Transfers and Obligations: Issues of Current Interest*, 43 SO. CAR. L. REV. 709, 734-51 (1992); Frank R. Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 SO. CAR. L. REV. 655, 734, 684-89 (1992).

²⁸ See *In re International Administrative Services, Inc.*, 211 B.R. 88 (Bankr. M.D. Fla. 1997) (claim of withdrawal of funds by controlling officer from insolvent corporation and their transfer to Guernsey), one of few cases to discuss the issue of venue.

The Uniform Fraudulent Conveyance Act²⁹ and the Uniform Fraudulent Transfer Act³⁰ will be sufficiently well known to most readers not to require detailed explanation here. It may, however, be useful to set out a description of some alternative common-law and civil law remedies that have arisen in choice of law situations.

English law

As re-enacted in the Law of Property Act 1925³¹, the Statute of Elizabeth provided that "Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced."³² As interpreted by the Court of Appeal,

²⁹ 7A U.L.A. (1985); in effect in eight jurisdictions as of 1995 (Delaware, Maryland, Massachusetts, Michigan, New York, Tennessee, Virgin Islands, Wyoming); e.g. N.Y. DEBT. & CRED. LAW § § 270-281. See note, *Good Faith and Fraudulent Conveyances*, 97 HARV. L. REV. 495 (1983); James A. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404 (1933).

³⁰ 7A U.L.A. 639; enacted in 37 jurisdictions as of Jan. 1, 1997; see e.g. CAL. CIV. CODE § 3439 (West 1987); TEX. BUS. & COM. CODE ANN. § § 24.001-24.013 (West 1987). See Frank R. Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 S. CAR. L. REV. 655 (1992); Michael L. Cook & Richard E. Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87 (1988). Application of the UFTA is prospective only: CAL. CIV. CODE § 3439.12 (West 1996), Stats. 1987, c. 40 § 2; *In re Smith*, 110 B.R. 597 (Bankr. M.D. Fla. 1990) and other cases cited at 7A U.L.A. supp. 187 § 1, notes 1-2 (1997).

³¹ 15 & 16 Geo. 5 ch. 20.

³² Law of Property Act 1925, § 172(1).

where a spouse, who has a beneficial interest in the matrimonial home has become bankrupt under debts which cannot be paid without the realisation of that interest, the voice of the creditors will usually prevail over the voice of the other spouse and a sale of the property ordered within a short period. The voice of the other spouse will only prevail in exceptional circumstances. No distinction is to be made between a case where the property is still being enjoyed as the matrimonial home and one where it is not.³³

The English Bankruptcy Act 1914 also contained avoidance provisions regarding settlements³⁴. The modern version is Part XVI of the Insolvency Act 1986, §§ 423-425, providing that if a person enters into a transaction at an undervalue, by gift or for inadequate consideration, where the court is satisfied that the transaction is entered into for the purpose "(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim

³³ *In re Citro*, [1991] Ch. 142, 157 (C.A.) See also *In re Eichholz (deceased)*, [1959] Ch. 708 (1958) (solicitor purchased with misappropriated clients' funds house as gift for wife; held recoverable by trustee for bankrupt decedent's estate under Law of Property Act 1925, § 172 and Bankruptcy Act 1914, § 130).

³⁴ § 424 of the Bankruptcy Act 1914 provided that any settlement of property, not being a settlement made before and in contemplation of marriage, or made in favor of a purchaser or incumbrancer in good faith for valuable consideration, was void against the trustee in bankruptcy if the settlor became bankrupt within two years after the date of settlement. See *In re Dent (a bankrupt)*, [1994] 1 W.L.R. 956 (1993). As to the special situation of settlements in consideration of marriage, especially prior to the Married Women's Property Acts 1870-1893, see ALBERT V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND (Lecture No. 11) 360-98 (1914); SIR ROBERT MEGARRY & HENRY W.R. WADE, LAW OF REAL PROPERTY, 1020-24 (5th ed, 1984); cf. HAROLD MARSH, MARITAL PROPERTY IN THE CONFLICT OF LAWS (1952).

which he is making or may make" the court may restore the position to would have been if the transaction had not been entered into, and protect the interests of persons who are victims of the transaction. The revision was a result of the Cork Committee's report.³⁵

While § 172 was in its early years extensively used, there are few recent cases based on it³⁶. The new provision is notable for the absence of any time bar³⁷; like § § 339-341 it allows for the restoration by the court of "the position to what it would have been if that individual had not given that preference". The latter provisions omit any requirement of a finding of intent, but include a time limit of five years ending with the date of the presentation of the bankruptcy petition for transactions "at an undervalue", and two years for "associates" (insiders) other than employees, and six months for transactions not at an undervalue to non-associates. This latter provision has, apparently inadvertently, created the situation in which because unlike § § 423-425³⁸ it provides no defense of adequate consideration good faith and lack of notice on the part of a subsequent titleholder, a five-year cloud falls over the title to all real property transferred by way of gift. This is so despite the provision's discretionary character and the fact that there are no recorded cases of courts actually penalizing innocent lenders and buyers.³⁹

³⁵ *INSOLVENCY LAW AND PRACTICE: REPORT OF THE REVIEW COMMITTEE*, Sir Kenneth Cork, Chairman, Cmnd. 8558 (1982, reprinted 1994).

³⁶ *MUIR HUNTER & JOHN BRIGGS, MUIR HUNTER ON PERSONAL INSOLVENCY*, § 3-467/1 (1987).

³⁷ *Compare* MICH. COMP. LAWS ANN. FFfF 566.11-566.23 (___ 19___).

³⁸ Specifically § 425(2)(a). *See* Chohan v. Saggat, [1994] 1 B.C.L.C. 706 (C.A.) (Libel judgment; property purchased by protected (statutory) tenant with funds provided by mortgage lender (building society)).

³⁹ Owen Dyer, *House Buyers Put at Risk*, THE TIMES (London), Feb. 15, 1992, at 25.

enactment of the Uniform Fraudulent Transfer Act of 1995⁶² and lie behind nearly all the District's existing case law.

A conveyance or assignment, in writing or otherwise, of an estate or interest in land or its rents and profits, or in goods or things in action, and a charge upon the same, and a bond or other evidence of debt given, or judgment or decree suffered, with the intent to hinder or defraud persons having just claims or demands, of their lawful suits, damages, or demands, is void as against the persons so hindered or defrauded.

This section does not affect the title of a purchaser for value, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of the grantor. The question of fraudulent intent is a question of fact and not of law.⁶³

The District of Columbia did not adopt the Uniform Fraudulent Conveyance Act. From the standpoint of this study, what is interesting about the recently abrogated D.C. law is that although based on English statutes and common law, it absorbed the typically-American quality of

⁶¹D.C. CODE T. 11 § 1120 (1929), superseded by D.C. CODE § 12-401 (1951). The statute came into District law by transmission from the common law of Maryland; *Fechheimer, Goodkind & Co. v. Hollander*, 21 D.C. 76, *app. dismissed sub nom. Hollander v. Fechheimer*, 162 U.S. 326 (1896).

⁶²D.C. Law 11-83, 43 D.C. Register 1309, Mar. 15, 1996, as amended by D.C. Law 11-255 § 27(c), 44 D.C. Register 1271, Mar. 7, 1997; codified as D.C. Code vol. 6A, § § 28-3101-3111 (1997).

⁶³D.C. Code § 28-3101 (1964) (abrogated).

against him"⁵⁶ where the identity of that person is unknown and unknowable is not generally followed in the United States: "[W]here the creditor is not in existence at the time of the conveyance, there must be evidence establishing actual fraudulent intent by one who seeks to have the transaction set aside."⁵⁷ In bankruptcy cases, while assets converted to exempt property will generally not be reachable, if such conduct has had a specific creditor in mind a discharge may be denied.⁵⁸

The Statute of Elizabeth transposed to the United States

The Statute of Elizabeth⁵⁹ came to the America as part of the common law and was in force in the District of Columbia⁶⁰ until 1929⁶¹; successor statutes remained in force until the

⁵⁶ Insolvency Act 1986, § 423(3)(a).

⁵⁷ *Eurovest, Ltd. v. Segall*, 528 So.2d 482, 483-84 (Fla. 3d D.C.A. 1988), *accord*, *Hurlbert v. Shackleton*, 560 So.2d 1276 (Fla. 1st D.C.A. 1990). *Compare*, N.Y. DEBT. & CRED. LAW § 274 (person who "is engaged or about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital") and UFTA § 4(a), 7A ULA 652 (1985) (transfers with actual intent to frustrate creditors and without reasonably equivalent consideration); and *see In re Rosenfield's Will*, 213 N.Y.S.2d 1009, *aff'd* 18 A.D.2d 718, 236 N.Y.S.2d 941 (1961) (testator, in financial difficulties and under criminal investigation, had undertaken to assign to his wife all his property and anything he might acquire in the future).

⁵⁸ *In re Oberst*, 91 B.R. 97 (C.D. Cal. 1988), citing *In re Reed*, 700 F.2d 986 (5th Cir. 1983).

⁵⁹ 13 Eliz. ch. 5.

⁶⁰ As interpreted in the District of Columbia, the Statute of Elizabeth did not affect, in favor of subsequent creditors, a conveyance made by a person not indebted at the time, absent intentional fraud: *Mattingly v. Nye*, 75 U.S. (8 Wall) 370 (1869).

recognition to foreign judgments and setting strict standards for the setting aside of conveyances on grounds of preference and fraud upon creditors. For example, the Cook Islands International Trusts Act 1984 provides:

Notwithstanding any provision of the law of the settlor's domicile or place of ordinary residence or the settlor's current place of incorporation and notwithstanding further that an international trust is voluntary and without valuable consideration being given for the same, or is made on or for the benefit of the settlor spouse or children of the settlor or any of them, an international trust and a disposition to an international trust shall not be void or voidable in the event of the settlor's bankruptcy insolvency or liquidation ... or in any action or proceedings at the suit of creditors of the settlor but shall remain valid and subsisting and take effect according to its tenor subject to the provisions of section 13B [regarding fraudulent conveyances and fixing a two-year statute of limitations running from the date of accrual of the cause of action].⁵⁴

There has been little reported litigation on such trusts⁵⁵, but the English rule that will reverse transfers made to prejudice "a person who is making, or may at some time make, a claim

CLIENT BUS. 96, 103); John Mobray, Q.C. & Joseph A. Field, *When is Asset Protection an Asset Risk? Warnings and Alternatives*, 4 J INT'L T. & CORP. PLAN. 3 (1995).

⁵³ Including at least Bahamas, Belize, Bermuda, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Turks & Caicos Islands, and Seychelles.

⁵⁴ Cook Islands International Trusts Act 1984, § 13A.

⁵⁵ Besides prosecution of the tax evasion and money-laundering type, viz. *United States v. Ushijima*, 26 F.3d 656 (7th Cir. 1994). *Goulding*

3. Absconding to avoid payment of debts (still an offense under the 1986 Act⁴⁸) could not be an act of bankruptcy as to a person resident abroad.⁴⁹

In English cases, "fraudulent conveyance" and "fraudulent preference" are interpreted according to English law⁵⁰, the burden of proof against the claimant however being more stringent where the relevant transaction occurs abroad and is undertaken by one "ordinarily resident", engaged in business and whose assets are outside of the jurisdiction.⁵¹

The pertinent strictures of the 1986 Act have been noted in the context of the development of asset protection trusts and family limited partnerships, which involve the removal of assets beyond the jurisdiction of potential future judgment creditors and outside the control of the settlor.⁵² The trust laws of a number of offshore jurisdictions⁵³ have enacted statutes refusing

⁴⁸ § 358: "The bankrupt is guilty of an offence if -- (a) he leaves, or attempts or makes preparations to leave, England and Wales with any property the value of which is not less than the prescribed amount and possession of which he is required to deliver up to the official receiver or trustee..."

⁴⁹ *In re Trench*, (1884) 25 Ch. D. 500 (retired major-general in the Indian army, resident in Boulogne, France).

⁵⁰ DICEY & MORRIS, *CONFLICT OF LAWS* (Dicey & Morris), Rule 159, at 1092 (Lawrence Collins, ed., 11th ed. 1987), citing *BLOM-COOPER* at. 61-63.

⁵¹ *Ex parte Defries*, *In re Myers*, 35 L.T. 392 (1876) ("It is utterly impossible to say under those circumstances that this case at all comes within the principle of the cases of the assignment of all a man's property or goods").

⁵² Geroge M. Menzies, *Gratuitous Alienations in Scots Law and Asset Protection Trusts*, [1993] PRIVATE CLIENT BUS. 126; Richard Citron & Michael Steiner, *Asset Protection Trusts -- Promise or Threat?*, [1994] PRIVATE

2. The status of "trading in England" does not cease following departure from England, however long the absence may continue, until all debts have been satisfied, including taxes.⁴⁷

Defries, *In re Myers*, 35 L.T. 392 (1876) (American circus promoter trading in France who there executed an assignment of assets deemed not to have made an English act of bankruptcy); *In re Sawyers*, (1879) 12 Ch. D. 522 (foreigner domiciled and resident abroad, member of an English firm that traded and contracted debts in England not liable to bankruptcy; an act of bankruptcy cannot be committed through an agent or by a firm as such). See discussion in Kurt Lipstein, *Jurisdiction in Bankruptcy*, 12 MOD. L. REV.. 454 (1949). *Cf. In re Crispin*, (1873) L.R. 8 Ch. App. 374 (non-trader domiciled abroad who contracts debts in England liable to be made bankrupt if he commits an act of bankruptcy in England, despite his departure prior to the presentation of petition).

⁴⁷*Theophile v. Solicitor-General*, [1950] A.C. 186; for comment on the prior Court of Appeal decision *In re A Debtor* (No. 335 of 1947), [1948] 2 All E.R. 533, see *Bankruptcy Jurisdiction Over Foreigners*, 207 L.T. 108 (1949). A more recent case is *In re A Debtor* (No. 784 of 1991), [1992] Ch. 554 (debtor, who had carried on a nursing home business, sold the business and went to live in the Canary Islands without paying a tax liability in excess of £500,000; in February 1991 the Inland Revenue's petition to make him bankrupt was accepted by the Registrar in bankruptcy, affirmed on appeal). *But cf. Koenigsberger v. Mellor* (Inspector of Taxes), Times Law Reports, Apr. 15, 1995 (Tax law adjudication: external underwriter's Lloyd's income is not from "trade or profession"; query whether this tax-law determination is relevant in the bankruptcy context. The pension eligibility issue has since been addressed by legislation.) See also David L. Campbell, *Jurisdiction Over the Non-resident Doing Business in England*, 10 INT'L & COMP. L.Q. 401 (1961); *International Westminster Bank v. Okeanos Maritime Corp.*, [1988] Ch. 210, also reported as *In re A Company* (No. 0035, 1987) (corporation without assets in England but having contracted a loan there held subject to winding up procedure); C.G.J. Morse, *Principles and Pragmatism in English Cross-Border Insolvency Law*, W.G. HART LEGAL WORKSHOP, July 3, 1991, Institute of Advanced Legal Studies, London.

as in the 1978 American Code⁴⁴ but still applied in some other common-law jurisdictions. The substantial body of private international law precedent in this area remains relevant⁴⁵. Key points are:

1. An Act of bankruptcy could not be constituted by a conveyance executed abroad by a foreigner not domiciled in England when it was intended to operate according to the law of the law of the foreigner's domicile.⁴⁶

⁴⁴"The Test of Section 303(h)(1) ... represents the most significant departure from present law concerning the grounds for involuntary bankruptcy, which requires balance sheet insolvency and an act of bankruptcy. This bill abolishes the concept of acts of bankruptcy. The only basis for an involuntary case will be the inability of the debtor to meet its debts. The equity insolvency test has been in equity jurisprudence for hundreds of years and though it is new in the bankruptcy context (except in Chapter X), the bankruptcy courts should have no difficulty in applying it." H.R. REP. NO. 595, 95th Cong., 1st Sess. 323-24 (1977); see *In re Kreidler Import Corp.*, 4 B.R. 256, 260 (Bankr. D. Md. 1980). Compare the French standard fixed in the 1985 law: an eligible debtor (merchant or artisan) is subject to involuntary procedure in insolvency (liquidation or reorganization) if in a state of having ceased making payments, defined as being unable to meet debts when due with all available assets. Cass. com., Feb. 14, 1978 Bull Civ. IV No. 66.; Cass. com., Jan. 16, 1980, Bull. civ. IV No. 28; July 11, 1988, 1988/19 Bulletin rapide du droit des affaires 13; 1994 Revue jurisprudentielle du droit des affaires, at 662, all cited in GEORGES RIPERT & RENÉ ROBLOT, TRAITÉ DE DROIT COMMERCIAL [Ripert & Roblot] § 2873 at p. 906 (14th ed. 1994).

⁴⁵LOUIS BLOM-COOPER, BANKRUPTCY IN PRIVATE INTERNATIONAL LAW, Thesis, Univ. of Amsterdam, 1954, ch. 6: "Jurisdiction to Adjudicate a Debtor Bankrupt".

⁴⁶*In re the debtors* (No. 836 of 1935), 52 T.L.R. 478 (1936) (American debtors carrying on business through a branch in England; rejecting view of ALBERT V. DICEY, CONFLICT OF LAWS at 314, note o (5th ed. 1932) that the Bankruptcy Act 1914 altered prior law on this point); *Cooke v. Chas. A. Vogeler Co.*, [1901] A.C. 102 (H.L. 1900) (Americans resident in Baltimore there executed a deed of assignment for the benefit of creditors); *Ex parte*

Section 423 has been applied to reverse the gratuitous transfer of the family residence to a wife in apparent anticipation of a suit for professional negligence⁴⁰ or in contemplation of setting up a business⁴¹ and to a transfer where the sole consideration was the wife's assumption of the mortgage debt⁴²; it was not necessary to show that asset protection was the sole purpose of the transactions. In litigation concerning an administrative order against a company⁴³ it was ruled that section 238, a parallel formulation concerning companies' transactions for less than full consideration, could support an order against a person who is resident abroad with no place of business in the United Kingdom, not carrying on business in the jurisdiction, but who has a "sufficient connection" with England for it to be just and proper to make the order against him despite the foreign element".

In English case law the concepts of fraudulent transfer and of fraudulent preference were and are closely related to the notion of "act of bankruptcy", abolished in the 1986 English reforms

⁴⁰ Moon v. Franklin, FT Law Reports, June 26, 1990; The Independent Law Reports, June 22, 1990. See also Arbuthnot Leasing International Ltd. v. Havelet Ltd. (No. 2), (1990) B.C.C. 636 (firm, having transferred assets and income to an associated company, sued by creditor seeking protective measures [Mareva injunction]).

⁴¹ Midland Bank plc v. Wyatt, [1994] E.G.C.S. 113.

⁴² In re Kumar, [1993] 1 W.L.R. 224. Compare United States v. McCombs, 30 F.3d 310 at 327 (2d Cir. 1994).

⁴³ In re Paramount Airways Ltd., [1993] Ch. 223 (concerning £1.65 million of company money allegedly diverted to Jersey; the court had some confidence that respect would be accorded its order in the bailiwick; cf. In re Tucker (a bankrupt), [1988] 1 W.L.R. 497, 502, discussed in David Graham, *Tucker and the Taxman*, in IAN FLETCHER, ED., CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS, at 205 (1990).

balancing creditor, family and settled interests. Thus *In re Estate of Wall*⁶⁴ found unreachable by creditors of the deceased husband the proceeds of entireties property; homestead and entireties exemptions are unknown in England. *Gibson v. Johnson*⁶⁵ refused application of the D.C. law to a gratuitous transfer of real property which had the effect of denying a tenant benefits of the Rental Housing Act:

It is true, as appellant contends, that we may liberally construe this statute to suppress fraud in the proper case. *Leonardo v. Leonardo*, 102 U.S. App. D.C. 119, 122, 251 F.2d 22, 25 (1958) [construing prior law, D.C. Code § 12-401 (1951)]. But it is clear that § 28-3101 is designed to protect "creditors" from fraudulent conveyances or persons with similar concerns. See *Snider v. Kelly*, 77 U.S. App. D.C. 363, 364, 135 F.2d 817, 818, cert. denied, 320 U.S. 764 (1943).

The District of Columbia courts were unresponsive to claims which in England would at least in principle have been entertainable under § 423(3)(a) of the Insolvency Act 1986, regarding creditors who "may at some time make[] a claim against" them. Thus in a case regarding a defalcating real estate lawyer, *District-Realty Title Insurance Co. v. Forman*⁶⁶, the trial court found

⁶⁴440 F.2d 215; 142 U.S. App. D.C. 187 (1971).

⁶⁵492 A.2d 574 (C.A.D.C. 1985).

⁶⁶518 A.2d 1004 (1986).

that the December 20, 1976 assignment of Columbia Title commissions to Sallie Forman was made with the primary intent to hinder the depositors of escrow funds in the event they discovered that Edward Forman was using their settlement funds for his personal use. The court found that since Mr. Gillman personally participated in both the conveyance of the N Street home and the assignment of commissions while acting as head of American Title and Columbia Title, District Title had imputed knowledge that these assets were unavailable to them as security when it extended credit to Mr. Forman in 1981. The court, therefore, found that District Title was neither misled nor induced to rely on Edward Forman's ownership of the N Street home or the Columbia Title commissions when he executed the promissory notes. The court lastly found that District Title otherwise offered no evidence that Mr. Forman intended to hinder or defraud it by the conveyances or assignment.

The trial court's decision, affirmed on appeal, found that subsequent District of Columbia law had displaced the common law rule set out in *Edwards v. Entwistle*⁶⁷ that had permitted

a subsequent creditor to establish that it has suffered fraud in fact by showing that the transfer was to the prejudice of the debtor's existing creditors. Such a presumption was an extension of the rule of the statute of 13 Eliz., ch. 5 (1570), which provided that any voluntary conveyance made for no consideration was fraudulent as a matter of law and void as against creditors existing at the time of conveyance.

Paulian (revocatory) actions

⁶⁷ 13 D.C. 43, 55-56 (1882).

The harsh presumption of the rule of the Statute of Elizabeth, reflecting an earlier generation of creditor-oriented law, paralleled the *présomption mucienne* of France and of some other civil law jurisdictions, abolished in France by the 1967 Civil Code amendments. Until 1967 it was presumed in law that property acquired during the marriage by the spouse of a merchant in France had been paid for with earnings from trade and such property would pass to the *syndic* managing the estate in bankruptcy. That presumption still exists in some civil law systems. Paulian actions derive from Roman law⁶⁸; the concept evolved in doctrine over centuries during which it changed from quasi-penal, to *in rem*, and finally to a personal action⁶⁹ which, if it has parallels with quasi-delict has as its essence "reparation in kind for damage suffered"⁷⁰. A subsequent purchaser for value and without notice is outside the scope of the action⁷¹. Furthermore, Paulian actions cannot be founded on payment of debts and have no relevance to the Anglo-Saxon concept of fraudulent preference: "The debtor pays without fraud his creditors in the order in which they present themselves [to be paid;] thus the diligent before the dilatory."⁷² If Paulian

⁶⁸ See Max Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931); Paul Collinet, *Origine byzantine de la paulienne*, 43 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAISE ET ÉTRANGER 187 (1919).

⁶⁹ DOMAT, LOIS CIVILES, tit. X, book II, sect. II, Nos. 2 & 3.

⁷⁰ H. Sinay, *Action paulienne et responsabilité délictuelle à la lumière de la jurisprudence récente*, 46 REVUE DU DROIT CIVIL 183, 184 (1948).

⁷¹ J.A. Ankum, *De Geschiedenis der "Actio Pauliana"* (1962); Jean Acher, *Essai sur la nature de l'action paulienne*, 5 REVUE TRIMESTRIELLE DE DROIT CIVIL 85 (1906).

⁷² *Crédit Lyonnais v. Bornarel*, Trib. civ. Lyon, June 13, 1939, Recueil Dalloz [D. Jur.] 1940 II 30; *Beurain v. Godouet*, Cass. civ., June 12, 1866, D. Jur. 1869 I 200, Recueil Sirey [S. Jur.] 1869 I 149 (insolvent [*en déconfiture*] non-merchant).

actions cannot be used to attack payments, in the event that an insolvency proceeding is undertaken a nullification action can be brought to reverse transactions made during the "suspect period" between the cessation of payments to creditors and the judgment in declaration of bankruptcy⁷³. They can apply to transfers of immovables between corporations in a merger⁷⁴, to the transfer of a debt⁷⁵, to the sale of real property⁷⁶, to the renunciation of the right of attack upon a gift⁷⁷ or to the renunciation of a legacy⁷⁸.

In general, the concept applies only to acts fraudulent as against prior creditors; only exceptionally where the intent to prejudice future creditors can be shown is it available to such future creditors⁷⁹. The statute of limitations in Paulian actions is thirty years⁸⁰; the French

⁷³ Law of Jan. 25, 1985, art. 107. The date of cessation of payment is determined by the court, and may be set at any date up to 18 months prior to the order opening the bankruptcy proceeding, *id.*, art. 9.

⁷⁴ *Huet v. Banque Alexandre de Saint-Phalle*, June 10, 1963, D. Jur. 1968 I 116.

⁷⁵ *S.a.r.l. J. Ritzenthaler et Fils v. Cazemajou*, Cass. civ. 1re, July 1, 1975, Bull. civ. I, No. 213.

⁷⁶ *Banque Nicolet, Latanchère et de l'Isère v. Plissonier*, Cass. civ. 1re, June 27, 1984 Bull. civ. I, No. 211.

⁷⁷ *Zettleman v. Greuez*, Cass. civ. 1re, Mar. 14, 1984, G.P. 1985 I 17.

⁷⁸ *Chancerelle v. Européenne de Banque*, Cass. civ. 1re, Nov. 7, 1984 Bull. civ. I, No. 298; *see* Jean Patarin, *Successions*, 91 REVUE TRIMESTRIELLE DE DROIT CIVIL 157 (1992). *Cf.* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORN. L. REV. 587 (1989) (majority U.S. rule permits disclaimer in frustration of creditors' claims). *Compare In re Kreiss*, 72 B.R. 933 (E.D.N.Y. 1987) (discretionary testamentary trust upheld).

⁷⁹ *Synd. Belleisle v. Boulangey*, Cass. civ., Feb. 2, 1852 RECUEIL CRITIQUE ET PÉRIODIQUE DALLOZ [D.P.] 1852 I 49; Cass. civ., D.P. 1894 I 55, D.S. 1898 I 510; Cass. civ., D.P. 1928 I 86; *cf.* Benjamin M. Goodman, *The Revocatory Action*, 9 TULANE L. REV. 423, 425-26 (1935); Tate, *The Revocatory Action in Louisiana Law*, ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 133 (Dainow ed., 1969); LA. CIV. CODE art. 2036 (West 19).

conception of *ordre public international* forbids the application in France of a limitations period borrowed from foreign law and inconsistent with the French limitation for the same matter⁸¹. The remedy for fraudulent cash transfers and for payment of fictitious debts is not a Paulian action but an action in declaration of simulation⁸²; that for failure to exercise a right that would accrue to the benefit of the creditor, or the estate, is an oblique action⁸³. A Paulian action will, however, lie in the event that realty is exchanged for cash or equal value, where the intent of the transferor to shield assets from his creditors is known to the transferee⁸⁴. Furthermore, in parallel to the common-law "badges of fraud", the relationship of the parties and their conduct can serve as evidence of intent⁸⁵.

The relevant portion of the French Civil Code provides:

Section VI. On the effect of contracts upon third parties.

⁸⁰ C. CIV. art. 2262; See 2 PLANIOU § 332 at 195; *Depuichault v. Babillot*, Cass. civ., Jan. 9, 1865 S. Jur. I 65; 1 GAUTHIER, RÉPERTOIRE DE DROIT CIVIL, "Action paulienne", at 10 (2d ed. 1988); 4 AUBREY & RAU, COURS DE DROIT CIVIL FRANÇAIS, § 313, at 232-39 (1902).

⁸¹ *Horn y Prado v. Crédit Lyonnais*, C.A. Pao, June 24, 1981, D. Jur. 1981 I 569; see Ernest G. Lorenzen, *comment, The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492 (1919).

⁸² 7 PLANIOU, § 971, at 278 (1931).

⁸³ C. CIV. art. 1166, Jen-Luc Aubert, 67 R.T.D.C. 692 (1969)

⁸⁴ *Zerouki v. Trésorier principal de Montrouge*, Cass. Comm. Mar. 1, 1994, Bull. civ. IV No. 81, 114 *Répertoire notarial Defrénois* 1118 (1994)(sale of a business at full market price but having the effect of making the assets of the debtor more difficult to pursue).

⁸⁵ See *Coupal v. Piche*, 1939 *Revue légale* 453 (Qué.)

Art. 1165. Contracts have effect only between contracting parties; they do not prejudice third parties...

Art. 1166. Nonetheless creditors can exercise all the rights and actions of their debtors, except for those which are exclusively personal.

Art. 1167. They may also, in their own names, attack acts done by their creditors in fraud of their rights.⁸⁶

The required elements of proof are (1) a suspect transfer (2) causing prejudice to the creditor (3) with intent on the part of the debtor. "[T]he Paulian action is considered an adjunct to administration in bankruptcy [*règlement judiciaire* or *liquidation des biens*] whatever the time of the undertaking of the act in question: before, during or after the statutory period during which transactions are deemed suspect."⁸⁷ The fraudulent transfer must, however, be subsequent to the debt⁸⁸. Inasmuch as a Paulian action affects only the parties to the proceeding and since only merchants and artisans may be the objects of French insolvency actions the interests of other creditors may readily be compromised if they do not join in the action⁸⁹.

Conflict of laws in the cases

⁸⁶ Informal translation.

⁸⁷ *Receveur divisionnaire des Impôts d'Albi v. Cardillac*, Cass. (Ch. comm.), Jan. 26, 1988, LEXIS PRIVE Lib., CASSCI File, No. 177. The taxpayers had transferred title to their residence to their sons upon being subjected to a tax audit but prior to being assessed for a value added tax deficiency.

⁸⁸ 16 LAURENT § 497; 3 DE PAGE § 229; 7 PLANIOL § 956 (allowing the action where the transfer was specifically directed against future creditors).

⁸⁹ *Menut v. Fourtie*, Req. Aug. 28, 1871, S. Jur. 1878 I 316.

In the United States there has been limited consideration either by the courts or in the literature⁹⁰ of the problem of conflict of laws in the application of fraudulent conveyance statutes. Such case law as exists allows for a few conclusions:

1. A tendency to apply the "multiple-factor, 'interest analysis' or most significant relationships analysis exemplified by the *Restatement (Second) of Conflict of Laws* (1971)"⁹¹, recommended in dicta in *Vanston Bondholders Protective Committee v. Green*⁹². The analysis of Bankruptcy Judge Teel in *In re International Loan Network*⁹³ is representative:

The defendants challenge the trustee's choice of Maryland law. Thus, as a preliminary matter the court must consider whether the trustee's choice of Maryland law is warranted. In deciding which state law should be viewed as the proper "applicable law,"

⁹⁰ But see Thomas H. Day, *Solution for Conflict of Laws Governing Fraudulent Transfers: Apply the Law That Was Enacted to Benefit the Creditors*, 48 BUS. LAW. 889 (1993); Albert A. Ehrenzweig & Peter Kay Westen, *Fraudulent Conveyances in the Conflict of Laws: Easy Cases Make Bad Law*, 6 MICH. L. REV. 1679 (1968).

⁹¹ *In re Morse Tool, Inc.*, 198 B.R. 384 (Bankr. D. Mass. 1989); *In re Consolidated Capital Equities Corp.*, 143 B.R. 80 (Bankr. N.D. Tex. 1992); 1992 Republican Senate-House Dinner Committee v. Carolina's Pride Seafood, Inc., 858 F.Suppl. 243 (D.D.C. 1994), vacated 158 F.R.D. 223.

⁹² 329 U.S. 156, 161-62 (1946).

⁹³ *Dicello v. Jenkins (In re International Loan Network)*, 160 B.R. 1, 17-18 (Bankr. D.C. 1993). A similar analysis was used in *Fox v. Peck Iron & Metal Co.*, 25 B.R. 674, 684-85 (Bankr. S.D. Cal. 1982). The District of Columbia (prior to the 1996 revision), Maryland and Virginia fraudulent conveyance laws have been compared in Paul D. Pearlstein & Lewis J. Saret, *Protecting Your Assets*, WASH. LAW., Nov. 1995, at 36.

the court will apply District of Columbia's choice of law principles. While the court is aware that there is a split of authority on whether the court should in fact apply its forum's principles or exercise its own "independent judgment," both parties have argued District of Columbia choice of law principles.

Under District of Columbia principles, the court must first determine whether there is a conflict between the laws of the relevant jurisdictions. As the defendants assert, the District has an interest as this is the place of ILN's incorporation. However, Maryland also has an interest: it is the site of the debtor's headquarters and was the principal state in which membership applications were processed and approved.... District of Columbia courts follow a modified interest analysis approach which requires the court to determine which jurisdiction has the "more substantial interest." The District is ILN's place of incorporation ... ILN's headquarters were located in Maryland; this was ILN's principal place of business.... Additionally, the Independent Representative Agreement and the Property Acquisition Certificate Membership Agreement stated that they would be governed by the laws of Maryland. Thus, even though members may have never set foot in Maryland, they could reasonably expect that Maryland law would govern disputes that arose. Finally, the majority of properties listed by ILN that members could allegedly choose from pursuant to the Property Program were located in Maryland. Accordingly, Maryland has the "most significant interest." [citations and footnotes omitted]

2. Contractual choice of law: notwithstanding Judge Teel's enlistment of it against petitioners, early investors seeking to retain their "profits" in *International Loan Network*⁹⁴ (a Ponzi⁹⁵ case)

⁹⁴ *Dicello v. Jenkins (In re International Loan Network)*, 160 B.R. 1 (Bankr. D.C. 1993), *supra* note 93; cf.

contract theory is not relevant as against a third-party claimant seeking to overturn an allegedly fraudulent conveyance⁹⁶.

3. Avoidance of the question as to whether choice of law is "substantive" or "procedural":

Colorado courts have consistently adopted the approach of the Restatement (Second) which eliminates the "substantive" vs. "procedural" dichotomy and instead focuses directly on the particular issue or type of action in deciding the conflict of laws question before the Court.⁹⁷

State statutes of limitation may be relevant to federal causes of action: *Federal Deposit Insurance Corp. v. Nordbrock*⁹⁸ concerned a claim under the Financial Institutions Reform,

In re Independent Clearing House Co. v. Abbott, 77 B.R. 8439 (D. Utah, 1987) (Ponzi case; fraudulent preference and conveyance issues addressed).

⁹⁵ As to which, see *Cunningham v. Merchant's Nat'l Bank (In re Ponzi)*, 4 F.2d 25 (1st Cir. 1925); *Cunningham v. Brown*, 265 U.S. 1 (1924).

⁹⁶ *In re Morse*, 108 B.R. at 385: "The choice-of-law clause carries little weight in the context of this adversary proceeding. The parties to a contract can specify which forum's law will govern their contract, and courts often follow their choice because both parties to the contract, and therefore to the suit on the contract, have agreed upon the choice. But this is a fraudulent conveyance action, not a contract action. And one of the parties to this suit -- the Trustee, who stands in the shoes of the creditors -- was not a party to the contract."

⁹⁷ *In re Kaiser Steel Corp.*, 87 B.R. 154, 159 (D. Colo. 1988).

⁹⁸ 102 F.3d 335 (8th Cir. 1996).

Recovery and Enforcement Act of 1989⁹⁹ which borrows the state limitation period only if longer than the six years otherwise applicable under the Act. Under the rule of *United States v. Summerlin*¹⁰⁰ the U.S. Government is not otherwise bound by state limitations¹⁰¹.

A leading cross-border case addressing the question is *Maxwell Commun. Corp. v. Barclays Bank plc*¹⁰², where, after careful study of the authorities, Brozeman, J. found a presumption against extraterritoriality in the provisions of 11 U.S.C. § 547(b) relating to avoidance of preferences. Comparing Professor Westbrook's "radical" submission¹⁰³ to the more traditional "reasonableness test" of the *Restatement (Third) of U.S. Foreign Relations Law*¹⁰⁴, the

⁹⁹ 12 U.S.C. § 1821 (1994).

¹⁰⁰ 310 U.S. 414, 416 (1940).

¹⁰¹ *But see infra* note 156.

¹⁰² 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

¹⁰³ Brief *amicus curiae*; see also Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991). 170 B.R. at 817: "The most fundamental problem with Professor Westbrook's approach is that it would establish a special choice-of-law rule applicable only to avoidance actions. His concept could not be imported into the broader arena, for if it were, it would dictate that the U.S. bankruptcy courts refrain from administering cases in which the debtor's home country is not the U.S. -- and that would be at war with the whole scheme of our insolvency law."

¹⁰⁴ Quoting (at 170 B.R. 815) Justice Scalia's interpretation of the "reasonableness" test: "a nation having some basis under section 402 for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is "unreasonable", *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 403(1)); accord, *U.S. v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994).

judgment decrees that considerations of comity require in that case the application of English law. It is not, it says, repugnant to American bankruptcy concepts; preference actions brought in connection with a Chapter 11 American proceeding (itself undertaken in coordination with a contemporaneous administration under the Insolvency Act 1986 of the Maxwell United Kingdom interests) ought to be dismissed. The rule applied in the case was that notwithstanding that the outcome might be different and that domestic creditors might be disadvantaged, "[o]nce it is determined that the facts as a whole have a center of gravity outside the U.S., then the court's attention should shift to the propriety of the proposed extraterritorial application of U.S. law."¹⁰⁵ The decision does not, however, provide much guidance for transactions by domiciliaries of the forum country¹⁰⁶ nor for transactions involving immovables. In *In re A. Tarricone, Inc.* the foreign representative of Uni-Petrol, a German company in liquidation, was denied the right, having filed a petition to open an ancillary proceeding under § 304, to pursue Tarricone, a firm in Chapter 11, for a fraudulent preference under American law, it being supposed that "Uni-Petrol's foreign representative might state a case, based on West German law" but that it could not ground its claims on §§ 547-548 of the Code¹⁰⁷. In *Elgin Sweeper Co. v. Melson Inc.*¹⁰⁸ it was held that

¹⁰⁵ 170 B.R. at 809.

¹⁰⁶ As the judgment explicitly concedes: "Much as I would relish the opportunity to address whether a debtor which is a U.S. entity could use section 547 to recover a preference made to a foreign creditor, I think it is best to refrain from such dicta." *Id.* at 809.

¹⁰⁷ 80 B.R. 21, 23 (Bankr. S.D.N.Y. 1987); related proceedings: *In re Metzeler*, 78 B.R. 674 (Bankr. S.D.N.Y. 1987); *Metzeler v. Boucher*, 66 B.R. 977 (Bankr. S.D.N.Y. 1966). See criticism of the proposition that foreign representatives should be able to utilize § 304 to claim the benefits of American avoidance powers rather than to gain assistance in implementing decrees of foreign courts: Richard A. Gitlin & Evan D. Flaschen, *The*

New York choice of law rules would apply New York law (the UFCA) in an action against a Canadian bank and others where the bank maintained offices in New York, two of the three named defendants were New York residents and a significant part of the conveyances alleged to be fraudulent took place in New York.

Claims in quasi-contract or based on the theory of unjust enrichment give rise to particular problems; it may not, as in the ordinary fraud case, be possible to point to a place of conduct yielding reliance by the plaintiff¹⁰⁹. Application of the law of the place to which assets have been received¹¹⁰ or to which they have been sent¹¹¹ would seem to permit the debtor to select the most attractive law; this perverse result was avoided in *RCA Corp. v. Tucker*¹¹² by characterizing¹¹³ the

International Void in the Law of Multinational Bankruptcies, 42 BUS. LAW. 307, 319 (1987).

¹⁰⁸ 884 F. Supp. 641 (N.D.N.Y. 1995).

¹⁰⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(2) (1971); SCOLES & HAY § 17.37; cf. DICEY & MORRIS (11th ed. 1987), Rule 203 (proper law of a contract; law of an immovable; in other circumstances the law of the jurisdiction where the enrichment occurs). French courts would usually apply the *lex fori*, under some circumstances the law of the place where the act giving rise to the claim occurred, BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ §§ 787-790 (1991); DOMINIQUE HOLLEUX ET AL., DROIT INTERNATIONAL PRIVÉ §§ 1437-1439 (1987).

¹¹⁰ *Bowling v. Cox*, [1926] A.C. 751 (P.C. on appeal from British Honduras) (funds collected by attorney for the executor of the estate of an undischarged bankrupt).

¹¹¹ *See*, for example, *Hongkong and Shanghai Banking Corp. v. United Overseas Bank Ltd.*, [1992] 2 S.L.R. 495 (High Court, Singapore) (tracing in equity of embezzled funds).

¹¹² 696 F.Supp. 845 (E.D.N.Y. 1988).

¹¹³ As to which, *see* Albert A. Ehrenzweig, *Characterization in the Conflict of Laws: An Unwelcome*

conflicts issue as in tort and applying the New York "center of gravity" or "grouping of contacts theory" to choice of law, and the forum state's six-year statute of limitations¹¹⁴. With respect to real property the situs has been ruled dispositive of the law governing fraudulent conveyances¹¹⁵; unwanted application of this rule has been avoided by treating the issue as one of tort¹¹⁶.

The question of choice of law is important in determining, among other things, the risk of loss from investment of funds alleged to have been fraudulently transferred, the attribution of rents and profits and any credit to be allowed for improvements, expenses and taxes, the latter

Addition to American Doctrines, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 395 (Kurt H. Nadelmann et al., eds. 1961).

¹¹⁴The action was in enforcement of a New York judgment and the property, installments due on a note, was located in New York. The transferors were domiciled in Florida and the transfer arguably occurred there; Florida's UFTA and its statute of limitations were more attractive to the debtors than New York's UFCA. The New York court's reasoning in applying the forum's statute of limitations would be inapposite with respect to the UFTA, which bars the right rather than the remedy.

¹¹⁵In New York State: *James v. Powell*, 19 N.Y.2d 149, 258, 225 N.E.2d 741, 745, 279 N.Y.S.2d 10, 15 (1967) (proceeding in enforcement of libel judgment awarded against Congressman Adam Clayton Powell; the validity of a conveyance by defendants of real property owned by them in Puerto Rico, alleged to have been made without consideration and with intent to defraud plaintiff by preventing the collection of a judgment obtained against defendant husband in New York, must be determined under the law of Puerto Rico, the place where the property is located. *But see* criticism in ALBERT A. EHRENZWEIG & ERIK JAYME, *PRIVATE INTERNATIONAL LAW*, 78-79 (1977), and Ehrenzweig & Westen, *supra* note 89); *Government Employees Ins. Co. v. Sheerin*, 65 A.D.2d 10, 13, 410 N.Y.S.2d 641, 643 (2d Dept. 1978). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971).

¹¹⁶*Irving Trust Co. v. Maryland Casualty Co.*, 83 F.2d 168 (2d Cir. 1936) (Missouri real estate; deed delivered to transferee in New York by way of preferential transfer).

depending in some jurisdictions on the good faith of the transferee¹¹⁷ and, importantly, any applicable statute of limitations. Two statutes of limitation are relevant: that which would extinguish the debt, normally the law applicable under contract choice of law principles, and that applicable in fraudulent conveyance actions with a view to security of title¹¹⁸. A fraudulent conveyance or revocatory action cannot be maintained if the underlying debt is unenforceable¹¹⁹; bringing suit in a foreign jurisdiction, likely one where the assets are located, can give rise to a counterclaim and unexpected strategic advantage to one party¹²⁰. The Insolvency Act 1986 maintains prior English law that a conveyance can be avoided by any person prejudiced by it so long as that person has an enforceable claim; it is not time-barred even if the creditor knew about the transfer and took no action¹²¹. Under the Uniform Fraudulent Transfer Act causes of action are typically extinguished "four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been

¹¹⁷ COLLIER ¶ 548.07, note 43. *Cf.* comment, *Fraudulent conveyances*, 44 HARV. L. REV. 467 (1931).

¹¹⁸ It is this dichotomy that § 9 of the UFTA seeks to resolve, rejecting the rule of *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556., 583 (M.D.Pa. 1983), applying the UFCA.

¹¹⁹ *Supra*, note 13.

¹²⁰ In several respects Florida has unusual procedural law that illustrates this point: the filing of a claim works a waiver of the statute of limitations on counterclaims arising from the same transaction, *Allie v. Ionata*, 503 So. 2d 1237 (S. Ct. Fla. 1987) and *Johnson v. Allen*, 621 So. 2d 507 (Fla. App. 2d Dist. 1993); property located in the state may be deemed vested in a trustee in bankruptcy by action of foreign law, *Bullen v. Her Majesty's Government of the United Kingdom*, 553 So.2d 1344 (Fla. App. 4th Dist. 1989), *supra* note 20.

¹²¹ *In re Maddever*, (1884) 27 Ch. D. 523. Note the distinction between orders under §§ 339-341 of the Insolvency Act 1986 (with varying time bars of 6 months, 2 years and 5 years) and those under §§ 423-425 (without limit of time).

discovered by the claimant."¹²² In *Hearn 45 St. Corp. v. Jano*¹²³ the New York Court of Appeals applied the statutory limitation for constructive fraud¹²⁴. The responsibility of the transferee for the fruits of fraudulently transferred assets is likewise variable: in France, a transferee in bad faith (and only such a transferee) must restore "not only the capital but the interests and profits, from the day of [receipt of] payment"¹²⁵.

Choice of law rules that are workable and reasonable in the inter-regional setting of a composite or federal legal system¹²⁶ can yield untoward results in an international context¹²⁷. The

¹²²UFTA., § 9, 7A U.L.A. (1985); *see e.g.*, TEX. BUS. & COM. CODE ANN. § 24.010(a)(1) (West 1987); but *cf.* Cal. Civ. Code § 3439(c) (West 1987) (absolute bar after seven years).

¹²³283 N.Y. 139, 27 N.E.2d 814 (1940); *cf.* *Rio de Janeiro v. Rollins & Sons*, 299 N.Y. 363, 87 N.E.2d 299 (1949) (right of creditor to set aside fraudulent transfer denied where underlying claim was barred by statute).

¹²⁴Then ten years, C.P.A. § 53; now six years, C.P.L.R. § 213(1); *Curry v. Chollette*, 57 A.D.2d 604, 393 N.Y.S.2d 787 (2d Dept. 1977). *See* Samuel M. Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations*, 32 CORN. L.Q. 222 (1946).

¹²⁵C. CIV. art. 1378. *See also* C. CIV. art. 1382 (obligation to pay damages); C. COMM. arts. 549 and 550.

¹²⁶Including most obviously such composite systems as that of the U.S., Canada and the United Kingdom, but also situations in which, for historical reasons, most typically changes in sovereignty, a different law applies for some purposes, as in Alsace-Lorraine (*see* RIPERT & ROBLOT at 851); and also the supra-national legal system of the European Union.

¹²⁷Armand B. Du Bois, *The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions*, 17 MINN. L. REV. 361 (1933); Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957); Hessel Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953); BATIFFOL & LAGARDE, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ,

Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments (1964)¹²⁸ and the parallel Lugano Convention¹²⁹ do not require the recognition of preliminary remedies ordered by the courts of another signatory state¹³⁰. The European Union draft convention on insolvency proceedings¹³¹ would, had it been implemented, dealt with some of these problems,

§ § 258-260 (8th ed. 1994); Edouardo Vitta, ch. 9, *Interlocal Conflict of Laws*, 3 ENCYCLOPEDIA OF COMPARATIVE LAW, PRIVATE INTERNATIONAL LAW.

¹²⁸Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, as amended in connection with the accession of new states to the European Community: Oct. 9, 1978, Oct. 25, 1982, May 26, 1989, codified version published at Official Journal of the European Communities [O.J.E.C.], July 28, 1990, C 189 at 2. For interpretation, see *Jenard Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, O.J.E.C., MAR. 5, 1979, C 59 at 1; LAWRENCE COLLINS, THE CIVIL JURISDICTION AND JUDGMENTS ACT 1982 (1983).

¹²⁹Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, Sept. 16, 1988, O.J.E.C., Nov. 25, 1988, L 319 at 9.

¹³⁰*Denilauler v. Couchet Frères*, [1980] E.C.R. 1553 (*ex parte* provisional and protective measures not subject to enforcement under title III of the Convention to actions *in rem*, as precluding its invocation in support of a Paulian action); *Cavel v. Cavel*, [1979] E.C.R. 1055 (protective measures in a matrimonial case specifically excluded under art. 1(2) of the Convention); see CIVIL JURISDICTION AND JUDGMENTS IN EUROPE: PROCEEDINGS OF THE COLLOQUIUM ON THE INTERPRETATION OF THE BRUSSELS CONVENTION BY THE COURT OF JUSTICE CONSIDERED IN THE CONTEXT OF THE EUROPEAN JUDICIAL AREAS, LUXEMBOURG, 11 AND 12 MARCH 1991 (1992) (Annex I includes the text of the Convention as amended).

¹³¹Text of draft convention reproduced in HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, CONVENTION ON INSOLVENCY PROCEEDINGS, H.L. Paper 59, H.M.S.O. 1996 (ISBN 0-10-405996-6); see also Jean-Luc Vallens, *Le droit européen de la faillite: la Convention relative aux procédures d'insolvabilité*, 1995 ACTUALITÉ LEGISLATIVE DALLOZ 217. Entry into force was frustrated by Britain's refusal to sign it by the May 23, 1996 deadline as part of a blockage of EU business in retaliation for EC failure to address its demands regarding the BSE-related

applying the law of the proceeding to determine the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings¹³² and the respective powers of the debtor and the liquidator¹³³ (but not third parties' rights *in rem*¹³⁴); and "the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Contracting State in which that lawsuit is pending."¹³⁵ The liquidator could claim through the courts of the situs of movables property which taken out of the forum state but would have to "comply with the law of the Contracting State within the territory of which he intends to take action" with respect to realization of assets¹³⁶. The draft convention reflects the fact that in member states with civil law systems fraudulent transfer laws are separate and distinct from insolvency statutes and that in many of those countries insolvency statutes do not apply to consumer debtors.

United Kingdom courts have been empowered since 1975 to issue *Mareva* injunctions, which have been characterized as *in rem*¹³⁷, freezing assets inside or outside the jurisdiction¹³⁸.

beef export ban. There has been some talk of presenting a new draft for signature.

¹³² Convention, art. 4(2)(b).

¹³³ *Id.*, art. 4(2)(c).

¹³⁴ *Id.*, art. 5.

¹³⁵ *Id.*, art. 14.

¹³⁶ *Id.*, art. 18.

¹³⁷ *Z Ltd. v. A-Z*, [1982] Q.B. 558 573 (C.A.), discussed in *Att.-Gen. v. Times Newspapers Ltd.*, [1992] 1 A.C. 191; see Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 R.A.C.D.I. 9, 113 (1992 III).

That power was codified in § 25 of the Civil Jurisdiction and Judgments Act 1982¹³⁹. It is an important modernization of the law since it avoids the impediment, which existed also in American jurisdictions prior to the promulgation of the Uniform Fraudulent Conveyance Act¹⁴⁰, that a creditor must have judgment before equitable assets could be reached. Yet there is no presumption of making parties outside the jurisdiction of the court subject to its contempt powers¹⁴¹ and courts do not readily issue orders which have no possibility of enforcement and little likelihood of being respected¹⁴². In one of the many cases concerning the bankruptcy of the Granfinanciera-Medex-Chase-and-Sanborn group, the court assessed U.S. jurisdiction with respect to certain challenged fraudulent transfers:

¹³⁸*Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093 (C.A.); *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.); *Derby & Co. Ltd. v. Weldon*, [1990] Ch. 48; *Derby & Co. Ltd. v. Weldon* (Nos. 3 & 4), [1990] Ch. 65 (C.A.). See Paul D. Friedman, *Worldwide Mareva Injunctions – Assumption of Jurisdiction*, 144 NEW L.J. 932 (1994). *Cf.* the U.S. rule enunciated in *Visual Sciences, Inc. v. Integrated Communications, Inc.*, 660 F.2d 56, 59(2d Cir. 1981) ("A court must have in personam jurisdiction over a party before it can validly enter even an interlocutory injunction against him.")

¹³⁹Discussed in *Balkanbank v. Taher*, Times L. Rep., Dec. 1, 1994, The Independent, Dec. 9, 1994, 139 S.J. L.B. 16 (C.A. 1994) (Irish worldwide Mareva injunction issued following allegations of fraudulent obtaining of American bank loan; injunction was later discharged and this was an English action for damages). *See also Practice Direction, High Court of Justice*, [1994] 1 W.L.R. 1233 (setting out guidelines for the issuance of Mareva injunctions and of Anton Piller orders for the production of documents).

¹⁴⁰ 1 GLEN, *supra* note 12, at 56-57, § 29 (1940)

¹⁴¹ Lawrence Collins, *The Territorial Reach of Mareva Injunctions*, 105 L.Q. REV. 262 (1989).

¹⁴² *Att.-Gen. v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1269-70, *rev'd on other grounds*, [1987] 1 W.L.R. 127 (C.A.), [1987] 1 W.L.R. 1282 (H.L.); *Att.-Gen. v. Observer Ltd.*, [1990] 1 A.C. 109 (H.L. 1988); cited in Collins, *Territorial Reach* at 296.

The defendants, finally, have argued that they are not subject to an action in this United States District Court and that they must be sued, if at all, in Colombia. I disagree. The allegedly fraudulent transfers were made from the debtor's New York Bank in U.S. currency to the bank accounts of each defendant in a Miami bank. The entire transaction, therefore, occurred in this country and it was completed within this District. If either defendant resided within the District, there would be no question as to the appropriate situs of the litigation under 11 U.S.C. § 548. The fact that each defendant, though then maintaining a bank account in Miami employed for the purpose of receiving these transfers, was then and is now domiciled in Colombia does not divest this court of jurisdiction.¹⁴³

In at least one instance a Manitoba court allowed the trustee of an United States bankruptcy to seek recovery there of property allegedly fraudulently transferred:

Although the U.S. Bankruptcy Act cannot, of its own force, operate beyond the confines of the U.S., private international law and the comity of nations operating on the general principles relating to movable property. will recognize the extra-territorial effect of such a statute, so far at least as it deals with personal property, and especially must that be the case where, as here, the Act does not expressly confine itself to property in the U.S., but extends to "all property".¹⁴⁴

¹⁴³ *In re Chase and Sanborn Corp.*, 58 B.R. 721 (Bankr. S.D. Fla. 1986) (see *In re Chase & Sanborn Corp.*, 904 F.2d 58 (11th Cir. 1990) for prior and subsequent history of this bankruptcy.

¹⁴⁴ *Williams v. Rice*, [1926] 3 D.L.R. 225, 249 (Man. K.B.)

In recent years English-law courts have frequently addressed fraudulent conveyance issues in creditors' claims against property outside the jurisdiction in terms of quasi-contract¹⁴⁵. In such circumstances, courts have applied Dicey & Morris Rule 201¹⁴⁶:

- (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
- (2) The proper law of the obligation is (*semble*) determined as follows:
 - (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
 - (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
 - (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

An earlier case, *Rousou's Trustee v. Rousou*¹⁴⁷, concerned a not uncommon set of facts. The debtor, a Cypriot in business in England and domiciled there, had, upon the failure of his catering business transferred funds standing to his credit in an account in Cyprus into the names of his children. The English court, relying on the earlier case of *Bowling v. Cox*¹⁴⁸ applied

¹⁴⁵ *Hongkong and Shanghai Banking Corp. Ltd. v. United Overseas Bank Ltd.*, [1992] 2 S.L.R. 495, *supra* note 111; *In re Jogia*, [1988] 1 W.L.R. 484.

¹⁴⁶ 12th ed., p. 1471.

¹⁴⁷ [1955] 1 W.L.R. 545.

¹⁴⁸ [1926] A.C. 751.

quasi-contract rules and allowed service of process outside the jurisdiction on the theory, criticized later in *In re Jokia*¹⁴⁹, that the obligation arose in England because of a violation of an English statute. Muir Hunter, appearing for the trustees in bankruptcy in *Rousou*, had offered alternative theories, all based on the Bankruptcy Act 1914, for inclusion of the funds in the bankruptcy estate: (1) that the funds belonged to the debtor at the time of the earliest act of bankruptcy within three months prior to the petition and were therefore vested in the trustee; (2) that the transfer was an avoidable voluntary settlement; (3) that the transfer was a fraudulent conveyance. As a judge of the District Court of Famagusta, Cyprus, had already made an order for examination of the debtor's Cypriot lawyer the court may have been assured of a favorable response to a writ served outside of England; in any event recovery of the funds would depend either upon recognition of the vesting, under English insolvency law, of the assets in the trustee, or by enforcement by the foreign court of a judgment or order issued in England.

Finally, in a curious case that has attracted scholarly interest in Britain 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 offenses¹⁵⁰. Alternatively, the trustee might have brought an ancillary proceeding under Bankruptcy Code § 304 or sought enforcement in Florida courts of an English judgment, relying on the Uniform Foreign Money-Judgments Recognition Act, although this latter procedure would be dependent

¹⁴⁹ [1988] 1 W.L.R. at 495.

¹⁵⁰ *Bullen v. Her Majesty's Government of the United Kingdom*, 553 So.2d 1344 (Fla. App. 4th Dist. 1989), *supra*, note 21, enforcing judgment of proceeding reported at *Regina v Garner*, [1986] 1 W.L.R. 73. In the Florida proceeding there was no recourse by the defendant to US bankruptcy law.

upon the willingness of the Florida court not to look behind the judgment to the revenue nature of the governmental claim¹⁵¹.

A framework for choice of law

Fraudulent conveyance and revocatory laws might be more rationally and consistently applied to concrete cases if they were viewed, like provisions for discharge in bankruptcy, as having dual character and were interpreted teleologically. Just as a discharge (in bankruptcy or in composition with creditors) works a cancellation of the debt if and only if the jurisdiction granting the discharge is the same as that of the law applicable to the debt or underlying obligation or the creditor has appeared in the proceeding and filed proof of debt, and at the same time bars recovery from the debtor under any theory (including the enforcement of a foreign judgment) in the courts of the discharge-issuing jurisdiction, fraudulent conveyance statutes serve as an enforcement mechanism for the court *and* as a basis for determining adversarial rights. Some regard ought to be paid to the public policy interest in quieting long-dormant claims, particularly in view of the tendency to regard statutes of limitation as affecting substantive rights¹⁵²; at the

¹⁵¹ Compare *United States of America v. Harden*, [1963] S.C.R. 366, 41 D.L.R.2d 721 (S. Ct. Can. 1963) (refusal to enforce U.S. District Court judgment in favor of the Internal Revenue Service); *but see* article 15, Protocol of November 9, 1995 to United States-Canada Income Tax Treaty, adding a new Article XXVI A (Assistance in Collection) and *Her Majesty the Queen v. Gilbertson*, 433 F. Supp. 410 (D. Ore. 1977) (refusal of District Court to enforce British claim for taxes).

¹⁵² *Cf. Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338, 340 (1996) (Nebraska treats its statute of limitations as procedural).

same time there is a distinct difference in the quality of preliminary and protective measures available in different jurisdictions and in the burden of proof put upon the claimant regarding the risk of flight of the defendant or of waste of assets¹⁵³. A creditor having chosen to remain out of the jurisdiction where assets are located in order to avoid counterclaims of a sort not entertainable in his chosen forum can reasonably refused license to complain that the law of the debtor's assets and domicile is less creditor-friendly. To the degree that a statute by its terms extinguishes the right of action after a specific period, especially one that cannot be tolled¹⁵⁴, a principle of legislative policy is evoked¹⁵⁵. Whether the characterization by state laws of the limitation as extinguishing the right rather than the remedy will be recognized as binding upon the U.S. Government is unsettled¹⁵⁶.

While there can be no assurance that a bankruptcy discharge granted in one jurisdiction will be recognized in another, it would be an exorbitant exercise of jurisdiction for a foreign court to use the happenstance of subsequent transient presence by that debtor in the jurisdiction to enforce a debt extinct at the debtor's domicile. The accidental presence in a jurisdiction of

¹⁵³ Lawrence Collins, *Provisional and Protective Measures in International Litigation*, *supra*, note 137.

¹⁵⁴ CAL. CIV. CODE § 3439.09(c) (West 1986) (seven years).

¹⁵⁵ UNIF. FRAUDULENT TRANSFER ACT prefatory note, 7A U.L.A. 642 (1985); *see id* § 9 cmt. 1, 7A U.L.A. at 665-66.

¹⁵⁶ Compare *U.S. v. Vellalos*, 780 F.Supp. 705, 708 (D.Hawaii 1992) (U.S. Government bound by characterization), *aff'd without op.*, 990 F.2d 1265 (9th Cir. 1993), and *Stocklin v. U.S.*, 858 F.Supp. 167, 168 (M.D. Fla. 1994) (holding U.S. Government not bound and citing other cases); *see discussion in U.S. v. Bacon* 82 F.3d 822 (9th Cir. 1996).

see Stovard.

gratuitous transferee, of transferred assets, or of assets otherwise belonging to the transferee creates some risk of seizure, and one may be more or less sympathetic to the defendant depending on the perception of that person's conduct as morally justified or repugnant, as some of the cases discussed show. While not every jurisdiction applies modern theories to choice of law problems, constitutional¹⁵⁷ or public policy¹⁵⁸ considerations may intervene. It would not appear that application of the most creditor-friendly law¹⁵⁹ would do other than reward forum shopping and promote uncertainty; yet honoring the choice of law implicit in a debtor's choice of haven for his transfers in fraud of creditors rewards sleaze.

The tension between the debtor protection ("fresh start") function (or, in the case of business enterprises that of the protection of employment and the preservation of goodwill and ongoing commercial relations) of bankruptcy and its role of maximizing and organizing return to creditors has its parallel in fraudulent conveyance statutes; and these operate in tandem with the concern for security of title that has led common-law jurisdictions generally to apply shorter prescriptive periods. Modern fraudulent conveyance laws recognize the rights of holders in due

¹⁵⁷ See *Bachchan v. India Abroad Publications, Inc.*, 454 Misc. 2d 228, 585 N.Y.S.2d 661, (S. Ct. N.Y. Co. 1992) (refusal to enforce English libel judgment on First Amendment grounds); Peter E. Herzog, "Constitutional Limits on Choice of Law" 234 R.C.A.D.I. 239 (1992 III).

¹⁵⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, 17; Jonathan H. Pittman, "The Public Policy Exception to the Recognition of Foreign Judgments," 22 *Vanderbilt J. Transnat'l L.* 969 (1989); comment DICEY & MORRIS, 12th ed., Rule 44 (foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition would be contrary to public policy).

¹⁵⁹ See references, *supra* note 90.

course and if they do not extinguish rights after a specific period of time they at least increase the burden of proof imposed upon creditors, as by requiring the showing of actual intent to defraud. Laws of succession impose a certain ordering of rights in the context of heirs and creditors. One should expect no less of fraudulent conveyance statutes merely because they are, by their title, relevant to transactions in fraud of creditors: indeed the intent of the debtor may be irrelevant to the application.

In the bulk of cases examined choice of law was, in fact, not determinative of outcome because the result would be the same whichever law was applied. One ought not to reward absconders and those out to conceal their assets; yet neither should creditors lassitude be ignored: prescription by adverse possession is a long-standing principle. The dearth of case law on asset protection trusts suggests that creditors may tend to settle rather than litigate with those who take flight. In some notable cases lawyers counseling absconders have fared less well¹⁶⁰. The law applied to real estate can rationally be the *lex situs*, including its conflict rules; this is particularly the case where title to real property has been transferred and it is not a matter of tracing funds removed to the jurisdiction¹⁶¹; or where funds have been borrowed on the security of real property

¹⁶⁰Riggs Nat'l Bank v. Andrews (*In re Andrews*), 186 B.R. 219 (Bankr. E.D. Va. 1995) (pre-bankruptcy planning deemed to be counsel in support of subsequent fraudulent transfer, vitiating lawyer-client privilege; *see also* United States v. Brown, 943 F.2d 1246 (10th Cir. 1991) (use of law firm and accounting firm trust accounts in bankruptcy fraud); Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997) (law firm subject to suit under RICO for assisting client to manipulate his bankruptcy to defeat creditor's claims).

¹⁶¹Hongkong and Shanghai Banking Corp. Ltd. v. United Overseas Bank Ltd., [1992] 2 S.L.R. 495 *supra* note 111; *Re Hallett's Estate*, (1880) 13 Ch. D. 696 (C.A.) (estate of defalcating solicitor); Chase Manhattan Bank

and these funds secreted from the jurisdiction. The application of *quasi-contract* rules to the proceeds of theft and fraud, wherever found, likewise makes sense. A debtor seeking protection from creditors in voluntary bankruptcy cannot complain that the bankruptcy law contains within it or makes available to the trustee or *syndic* provisions for the recovery of assets. Vested rights, such as the rights of innocent third parties and holders in due course, if recognized in the jurisdiction of situs, will defeat recognition of any contrary determination of a foreign tribunal. Yet these rights impact only on the title to land and do not bar action in tort or the targeting of assets within the forum based on legal theories, such as *fraude à la loi*, that may be peculiar to that forum.¹⁶²

N.A. v. Israel-British Bank (London) Ltd., [1981] Ch. 105 (mistaken payment to overseas correspondent bank which subsequently went into liquidation).

¹⁶²See, Soc. Lafarge v. Keramische Industrie Bedarfs, Cass. civ. 1re, May 17, 1983, 74 R.C.D.I.P. 346 (1985) (composition in bankruptcy), and in the context of forced heirship, the Odell v. Caron litigation, Cass. civ. 1re, March 19, 1991, No. 461; January 23, 1990, 1991 J.C.P. II No. 21637; March 20, 1985, 1986 J.C.P. II No. 20630, 75 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 66 (1986); case No. 282, June 15, 1982, case No. 564; Cour d'appel d'Aix, 1re, March 9, 1982, 72 R.C.D.I.P. 282 (1982) (*fraude à la loi*, incorporation of real estate investment to avoid French succession rules). Compare Fabry v. Le Van Chau, Cass. civ. 1re, Jan. 7, 1982, Bull. civ. I No. 6 (French rules of succession not applicable to real estate located in Vietnam); Pearch v. Thayer, Cass. civ. 1re, Dec. 4, 1990, Bull. civ. (calculation of forced heirship distribution of French property of American decedent domiciled in District of Columbia limited to real property located in France); Courtois v. de Ganay, C.A. Paris, 1re, Jan. 10, 1970, 60 R.C.D.I.P. 518 (1971), 100 JOURNAL DE DROIT INTERNATIONAL [Clunet] 207 (1973) (inter vivos American trust); Arpels v. Arpels, Cass. civ. 1re, May 4, 1994, Bull. civ. (non-recognition of disinheritance under American will of forced heirs as to French property).

It is in cases where creditors bring involuntary or ancillary bankruptcy proceedings or seek enforcement of foreign judgments or attack assets or transferees in a jurisdiction having no particular connection with the underlying dispute or source of assets that choice of law may most put at risk local legislative policy and raise questions regarding statutes of limitation, the tolling of such statutes, and burden of proof. Here the protection of the aggrieved creditor or transferee may lie in an injunction against the commencing or prosecuting of a vexatious action¹⁶³ or its dismissal on jurisdictional¹⁶⁴ or *forum non conveniens*¹⁶⁵ grounds. Where in the bankruptcy

¹⁶³ ALBERT EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 183, note 10 (1962). Compare *British Airways Board v. Laker Airways Ltd.* [1984] 3 All E.R. 39 (H.L.); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C.C. 1984); *American Home Assur. Co. v. Ins. Corp. of Ireland*, 603 F. Supp. 636 (1984).

¹⁶⁴ *Kimbrough v. Hardison*, 263 Ala. 132, 81 So.2d 606 (1955) (refusal of application to set aside fraudulent conveyance of Florida land).

¹⁶⁵ See *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (1st Cir. 1991) (declining securities law action against Canadian firm and its officers despite representations from the SEC that such action would "impair the ability of U.S. shareholders to obtain relief under the federal securities laws and could, therefore, undermine the effectiveness of private actions in enforcing those laws", Br. SEC, p. 5. *Ferguson v. Ford Motor Co.*, 77 F. Supp. 425 (S.D.N.Y. 1948) ("In determining whether doctrine of 'forum non conveniens' should be applied, court should consider private interests of litigant relative to ease of access to source of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of need for view of premises which may be involved, burden of jury duty on forum, onus of trial on court's functioning, and federal court's familiarity with state law which will determine the controversy.") But see Russell J. Weintraub, *International Litigation and Forum non Conveniens*, 29 TEX. INT'L L.J. 321 (1994); Marc O. Wolinsky, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 UNIV. CHICAGO L. REV. 373 (1980); David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"*, 103 L.Q. REV. 398 (1987) (Cases dismissed on *forum non conveniens* grounds "hardly ever make it to trial in a foreign forum." *Id.* at

context, as in *In re International Loan Network*¹⁶⁶, a choice of applicable law must be made the "most significant interest" test (in jurisdictions that apply that principle) or the "proper law" of quasi-contract yields a reasonably predictable result: this subject to the forum's policy, if any, fixing a finite time limit to the initiation of suit or the statute's in extinguishing the right. Similar problems of classification and choice of law were addressed in *Macmillan Inc. v. Bishopsgate Trust (No. 3)*¹⁶⁷, where securities belonging to the plaintiff had been misappropriated and used as security for loans to finance the Maxwell group of companies. The court there held that

the appropriate law to decide questions of title to property, such as shares, is the *lex situs*, which is the same as the law of incorporation. No doubt contractual rights and obligations relating to such property fall to be determined by the proper law of the contract.¹⁶⁸

The court also noted that rules of conflict of laws had to be directed at the issue of law in dispute rather than at the cause of action on which the plaintiff relied. A question of good title might well, however, be distinct from that relating to the right of the claimant to restitution¹⁶⁹.

419). *Forum non conveniens* is a concept unknown to civil law systems. *Cf. De Dampierre v. De Dampierre*, [1988] 1 A.C. 92 (H.L. 1987) (in a matrimonial dispute, applying the same criteria to the question of *lis alibi pendens*).

¹⁶⁶ *Dicello v. Jenkins (In re International Loan Network)*, 160 B.R. 1 (Bankr. D.C. 1993), *supra* note 93.

¹⁶⁷ [1996] 1 W.L.R. 387 (C.A.).

¹⁶⁸ *Id.*, per Aldus, L.J., at 424.

¹⁶⁹ *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, (1993) 91 L.G.R. 323; *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] 2 A.C. 378, at 386.

Conclusions

The paucity of cross-border cases limits the reliability of conclusions to be drawn. Furthermore, in many of the reported cases comments as to choice of law can be regarded as dicta because there was, in fact, a "false conflict" of the Cavers type¹⁷⁰; choice of an alternative law would have led to no different result. The increasing sophistication and apparent effectiveness of asset protection measures witnessed by an near-absence of case law mean that much of the evolving precedent concerns instead commercial, especially banking and insurance, disputes, of which the cases of investors who resist cash calls are particular examples¹⁷¹. The practical problem arises as between jurisdictions where the availability of provisional and protective measures (comparing, say, English Mareva injunctions and the American *lis pendens*) has been taken into account in the fashioning by the courts and legislatures of fraudulent conveyance remedies and in the limitations period applied to them. There is, then, no easy rule to put forward: it may be that the pragmatic, subjective, discretionary and *ad hoc* grouping of contacts principle, often viewed skeptically by civil law jurists as leading to uncertainty, offers the best outcome. This may, however, imply dépeçage -- characterization issue by issue to assure fair protection for the

¹⁷⁰ Cavers, *The Choice-of-law Process*, 1965, p. 79.

¹⁷¹ *Ash v. Corp. of Lloyd's*, 1995 Ont. C.J. 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." Compare early shareholders' liability cases such as *Citizens Bank v. Hibernia Bank & Trust Co.*, 19 La. App. 461, 140 So. 705 (1932); Ehrenzweig *Treatise* 420-21.

transferee of property held under color of right. Commonly this concerns marital regimes regarded variously as mutable (whereby the relative interests of spouses in existing property change in accordance with the law of actual domicile)¹⁷², partially mutable (the U.S. rule)¹⁷³ or immutable (the French rule)¹⁷⁴; in English law, although the issue is unsettled, but a change in matrimonial domicile after marriage is said not to alter existing rights¹⁷⁵. Doubt can also arise from dower rights¹⁷⁶, divorce settlements¹⁷⁷, retirement funds¹⁷⁸ and other property that may be exempt

¹⁷² Cf. quasi-community property, CALIF. CIV. CODE § 164; Herma H. Schreter, "Quasi-Community Property" in *the Conflict of Laws*, 50 CAL. L. REV. 206 (1962); Addison v. Addison, 62 Cal.2d 558, 43 Cal. Rep. 97, 399 P.2d 897 (S.Ct. 1965); Fredericks v. Fredericks, 226 Cal. App. 3d 875, 227 Cal. Rptr. 107 (4th Dist. 1991)

¹⁷³ Home State Bank v. Fuell, 654 F. Supp. 113 (D.P.R. 1987); Newman v. Newman, 558 So.2d 821, 823; HAROLD MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 103-10 (1952); ROBERT LEFLAR ET AL., AMERICAN CONFLICTS LAW § 233 (4th ed. 1986); RUSSELL J. WEINTRAUB, COMMENTARY OF THE CONFLICT OF LAWS § 8.14 (3d ed. 1986); EHRENZWEIG, TREATISE § 245, 648-49 (1962); 1 RABEL, CONFLICT OF LAWS 201 (2d ed. 1958).

¹⁷⁴ C. CIV. art. 1397 (Fr.); F. Chevallier-Dumas, *La fraude dans les régimes matrimoniaux*, 1979 REVUE TRIMESTRIELLE DU DROIT CIVIL 64 (1979); Banque nationale de Paris v. Lupezza, Lyon, Ire, Oct. 21, 1980, D. Jur., 1982 I 20. See Pillon v. Peck, Meaux, May 4, 1928, 55 Clunet 1223 (1928) (French rule of immutability applied to American decedent's estate).

¹⁷⁵ DICEY & MORRIS, 12th ed., Rule 152. This represents a reformulation of the rule numbered 156 in the 11th ed.; the 12th ed. mischaracterizes the American rule as one of mutability. See De Nicols v. Curlier, [1900] A.C. 21.

¹⁷⁶ See Wilson v. Robinson, 83 F.2d 397 (2d Cir. 1936).

¹⁷⁷ *Matter of Holloway*, 955 F.2d 1008 (5th Cir. 1992) (setting aside security interest granted to former wife); *In re Friedman*, 126 B.R. 63 (9th Cir. B.A.P. 1991) (status as "insider" to be decided on case-by-case basis); *In re Schuman*, 81 B.R. 583 (9th Cir. B.A.P. 1987) and *Matter of Holloway*, 955 F.2d 1008 (5th Cir. 1992) (former spouse may be insider); *In re Lemanski*, 56 B.R. 981,983 (Bankr. W.D. Wis. 1986) and *In re Taylor*, 29 B.R. 5, 7 (Bankr. W.D. Ky. 1983) (applying test of influence and control); *In re Busconi*, 177 B.R. 153 (B.D. Mass. 1995)

from creditors in one jurisdiction but not in another, as well as over debts discharged in the jurisdiction of a prior bankruptcy and not elsewhere, and pre-bankruptcy planning generally. If most cases involve the prompt assertion of their rights by creditors, inevitably cases some will not.

There has, meanwhile, over the past few decades been an abandonment, particularly in the United States, of the "parochial" assertion of domestic supremacy in matters including antitrust, securities and consumer rights in favor of party autonomy and respect for foreign legal systems¹⁷⁹. At the same time, the distinction between foreign and interstate judgments¹⁸⁰ (as between foreign

(hostility in divorce proceeding excluded finding that former spouse was insider); *In re Standard Stores, Inc.*, 124 B.R. 318 (B.C.D. Cal. 1991) (exercise of sufficient control to be deemed insider); *In re Levy*, 185 B.R. 378 (B.S.D. Fla. 1995) (non-marital partner deemed an insider).

¹⁷⁸ *In re Landau (a Bankrupt)*, (Ch. Div.) Times Law Reports, Jan. 1, 1997; compare *Patterson v. Shumate*, 504 U.S. 753 (1992) and *Royal Bank of Canada v. North American Life Insurance Co. (In re Ramgotra)*, [1996] 1 S.C.R. 325.

¹⁷⁹ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) and other cases cited at SCOLES & HAY, (2d ed. 1992) § 9.5 n., 2; *Powell Duffryn plc v. Petereit*, [1992] E.C.R. I-1745, applying the Brussels Convention (1968). The U.S. Code includes three nonwaiver provisions, in terms of "contrary stipulations void", 15 U.S.C. § 77n, 15 U.S.C. § 77aaaa and 15 U.S.C. § 1712. The Shearson/American Express cases, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) and their progeny have carved out an exception to these provisions, Kristine Paden, *Casenote: Choice of Forum, Choice of Law, and Arbitration Clauses Override U.S. Security Rights: Riley v. Kingsley Underwriting Agencies, Ltd.*, (1993) 6 TRANSNAT'L LAWYER 432.

¹⁸⁰ *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, cert. denied 405 U.S. 1017 (3d Cir. 1971); FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1985).

and interstate conflicts¹⁸¹) has been blurred. Further, there has been a virtual end to reference by Anglo-saxon forums to "public policy" as a basis for decision making¹⁸². One can expect, then, that some challenges to foreign claims may be heard first at the enforcement of judgment¹⁸³ stage, including contested alienation of property. The legislative history of the UFTA and the obvious intent of the Bankruptcy Code with its "fresh-start" bias and relatively short time bars would seem to impose limits on the assertion by foreign creditors of claims that upset domestic property rights, inviting them to find a third-country forum if they can. Private international law offers no straightforward resolution for the choice of law problem where creditors seek relief in a third country under fraudulent conveyance theory and it is not the underlying claim, but only the remedy, that has been extinguished. It may be for this reason that fraudulent conveyance law has become a new ground for conflict of legislative policy.

¹⁸¹ *Supra* note 127.

¹⁸² Nelson Enonchong, *Public Policy in the Conflict of Laws: A Chinese Wall Around Little England?*, 45 INT'L & COMP. L.Q. 633 1966); Chief Judge Kaye in *Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993); *cf.* Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

¹⁸³ *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661, *supra* note 157.