

6500/96

LIMITE

DRS 8 (CFC)

NOTE

Subject: Report on the Convention of Insolvency Proceedings

Delegations will find attached the above text, as finalized by the Legal Linguistic experts' working party.

REPORT
on the Convention on Insolvency Proceedings ⁽¹⁾

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⁽¹⁾The text of the Convention on insolvency proceedings was published in Official Journal No L 6500/96 . The Convention, open for signature in Brussels on 23 November 1995, was signed on ^{EN} (ANNEX) by the Plenipotentiaries of the following twelve Member States: Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Austria, Portugal, Finland and Sweden.

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IV. LIST OF PARTICIPANTS

I.BACKGROUND TO THE CONVENTION

1.The absence of a Convention on insolvency proceedings within the framework of the Community is viewed as a shortcoming in the completion of the internal market. It seems hard to accept that undertakings' activities are increasingly being regulated by Community law while national law alone continues to apply in the event of the failure of an undertaking. This consideration prompted Community Ministers for Justice, meeting informally in San Sebastian from 25 to 27 May 1989, to express the wish that a solution be found and to relaunch the negotiations on a Convention on this matter between the Member States and to give instructions to that effect to an ad hoc Working Party on the Bankruptcy Convention set up within the Council of the European Communities, as it then was.

A number of national experts (see the list in Annex 1) was therefore designated. The ad hoc Working Party met from 1991 until the conclusion of the definitive text of the Convention in 1995. Dr Manfred Balz (from Germany) was nominated chairman of the committee of experts. He was also the main author of the various drafts discussed during the negotiations.

2.A limited number of bilateral conventions do indeed exist between some Member States (see Article 48 of the Convention); however, Member States should be linked by a multilateral convention which, through mutual recognition of proceedings opened in each of the Member States, would permit coordination of the measures to be taken regarding an insolvent debtor's assets. To date, attempts to draw up a suitable instrument have been unsuccessful.

3. Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings were excluded from the scope of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels on 27 September 1968 and revised for the accession of new Community Member States in 1978, 1982 and 1989 (see OJCE No C 189 of 28 July 1990) hereafter referred to as the "1968 Brussels Convention". Regarding those proceedings, a committee of experts met, under the auspices of the Commission of the European Communities, between 1963 and 1980 to draw up a first, and subsequently (following the Community's enlargement as from 1973) a second, draft Convention (see Bulletin of the European Communities, Supplement 2/82, containing both the Draft Convention and the explanatory report). The latter Convention was studied by an EC Council Working Party from 1982 until 1985, when work was suspended for lack of sufficient consensus.

That draft Convention provided for single proceedings (with exclusive competence to decree bankruptcy conferred on the Courts of State in which the debtor's centre of administration was located) which would be recognized in the other Contracting States, and parallel local proceedings were not permitted in those other States. The principles of "unity" (a single proceeding for the whole territory of the Community) and "universality" (the proceedings comprise all debtor's assets, wherever located) which governed the proceedings were therefore scrupulously followed in this text.

4. In the meantime, negotiations had been initiated within the Council of Europe which culminated in the adoption of a "European Convention on Certain International Aspects of Bankruptcy", opened for signing in Istanbul on 5 June 1990 hereafter referred to as the "1990 Istanbul Convention" (see the Convention and its explanatory report in Council of Europe, International aspects of bankruptcy, Strasbourg 1990).

It must be pointed out, however, that it is not certain that any Member State will ratify the 1990 Istanbul Convention. Moreover, Article 40 thereof allows scope for reservations on either Chapter II (Exercise of certain powers of the liquidator) or Chapter III (Secondary insolvency proceedings), which involves a serious risk of disparity as between Contracting States.

Notwithstanding, the text of the 1990 Istanbul Convention remains important since it introduced more flexibility into the underlying principles of unity and universality.

5. The earlier Community draft ran into a number of obstacles. The principles of unity of the bankruptcy proceedings, on which it was based, led in particular to some complex provisions needed to take account of safeguards and privileges existing only in one or other Member State. Those provisions included the possibility of forming national "sub-estates" with regard to security interests, privileges and priority claims. Overall, the system proved to be too complicated and ambitious.

For that reason, the new Community Convention on insolvency proceedings offers solutions which are as simple and flexible as possible. Above all, it is based on the principle of the universality of the proceedings limited, however, by the possible opening of one or more sets of secondary proceedings the effects of which are confined to the Member State or Member States in which they were opened.

The parallelism between the main proceedings (recognized elsewhere) and the secondary proceedings (enabling creditors in another Contracting State to invoke a local instrument in order to safeguard their interests) has made it possible to avoid over-rigid centralization, which hitherto appeared to be unacceptable to some Member States. Mandatory rules of coordination with the main proceedings guarantee the needs of unity in the Community.

II. GENERAL INTRODUCTION TO THE CONVENTION

A. Scheme of the Convention

6. The Convention is divided into six Chapters with a total of 55 Articles. A Preamble, which contains important information about the scope and character of the Convention, and three Annexes, which form an integral part of it, complement its provisions.

Chapter I (Articles 1 – 15) defines the scope of application of the Convention (Articles 1 – 2), lays down the rules of direct international jurisdiction (Article 3), and determines the national law applicable through uniform conflict of laws rules (Articles 4 – 15).

Chapter II (Articles 16 – 26) addresses the recognition and enforcement of insolvency proceedings opened in other Contracting States and the recognition of the liquidator's powers.

Chapter III (Articles 27 – 38) contains the rules on secondary proceedings and on their coordination with the main proceedings and with other secondary proceedings.

Chapter IV (Articles 39 – 42) introduces several uniform rules on the right to lodge claims, the duty to provide information and the language to be used.

Chapter V (Articles 43 – 46) confers jurisdiction to interpret the Convention on the Court of Justice of the European Communities.

Chapter VI (Articles 47 – 55) contains the transitional and final provisions, including those regarding the applicability in time of the Convention (Article 47), its relationship to other Conventions (Article 48) and the procedures to amend the Annexes (Article 54), which list the insolvency proceedings to which the Convention applies and the persons who or organs which may be recognised as liquidator under the Convention.

B.Reasons for the Convention

7.To date, from a Private International Law perspective, the situation in the Community in the field of insolvency has been far from encouraging. There was a conflict of laws at both the internal level, with divergent national substantive rules, and the international level, with different Private International Law solutions.

Unlike contracts, insolvencies do not form an area of the law where private spontaneous cooperation can compensate for the lack of a common legal framework at the international level. Institutional co-operation is needed to provide a certain legal order to avoid incentives for the parties to transfer disputes or goods from one country to another, seeking to obtain a more favourable legal position ("forum shopping"), or to realise their individual claims independently of the costs which this may entail for the creditors as a whole or to the going-concern value of the debtor's firm.

Only a multilateral Convention among all the Member States may discourage the opportunistic conduct of debtors or creditors from taking place and allow for the efficient administration of the financial crisis of firms and individuals within the Community. The Convention on insolvency proceedings provides such a mandatory legal framework of intra-Community cooperation.

The Convention implements Article 220 of the Treaty establishing the European Community (hereafter referred to as the "EC Treaty") and complements the 1968 Brussels Convention. It also confers on the Court of Justice of the European Communities jurisdiction to rule on the interpretation of its provisions. But, unlike the 1968 Brussels Convention, it also contains conflict of law rules. There are important grounds which justify this difference.

8. Insolvency proceedings are collective proceedings. Collective action needs clearly determined legal positions to provide for an adequate bargaining environment. This is true not only once the insolvency proceedings have been opened, but also before they have been opened (when the debtor is already in economic difficulties), as the rights "in bankruptcy" will influence negotiations for a possible "pre-bankruptcy" reorganization.

Furthermore, international insolvency proceedings can be effectively conducted only if the States concerned recognize the jurisdiction of the courts of the State of the opening of the proceedings, the powers of their liquidators and the effects of their judgements. They may accept it only if the rules on conflict of laws are also harmonized, because harmonized conflict of law rules prove a degree of certainty that, in the event of insolvency, rights created or granted in their jurisdictions will be recognized throughout the Contracting States.

C.Scope

9.The Convention applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Two Annexes to the Convention determine the national proceedings covered by the Convention. These Annexes form an integral part of the Convention.

10.Insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings are all excluded from the scope of the Convention. Community discussions are under way regarding reorganization and winding-up proceedings for these entities.

11.The Convention deals only with the intra-Community effects of insolvency proceedings. It applies only when the centre of the debtor's main interests lies within the territory of a Contracting State (i.e. the Community). Even then, the Convention does not regulate the effect of the proceedings vis-à-vis third States. In relation to third States, the Convention does not impair the freedom of the Contracting States to adopt the appropriate rules.

D. The main and secondary model of insolvency proceedings

12. The Convention tries to provide a "neutral mechanism" for international cooperation, honouring the basic expectations of the parties, independently of the Contracting State in which they are situated. For this purpose, it follows a combined model of the existing principles of regulation of international bankruptcies (universality or territoriality of effects and unity or plurality of proceedings).

The idea of a single exclusive universal form of insolvency proceedings for the whole of the Community is difficult to implement without modifying, by the application of the law of the State of the opening of proceedings, pre-existing rights created before insolvency under the different national laws of other Contracting States. The reason for this lies in the absence of a uniform system of security rights in Europe, and in the great diversity of national insolvency laws as regards criteria for the priority to be given to the different classes of creditors.

13. In this legal context, the Convention seeks to reconcile the advantages of the principle of universality and the necessary protection of local interests. This explains why a combined model has been adopted which permits local proceedings to coexist with the main universal proceedings.

14. Insolvency proceedings may be opened in the Contracting State where the debtor has the centre of his main interests. Insolvency proceedings opened in that State will be main proceedings of universal character; "main", because if local proceedings are opened, they will be subject to mandatory rules of coordination and subordination to it, and "universal", because, unless local proceedings are opened, all assets of the debtor will be encompassed therein, wherever located.

Single main proceedings are always possible within the Community but the Convention does not exclude the opening of local proceedings, controlled and governed by the national law concerned, to protect those local interests. Local proceedings have only territorial scope, limited to the assets located in the State concerned. To open such local proceedings it is necessary that the debtor possesses an establishment in the territory of the State of the opening of proceedings (hereafter referred to as the "State of the opening"). In relation to the main proceedings, local insolvency proceedings can only be "secondary proceedings", since the latter are to be coordinated with and subordinated to the main proceedings.

E. The main insolvency proceedings

15. The "main insolvency proceedings" can be opened only in the Contracting State where the debtor has established the "centre of his main interests" (hereinafter "F1 State"). Normally it will be the place of the registered office in the case of legal persons. There can be only one main set of insolvency proceedings.

16. The main insolvency proceedings may be winding-up or reorganization proceedings, as listed in Annex A to the Convention.

17. The law of the State of the opening (*lex fori concursus*) is generally applicable to the insolvency proceedings. It governs the opening of the proceedings, their conduct and their closure.

18. Some aspects are regulated directly by the Convention, which provides a uniform system of individual notification, lodgement of claims and use of language:

(a) Creditors abroad must be duly informed of the opening of the proceedings. An individual notice must be sent to all known creditors domiciled in other Contracting States;

Where necessary, a notice of the opening of the proceedings shall be published in other Contracting States in accordance with their national publication procedures (F2 laws). Contracting States within the territory of which the debtor has an establishment may demand mandatory publication.

(b) Creditors who have their habitual residence, domicile or registered office in a Contracting State may participate in the main proceedings, whatever the nature (public or private) of their claims.

19. Main proceedings are always universal. This has a number of important legal consequences:

(a) Assets located outside the State of opening are also included in the proceedings and sequestrated as from the opening of proceedings on a world-wide basis;

(b) All creditors are encompassed;

(c) Proceedings opened in one Member State will produce effects throughout the whole territory of the Contracting States (i.e. the Community). The recognition of the effects of the proceedings in other Contracting States is automatic, by force of law, without the need for an exequatur, and is independent of publication;

However, enforcement of judgments will require prior limited control by the national courts, through an exequatur. If the conditions set out by the Convention are satisfied, the national Courts are obliged to grant it.

The Convention follows the model of "extension" to the other States (to F2, F3, etc.) of the effects laid down by the national law of the State where the main proceedings have been opened (F1).

(d)The liquidator appointed in the main proceedings has authority to act in all the other Contracting States, without the need for an exequatur. He may remove assets from the State in which they are located. In exercising these powers (granted by F1 laws), the liquidator must comply with the laws of the State concerned (F2). This is particularly the case if coercion is necessary to gain control of the assets (he must then request the assistance of the local authorities);

(e)Individual execution is not possible against the assets of a debtor located in any Contracting State;

(f)There is a legal duty to surrender to the insolvency proceedings the proceeds recovered by individual execution or obtained from the debtor's voluntary payment out of assets located abroad.

20. Local insolvency proceedings opened in accordance with the Convention limit the universal scope of the main proceedings. Assets located in the Contracting State where a court opens local insolvency proceedings are subject only to the local proceedings. However, the universal character of the main proceedings reveals itself through the mandatory rules of coordination of the local proceedings with the main proceedings, which include some specific powers of intervention given by the Convention to the liquidator of the main proceedings (see points 36(3) and 38) and the transfer of any surplus in the local proceedings to the main proceedings.

F. Protection of local interest within the main proceedings

21. The application by the State of the opening of proceedings of its law and the automatic extension of the effects of those proceedings to all Community Member States may interfere with the rules under which local market transactions are carried out in other States. For this reason, in the provisions governing the main proceedings, the Convention gives due attention to important local interests: protection of legitimate expectations and security of transactions.

22. To this end, the Convention excludes certain rights located abroad from the effects of the main proceedings or declares that those effects must be decided by the insolvency laws of the States concerned, and not by the law of the State of the opening of the proceedings.

23. 1.Exclusion from the effects of the main proceedings:

(a)The opening of insolvency proceedings will not affect pre-existing rights in rem of creditors or other third parties over assets situated in a different State at the time of the opening of the proceedings. The same rule is also applicable to reservations of title. Firms may obtain credit under conditions which could not be offered without this kind of guarantee.

If the law of the State in which the security is located permits these rights to be affected, the liquidator (or any authorized creditor) has to request the opening of local insolvency proceedings to achieve this result. The position of the secured creditors will then be the same as in a purely domestic bankruptcy. Only security rights which are in the legal form of a "right in rem" qualify for this benefit.

(b)Set-off rights governed by the law of a Contracting State other than the State of the opening receive a solution parallel to that of rights in rem.

2.In other cases, the Convention amends the rule that the law of the State of opening (F1) is applicable and provides that the law of the State concerned (F2) shall govern certain specific effects of the insolvency. In this way, the effects in a given State of insolvency proceedings opened in another Contracting State will be the same as in a domestic case.

(a)To protect the local systems of registration of property rights, the admissible effects of the insolvency proceedings on rights of the debtor in respect of immovable assets, ships or aircraft subject to registration are determined by the bankruptcy laws of the State of registration.

(b) Furthermore, in order to protect bona-fide third-party purchasers the Convention provides that the law of the Contracting State in which the assets are situated applies in the case where the debtor disposes for consideration of immovable assets after the opening of insolvency proceedings in another Contracting State. In the case of aircraft, ships or securities subject to registration, the law of the State of registration applies.

(c) To avoid disruptions in payment systems and financial markets, which may be protected by national law against the normal rules of insolvency law, the effects of the insolvency proceedings are determined by the law of the State the law of which governs the payment system or financial market.

(d) The effects of the insolvency proceedings on contracts conferring rights to make use of or acquire immovable property, and on employment contracts and relationships are governed respectively by the laws of the State in which they are situated and by the law applicable to the contract.

G. Local insolvency proceedings: "independent" and "secondary" territorial proceedings

24. Local insolvency proceedings may be opened in the Contracting State where the debtor has an establishment. The effects of local proceedings are limited to the assets located in that State. Local insolvency proceedings are always "territorial".

25. The Convention permits the opening of local proceedings both before and after main proceedings have been opened in the Member State where the debtor has his centre of main interests.

Local insolvency proceedings are considered as "independent" territorial insolvency proceedings in the first case (since there are as yet no main proceedings to which they are subordinated) and as "secondary" territorial insolvency proceedings in the latter case.

Independent proceedings become secondary proceedings once main proceedings have been opened, subject to some special rules (see points 31, 37 and 38).

26. Both types of proceedings are subject to rules of coordination with the main proceedings (in the case of independent territorial proceedings, after the opening of the main proceedings) and with other local proceedings.

27. The law of the State of the opening of the local proceedings is applicable to the local insolvency proceedings (see point 17).

The right to participate in local insolvency proceedings is not limited to local creditors. Once local proceedings have been opened, all creditors (whether local or not) may participate directly or through the liquidator in the main proceedings. This openness guarantees respect for the principle of equal treatment of creditors throughout the Community. As the Community forms an internal market, there can be no restrictions on participation in local proceedings based on the place of origin of the creditor's claim, or on the place of residence of the creditor.

28. The Convention does not restrict the right of any creditor to demand the opening of secondary territorial insolvency proceedings.

29. Secondary territorial insolvency proceedings may only be winding-up proceedings (see also point 31).

30. The right to request the opening of independent territorial proceedings is limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the applicable law. The purpose of these restrictions is to avoid the existence of parallel local proceedings which are not coordinated in the framework of the main Community proceedings.

Such limitations would not impair the individual rights of the creditors to recover debts: if no collective insolvency proceedings are opened, they may resort to individual enforcement measures.

31. Independent territorial proceedings may be winding-up or reorganization proceedings as listed in Annex A or Annex B to the Convention.

In the case of reorganization proceedings, the subsequent opening of the main proceedings makes them subject to the possibility of conversion into winding-up proceedings, if the liquidator in the main proceedings so requests. If such a conversion is not requested, the local proceedings may continue as reorganization proceedings.

H.Functions of the local proceedings

32.The first function of local proceedings is the "protection of local interests". Creditors may request the opening of local territorial proceedings to protect themselves against the effects of the law of another Contracting State. They can thus be certain that, even if the debtor's centre of interests is located in another Contracting State, their legal position will be the same as in domestic proceedings. This possibility makes sense for creditors who cannot rely on the recognition of their rights (or their preferential rank) in proceedings in another Contracting State. Further, it also makes sense for creditors who cannot count on the application of the law of another Contracting State (for instance, small creditors who participated only in domestic transactions with the local establishment of an undertaking of another Contracting State, etc.).

33.The second function of local proceedings is to serve as "auxiliary proceedings" to the main proceedings.

The liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires. This may be, for instance, the case where the estate of the debtor is too complex to administer as a unit, where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. It will be always the case where the liquidator in the main proceedings seeks to affect the rights in rem of creditors or other third parties in respect of assets situated in another State at the time of the opening.

I.Coordination of local insolvency proceedings

34.Parallel main and local insolvency proceedings represent an intermediate stage between the individual actions undertaken by the creditors and the "collective action" in the full sense of the term, represented by single universal proceedings. Cooperation is made easier, since the liquidators' role of intermediary limits the number of parties, reducing the overall complexity.

However, the method of coordination established between the local proceedings is as important as their existence. In order to encourage cooperation, the Convention permits all creditors, irrespective of the State of origin of their claims, to participate in the local proceedings (local proceedings are not reserved for local creditors).

35.Secondary insolvency proceedings are subject to coordination with the main proceedings in a number of ways to ensure that due attention is given to the interests of the main insolvency without encroaching on the specific functions of the secondary proceedings. Some of these rules of coordination apply also to secondary proceedings inter se (see points 36(1), (2) and (5)).

36.1. The Convention imposes a duty of reciprocal cooperation and exchange of information on all liquidators in both the main and secondary proceedings.

2. All liquidators are empowered to:

(a) lodge in other proceedings the claims already lodged in the proceedings for which they have responsibility; this power is very important for small creditors, whose claims may thus be lodged in proceedings in another Contracting State without great expense, and also for the liquidator in the main proceedings, since it can reinforce his powers to influence the secondary proceedings;

(b) participate in those proceedings.

3. The liquidator in the main proceedings is, as such, empowered to:

(a) request the opening of secondary insolvency proceedings;

(b) make proposals with a view to the winding-up or other use of the assets in the secondary proceedings;

(c) propose any rescue plan, composition or comparable measure in the secondary proceedings or require such arrangements to be subject to conditions, his consent being in principle required to that effect;

(d)request a stay on the liquidation of the assets in the secondary proceedings. Such request may be rejected by the local court only if it is manifestly of no interest to the creditors in the main proceedings. The reason behind this is a desire to provide time for a reorganization or composition to be concluded in the main proceedings, or for the sale of the whole undertaking or establishment.

4.Any assets remaining after winding-up and distribution in local proceedings pass to the main proceedings.

5.Any creditor may keep what he has obtained in secondary proceedings but may not participate in the distribution of the estate in the main insolvency proceedings until the other creditors with the same ranking (according to the law of the main proceedings) have obtained, in percentage, an equivalent dividend. The same rule is applicable when the creditor seeks to participate in other secondary proceedings. A consolidated account of dividends must be drawn up for all of the Contracting States (i.e. the Community.)

37.Independent territorial insolvency proceedings also become "subordinated" proceedings as soon as main proceedings are opened within the Community. In this case, the same coordination rules to which secondary proceedings are subject apply to the extent that the progress of the independent proceedings so permits. After the opening of main proceedings, local insolvency proceedings may therefore continue not as independent proceedings but as secondary proceedings.

38. In addition, the liquidator in the main proceedings has the specific right to request the conversion of the previously opened independent territorial proceedings of a reorganizational nature (see points 31, 86 and 210) into winding-up proceedings (with a view to easier coordination with the main insolvency proceedings).

39. The Convention does not address the exceptional situation of two parallel independent territorial proceedings taking place at the same time in the Community, without main proceedings having been opened in the Contracting State where the debtor has his centre of main interests. It should be possible to apply, by analogy, the same conventional rules which serve to coordinate secondary insolvency proceedings inter se (see points 36(1),(2) and (5)).

III. ANALYSIS OF THE PROVISIONS

A. PREAMBLE

40. The preamble to the Convention contains several important items of information regarding the role of the Convention within the Community system.

41. The first concerns the legal basis of the Convention. The preamble cites Article 220 of the EC Treaty as that basis.

Consequently, the characteristics of the Convention on insolvency proceedings are as follows:

–all Member States must ratify the Convention,

–powers to give rulings on interpretation are conferred on the Court of Justice of the European Communities. Unlike the 1968 Brussels Convention and the Rome Convention of 19 June 1980 on the Law applicable to Contractual Obligations, hereafter referred to as the "1980 Rome Convention", these powers are granted in the text of the Convention itself and not in additional protocols,

–there can be no reservations, except as regards the conferral of powers on the Court of Justice of the European Communities (see Article 46) (see points 57 et seq.).

42. The Convention on insolvency proceedings complements the system of international jurisdiction and recognition and enforcement of judgments set up in the 1968 Brussels Convention, which is also based on Article 220 of the EC Treaty.

However, the Convention on insolvency proceedings goes beyond the scope of the 1968 Brussels Convention, since it not only governs international jurisdiction and the recognition of judgments but also contains rules on conflicts regarding the law applicable to the proceedings and effects thereof. A Convention on the mutual recognition of insolvency proceedings would not be possible without the guarantee of respect for acquired rights offered by a uniform system of rules on conflict of laws. Harmonized conflict of law rules guarantee acquired rights so that, in the event of insolvency, rights created in each state will be recognized in other Contracting States.

43. The Convention on insolvency proceedings does not contain any explicit provision regarding its interpretation. In the same way as in the 1968 Brussels Convention and the 1980 Rome Convention, two principles should be followed when interpreting its provisions: the principle of respect for the international character of the rule, and the principle of uniformity.

The Convention is a self-contained legal structure, and its concepts cannot be placed in the same category as concepts belonging to national law. The Convention must retain the same meaning within different national systems. Its concepts may not therefore be interpreted simply as referring to the national law of one or other of the States concerned.

When the substance of a problem is directly governed by the Convention, the international character of the Convention requires an autonomous interpretation of its concepts. An autonomous interpretation implies that the meaning of its concepts should be determined by reference to the objectives and system of the Convention, taking into account the specific function of those concepts within this system and the general principles which can be inferred from all the national laws of the Contracting States.

However, the Convention itself may require the meaning of a concept to be found in the applicable national law, when it does not wish to interfere with the national laws or when the function of a specific provision of the Convention so requires. This is the case, for example, with the concept of insolvency in Article 1 or the concept of rights in rem as laid down in Article 5 of the Convention.

Uniformity of interpretation is required in order to ensure equality in the rights and obligations derived from the Convention for the Contracting States and for the persons concerned irrespective of the Contracting State in which they are located. To this end, the Convention confers powers of interpretation on the Court of Justice of the European Communities.

44. The second important piece of information concerns the territorial framework of the Convention, which covers only the "intra-Community effects" of insolvency proceedings. The Convention governs only internal conflicts of the Community, with two further limitations:

(a) the Convention does not govern all intra-Community conflicts. It covers only cases where the centre of the debtor's main interests is located in a Contracting State. When the centre of the debtor's main interests is outside the territory of a Contracting State, the Convention does not apply. In such a case, it is up to the private international law of Member States to decide whether insolvency proceedings may be opened against the debtor and on the rules and conditions to be applied;

This holds true regardless of whether the debtor has assets or creditors in other Member States and whether the question of the effects of such proceedings in other Member States is raised (see point 82);

(b) Even when the centre of a debtor's main interests is in a Contracting State and the Convention is applicable, its provisions are restricted to relations with other Contracting States. Where non-Member States are concerned, it is the responsibility of each Member State to define the appropriate conflict rules.

Hence, for example, Article 8 governs the effects of insolvency proceedings on contracts relating to the immovable property of the debtor, as an exception to the general applicability of the law of the State of the opening (ex Article 4), but is applicable only when the immovable property is located in a Contracting State. If the asset in question is situated in a non-Contracting State, the Convention does not govern the case. It is for the State opening the proceedings to decide whether or not an exception to the general applicability of its law is advisable, and under what terms.

45. As the Convention provides only partial (intra-Community) rules, it needs to be supplemented by the private international law provisions of the State in which the insolvency proceedings were opened.

When incorporating the Convention into their legislations, the Contracting States will therefore have to examine whether their current rules can appropriately implement the rules of the Convention or whether they should establish new rules to that end. In this respect, nothing prevents Contracting States from extending all or some of the solutions of the Convention unilaterally on an extra-Community basis, as part of their national law.

46. The third important item of information relates to the relations between this Convention and Community law. The Convention represents the general framework of intra-Community cooperation in the area of insolvency proceedings. However, as in the 1968 Brussels Convention (Article 57(3)) and the 1980 Rome Convention (Article 20), the principle of the primacy of secondary Community law is explicitly enshrined in it. For this reason, the preamble stresses that the Convention does not affect the possible application of the provisions of Community law, or of national law harmonized in accordance with those provisions, which govern insolvency proceedings in particular areas.

This principle does not prevent certain rules of the Convention from directly amending the solutions contained in previous Community acts (see Article 12).

47. The fourth item of information concerns the binding nature of the Convention, the provisions of which, including the rules on conflicts of law, should be applied by the court of its own motion even if they are not invoked by the parties concerned.

Although there is no specific mention of this point in the Convention, this was the solution adopted in the 1968 Brussels Convention. Substantial grounds for the binding nature do exist in the Convention on insolvency proceedings, since it deals with collective proceedings which by their very nature are likely to affect multiple interests and individuals. This binding nature is necessary to strengthen the legal protection of individuals established in the Community, since the Convention represents the basic guarantee of their rights vis-à-vis insolvency proceedings opened in other Contracting States.

However, it is for the national law to determine whether the judge is himself bound to establish the facts or whether it is for the interested parties to establish them (see Schlosser Report on the 1968 Brussels Convention, point 22).

B. CHAPTER I: GENERAL PROVISIONS

Article 1

Scope

48. Article 1(1) defines the scope of the Convention by means of the concept of "collective insolvency proceedings". Given that it has to encompass widely differing national proceedings, Article 1 restricts itself to providing a very broad framework. Paragraph 1 defines this framework, requiring four cumulative conditions, which will be described below.

It should be pointed out here that, for the Convention to be applied, it is not sufficient that the proceedings in question meet these conditions in a generic way. Under Article 2(a) and (c), for insolvency proceedings to be covered by the Convention the proceedings concerned must also have been expressly entered by the State concerned in the lists of proceedings in the Annexes, which form an integral part of this Convention. Only those proceedings expressly entered in the list will be considered "insolvency proceedings" as covered by the Convention and will be able to benefit from its provisions. In an area where national laws differ considerably, the lists are aimed at providing legal certainty regarding the proceedings to which the Convention may be applied.

In short, Article 1(1) lays down the conditions which enable proceedings to be added to the lists in the Convention by Contracting States, and only when the proceedings are included in the appropriate list will the Convention be applicable (see Article 2 (a) and (c)).

49. Article 1(1) defines the proceedings to which the Convention applies on the basis of four fundamental conditions:

(a) proceedings must be "collective", i.e. all the creditors concerned may seek satisfaction only through the insolvency proceedings, as individual action will be precluded;

(b) the proceedings must be based on the debtor's "insolvency" and not on any other grounds.

The Convention is based on the idea of financial crisis, but does not provide its own definition of insolvency. It takes this from the national law of the country in which proceedings are opened.

There is no test of insolvency other than that demanded by the national legislation of the State in which proceedings are opened. Thus, if a national law is based on the occurrence of an act of bankruptcy listed in the bankruptcy law or on the evidence that the debtor has ceased to pay his debts, it is sufficient for one of these facts to be established in order that insolvency proceedings be opened and the Convention applied.

By way of exception, it may happen that one of the forms of proceedings listed in Annex A or Annex B to the Convention is not confined to bankruptcy law but serves several purposes. Such a proceeding falls within the scope of the Convention only if it is based on the debtor's insolvency (where appropriate the 1968 Brussels Convention will be applied). This is the case with winding-up proceedings under British and Irish law (see points 55 et seq. of the Schlosser Report to the 1968 Brussels Convention).

Thus, States which list proceedings which can be used for purposes other than insolvency, must provide sufficient means of identification of the proceedings to facilitate the application of the Convention. For instance, requiring their courts or competent bodies to specify clearly the grounds on which the decision to open proceedings is based, so that these can then be used as an identification "label";

(c) the proceedings must entail the total or partial divestment of the debtor, that is to say the transfer to another person, the liquidator, of the powers of administration and of disposal over all or part of his assets, or the limitation of these powers through the intervention and control of his actions. It should be remembered that partial divestment, whether of his assets or his power of administration, is sufficient. The legal nature that such divestment may take, depending on the national legislation applicable, has no bearing on the application of the Convention to the proceedings in question;

(d)the proceedings should entail the appointment of a liquidator. This requirement is directly linked to the previous condition. The concept of liquidator used by the Convention is, once again, a very broad concept. Under Article 2(b) it includes any person or body whose function is to administer or realize the assets or supervise the management of the debtor's business. The court itself may fulfil this role. The persons or bodies considered to be liquidators by the Convention are set out in the list in Annex C to the Convention.

50.All the proceedings listed in Annex A have two ultimate consequences: the total or partial divestment of the debtor and the appointment of a liquidator. However, distortions would arise if the Convention were to apply only from the time when these consequences occur. The initial stages of insolvency proceedings could be excluded from the Convention's system of international cooperation. These consequences are necessary for proceedings to appear in the lists in Annex A. However, once the proceedings have been included, it is sufficient to open proceedings in order that the Convention should apply from the outset.

51.Article 1(1) of the Convention does not include in its final version the condition that the proceedings may entail the realization of the debtor's assets.

Limiting the application of the Convention to winding-up proceedings would have had the advantage of simplifying the resulting rules. The disadvantage would have been that it would have excluded from European cooperation very important proceedings in bankruptcy practice in certain Contracting States, such as the "suspensión de pagos" in Spain or the "surséance van betaling" in the Netherlands.

Economic analysis shows that retaining the option between two possibilities in insolvency law (winding-up or reorganization) is in itself a sound decision. The same should hold true in the international arena. There is no economic reason to justify the exclusion of reorganization proceedings from international cooperation. The Convention also contains sufficient mechanisms to protect creditors' interests (e.g. the possibility of opening territorial insolvency proceedings in accordance with local law). For some Contracting States the exclusion of reorganization proceedings would therefore be unjustified.

The outcome of the negotiations was a compromise to extend the Convention system to insolvency proceedings the main aim of which was not winding-up but reorganization.

As part of this compromise, however, local territorial proceedings opened after the main proceedings may only be winding-up proceedings (see points 83 and 86). If opened before, local territorial proceedings are subject to conversion into winding-up proceedings if the liquidator of the main proceedings so requests. The complications of compatibility and coordination between secondary reorganization proceedings (of which there could be several, if the debtor was based in several different Contracting States) and the main proceedings have led to restriction.

52. The Convention is drawn up on the basis of insolvency proceedings conducted by the courts. This will be the general rule.

However, Article 1 does not require the proceedings necessarily to involve the intervention of a judicial authority (or of an authority with an equivalent role). They must be proceedings (comprising a minimum number of acts and formalities as set down in law) which are officially recognized and legally effective in the State in which the proceedings are opened and which fulfil the four conditions set out in Article 1(1).

The requirement of intervention by a judicial authority was deliberately excluded to allow the Convention to be applied to ordinary non-judicial collective proceedings in countries such as the United Kingdom and Ireland (especially the creditor's voluntary winding-up). These proceedings offer sufficient guarantees (including access to the courts, for the legality of the proceedings to be supervised and for any questions which may arise to be settled) in order that they be brought under the Convention. Their practical significance justifies this: they represent an important percentage of all corporate insolvency cases. Once again, the Convention has enough mechanisms to defend the positions of the creditors (the possibility of secondary proceedings, public order exceptions, safeguard of acquired rights, etc.) to enable these proceedings to benefit from the Convention system.

The fact that non-judicial proceedings are covered in the Convention does not mean that they are dealt with as if they were judicial proceedings or that the decisions adopted in the course of these proceedings are regarded as having the effect of a court ruling. It simply means the rules of the Convention must be applied with flexibility taking into account that they were drawn up on the basis of proceedings conducted by a court.

From this point of view, the Convention guarantees a positive answer to two essential questions:

1. these proceedings have to be recognized as collective insolvency proceedings pursuant to

Article 1. Once proceedings have been opened in a Contracting State in accordance with Article 3, the creditors must seek payment of their debts through these collective proceedings, even if they are not conducted by the courts. Any question relating to the conduct of the proceedings or the decisions taken in the course of those proceedings, should be referred to the courts of that State;

2. the appointment of the liquidator and the powers conferred on him by the law of the State where proceedings were opened must be recognized in other Contracting States. However if the liquidator wishes to exercise his powers in another Contracting State, it is necessary for the Contracting States having proceedings of this type (the United Kingdom and Ireland) to introduce into their national legislation a system of confirmation by the courts of the nature of the proceedings and the appointment of the liquidator. This condition is shown in the list in Annex A which contains the proceedings designated by each country. In both cases these are termed proceedings "with confirmation of or by a court".

53. Finally, Article 1(1) does not require that a debtor have a particular status. The Convention applies equally to all proceedings, whether these involve a natural person or a legal person, a trader or an individual (see comments on Article 4).

54. Article 1(2): The Convention does not cover insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or collective investment undertakings.

Contracting States subject these entities to prudential supervision through national regulatory authorities in order to minimize the risk to the relevant industries and to the financial system as a whole. All these entities are subject to specific Community regulations in the exercise of freedom of establishment and freedom to provide services, which are founded on the principle of control by the authorities of the State of origin of the entity in question. Negotiations are under way for Directives on reorganization measures and winding-up proceedings for credit institutions and insurance undertakings and Directives concerning insolvency proceedings relating to other entities described in this point are expected to follow. It has been agreed, therefore, that insolvency proceedings relating to the aforementioned entities should be excluded from the scope of this Convention.

55. The exclusion of credit institutions and insurance undertakings was agreed to by all Member States only after a statement by the Council and the Commission regarding the need to step up work on insolvency proceedings involving institutions and undertakings referred to in Article 1(2).

56. The excluded entities and undertakings are defined not in the Convention but by other instruments of Community law. The provisions currently applicable are mentioned in points 57 to 60.

The entities and undertakings which fall under the definitions given by the relevant Community Regulations and Directives are excluded from the Convention. Once an entity or an undertaking falls under the said definitions, the fact that the specific rules laid down by those Community Regulations or Directives are not, for any other reason, applicable to them does not alter this rule.

57. An "insurance undertaking" is any entity covered by the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance as last amended by Directive 95/26/EC and by the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance, as last amended by Directive 95/26/EC.

58.A "credit institution" is any entity covered by the definition in the First Council

Directive 77/780/EEC of 12 December 1977 the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions as last amended by Directive 95/26/EC, which is an enterprise whose activity consists of receiving deposits or other reimbursable funds from the public and granting loans on its own account.

59.An "investment undertaking" is any entity covered by the definition in Council Directive

93/22/EEC of 10 May 1993 on investment services in the securities field as amended by Directive 95/26/EC (Article 1); in other words, any enterprise which regularly carries out a professional activity consisting of supplying third parties with an investment service concerning securities (and money-market instruments). Examples of an investment service are: the receiving, transfer and buying or selling of securities on behalf of another person, dealing in these securities on one's own behalf, management on a discretionary and individualized basis of investment portfolios of securities in accordance with a mandate given by the investors.

60.A "collective investment undertaking" is any undertaking covered by the definition set out in

Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as last amended by Directive 95/26/EC; in other words, any body whose sole aim is the joint investment of securities from capital collected from the public, whose operations are subject to the principles of risk sharing, and the shares of which are, on the bearer's request, bought or paid back, directly or indirectly, from the assets of those bodies.

Article 2
Definitions

61. Article 2 provides definitions of a series of concepts which appear throughout the Convention.

62. Article 2(a) indicates that, for the purposes of the Convention, "insolvency proceedings" refer to proceedings which meet the conditions in Article 1(1) and are included in Annex A to the Convention which forms an integral part thereof. Hence only the proceedings included in the Annex may benefit from the system of recognition in the Convention.

Contracting States may amend the list of their proceedings by using the revision mechanism laid down in Article 54.

63. Article 2(b): the concept of "liquidator" is understood in a broad sense, to encompass any person or body who or which is appointed to administer or realize the bankrupt's assets, or to supervise the management of the debtor's affairs (the full or partial divestment of the debtor being one of the pre-conditions if the proceedings are to fall under the Convention).

The identification of those persons or bodies of national law who or which may be characterized as "liquidator" for the purposes of the Convention is established by means of their inclusion in the list of Annex C of the Convention.

When the court itself performs, according to the national law, functions of administration of the debtor's assets, it may qualify as "liquidator" within the meaning of the Convention. It is, however, necessary that the State in question states in Annex C of the Convention that its courts may act as liquidator.

64. Article 2(c): the concept of "winding-up proceedings" aims to define the type of proceedings acceptable as secondary proceedings.

For the reasons given in point 51, only insolvency proceedings within the meaning of Article 1 which, in addition, may entail the realization of the debtor's assets can be secondary proceedings after the main proceedings have been opened.

The fact that winding-up proceedings may be brought to a close through agreement with the creditors, or in some other way, thus putting an end to the debtor's insolvency, does not alter this qualification if the essential aim of the proceedings is to proceed with winding-up.

The Contracting States must enter in the list in Annex B those proceedings which serve as secondary proceedings. If a State fails to include specific proceedings in the list in Annex B, these proceedings may not then benefit from the provisions of the Convention. All Contracting States must include at least one type of proceedings in the list in Annex B.

65. The Convention does not restrict the types of proceedings which can serve as independent territorial proceedings opened before the main proceedings in accordance with Article 3(4).

These proceedings may be those included in Annex A (including reorganization proceedings) or Annex B (only winding-up proceedings). However, once the main proceedings are opened, the liquidator in the main proceedings is empowered to request the conversion of any local insolvency proceedings opened in accordance with Article 3(4) into winding-up proceedings listed in Annex B.

66. Article 2(d): the expression "court" is taken in a very broad sense. It covers not only the judiciary or an authority which plays a role similar to that of a court or public authority (as was the case with earlier versions of the draft), but also a person or body empowered by national law to open proceedings or make decisions in the course of those proceedings (see point 52).

This wording brings this Convention close to the concept of "competent authority" in Article 4 of the 1990 Istanbul Convention, where the explanatory report (in point 23) states that the term "competent authority" for the opening of proceedings may include the competent body of a legal person which decides on its own winding-up for reasons of insolvency as is the case in Ireland and the United Kingdom.

67. Article 2(e): "judgment" must be taken in a broad sense to mean "decision", consistent with what is said in point 66.

68. Article 2(f): "the time of the opening of proceedings" is very important, since many questions are settled by reference to it. The time of the opening of proceedings is deemed to be the time when the decision begins to be effective under the law of the State of the opening of the proceedings.

The Convention does not require the decision to open insolvency proceedings to be final. It is sufficient for it to have effect in the State of opening and for its effects not to have been stayed.

In the case of non-judicial proceedings of the "creditors voluntary winding-up" type, the working party discussed whether, in order to fix the time of opening, the same rule should be used or whether the date of confirmation by the court of the nature of the proceedings and the appointment of the liquidator should be taken as the reference point. Only in order to allow the liquidator to exercise his powers on the territory of another Contracting State would it be necessary to take the date of confirmation by the court as the reference (see point 52). For all other matters, the general rule given above in this point stands.

69. Article 2(g): "the Contracting State in which assets are situated". This definition is important insofar as the main proceedings do not affect certain rights on assets located abroad (see Articles 5 and 7) and territorial proceedings can only affect the assets located in the State in which proceedings are opened. To this extent the Convention must help to determine what criteria regarding location are to be followed. In reality, the Convention does no more than stress traditional solutions of private international law which are well known in all the Contracting States.

Thus, tangible property is considered to be located in the place in which it is physically situated.

Property and rights ownership of or entitlement to which must be entered in a public register are considered to be located in the State under the authority of which the register is kept. This provision is applicable, for example, in the case of ship and aircraft registers, and also extends to intangible property, such as patents or securities. The State under whose authority the register is kept is not necessarily the State in which the register is physically situated (e.g. it may be a consular register or centralized international register).

"Public register" does not mean a register kept by a public authority, but rather a register for public access, an entry in which produces effects vis-à-vis third parties. It also includes private registers with these characteristics, recognized by the national legal system concerned.

In the case of Community patents, trademarks and other similar rights of Community origin, Article 12 states that these can only be included in main proceedings based on Article 3(1) (see point 133).

Finally, claims are deemed to be situated in the State where the debtor required to meet the claim in question (and not the insolvent debtor) has his centre of main interests. The concept of "centre of main interests" is the same as that specified in Article 3(1) (see point 75).

70. Article 2(h): The concept of "establishment" is linked to the basis of international jurisdiction to open territorial proceedings. In this regard, it should be mentioned that Article 3(2), in which the jurisdiction to open such territorial proceedings is dealt with, was one of the most debated provisions throughout the negotiations.

Several Contracting States wished to have the possibility of basing territorial proceedings not only on the presence of an establishment, but also on the mere presence of assets of the debtor (assigned to an economic activity) without the debtor having an establishment.

For the sake of an overall consensus on the Convention, those States agreed to abandon the presence of assets as a basis for international competence provided that the concept of establishment is interpreted in a broad manner but consistently with the text of the Convention. This explains the very open definition given in Article 2(h).

In the Convention, the mere presence of assets (e.g. the existence of a bank account) does not enable local territorial proceedings to be opened. The presence of an establishment of the debtor within the jurisdiction concerned is necessary.

Though defended by one State, the possibility of adopting the same concept of establishment in the Convention as that given by the Court of Justice of the European Communities in its interpretation of Article 5(5) of the 1968 Brussels Convention was ruled out. The majority of States preferred an independent concept to be developed.

Indeed, the Court of Justice of the European Communities emphasized that the special powers laid down in Article 5 of the 1968 Brussels Convention must be strictly interpreted vis-à-vis the general forum of the place of domicile of the defendant. Under these conditions, to import a concept from the 1968 Brussels Convention involved the risk of conveying a possibly restrictive interpretation of the concept of establishment to the Convention on insolvency proceedings, which was precisely the opposite of what most of the working party intended. For this reason, they opted to give the Convention its own definition, which is contained in Article 2.

71. For the Convention on insolvency proceedings, "establishment" is understood to mean a place of operations through which the debtor carries out an economic activity on a non-transitory basis, and where he uses human resources and goods.

Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.

The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an "establishment". A certain stability is required. The negative formula ("non-transitory") aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.

The rationale behind the rule is that foreign economic operators conducting their economic activities through a local establishment should be subject to the same rules as national economic operators as long as they are both operating in the same market. In this way, potential creditors concluding a contract with a local establishment will not have to worry about whether the company is a national or foreign one. Their information costs and legal risks in the event of insolvency of the debtor will be the same whether they conclude a contract with a national undertaking or a foreign undertaking with a local presence on that market.

Naturally, the possibility of opening local territorial insolvency proceedings makes sense only if the debtor possesses sufficient assets within the jurisdiction. Whether or not these assets are linked to the economic activities of the establishment is of no relevance.

Article 3
International jurisdiction

72. The rules of jurisdiction set out in the Convention establish only international jurisdiction, that is to say, they designate the Contracting State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Contracting State must be established by the national law of the State concerned.

73. Main insolvency proceedings:

Article 3(1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, wherever located.

Only one set of main proceedings may be opened in the territory covered by the Convention.

74. Which persons or legal entities may be subject to insolvency proceedings is determined by national law. Where the international jurisdiction rule mentions the debtor, this means the natural persons or legal entity (whether a legal person or not) concerned.

75. The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

By using the term "interests", the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression "main" serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office.

76. The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes).

The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity.

Naturally, the drawing up of a European norm on associated companies may affect this answer.

77. Article 3(1) gives the courts in the State of the opening of proceedings jurisdiction in relation to insolvency proceedings. However, the Convention contains no rule defining the limits of this jurisdiction.

This is a fundamental question since it raises the issue of the relationship between the Convention on insolvency proceedings and the 1968 Brussels Convention and their respective scope.

Certain Contracting States recognize a "vis attractiva concursus" in their national law, by virtue of which the Court which opens the insolvency proceedings has within its jurisdiction not only the actual insolvency proceedings but also all the actions arising from the insolvency.

Although the projection of this principle in the international domain is controversial, the 1982 Community Draft Convention contained a provision in Article 15 which, according to the Lemontey Report, was inspired by the "vis attractiva" theory. This Article conferred on the courts of the State of the opening of insolvency proceedings jurisdiction over a wide series of actions resulting from the insolvency.

Neither this precept nor this philosophy has been adopted in this Convention. There is no provision in Article 3 of the Convention addressing this problem. However, the Convention's silence on the matter is only partial. Article 25 thereof contains the delimitation criterion between both the 1968 Brussels Convention and this Convention.

This criterion is directly taken from the Court of Justice of the European Communities. It was outlined by the Court of Justice in the interpretation of Article 1(2) of the 1968 Brussels Convention in its Judgment of 22 February 1979 (Case 133/78, Gourdain-v-Nadler [1979] ECR p. 733).

Article 1(2) of the 1968 Brussels Convention excludes "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" from its scope. In that Judgment the Court of Justice of the European Communities used the nature of the action taken as the criterion for determining whether or not the jurisdiction rules of the 1968 Brussels Convention applied. According to this criterion, actions directly derived from insolvency and in close connection with the insolvency proceedings are excluded from the 1968 Brussels Convention. Logically, to avoid unjustifiable loopholes between the two Conventions, these actions are now subject to the Convention on insolvency proceedings and to its rules of jurisdiction.

78. The rule on international jurisdiction in Article 3(1) enables the court having jurisdiction to open main insolvency proceedings to order provisional and protective measures from the time of the request to open proceedings.

Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. They may be ordered by the court having jurisdiction according to Article 3(1) irrespective of the Contracting State where the assets or persons concerned (either debtor or a creditor) are located. Such measures may adopt a wide-range of forms, according to the national law of the court ordering them (e.g. interlocutory orders to do or not to do, appointment of a temporary administrator, attachment of assets).

These preservation measures shall be recognised and enforced in other Contracting States, according to the conditions set out in Article 25 of the Convention (see point 198).

Article 3 (1) does not prevent the liquidator, or any other empowered person, from going to the place where the preservation is to be carried out (e.g. the State in which the assets are located) and asking the local courts to adopt provisional measures available under the national law. This possibility presupposes that the courts of that State enjoy jurisdiction to adopt such measures under their national law (as should usually be the case), and the fulfilment of the subject-matter requirements of that law (evidence of a good prima facie case, sufficient urgency, security to cover damages which may be caused, etc.).

These preservation measures are ancillary to the main proceedings. Logically, they remain subordinated to the decisions taken in the course of the main proceedings by the court having jurisdiction under Article 3(1) and which benefit from the system of recognition and enforcement of the Convention. Hence, under Articles 16 and 25, such a court may even stipulate that those preservation measures are to be lifted, modified or continued (see point 198).

The possibility of going to the court of the place where the measures are to take effect is referred to again in Article 38, although with a different purpose. Article 38 empowers the temporary administrator appointed after the request for the opening of main insolvency proceedings, but before such opening, to call directly on the authorities of any other Contracting State to adopt preservation measures provided under the insolvency law of this State for winding-up proceedings on the debtor's assets situated in its territory, as a pre-opening stage of secondary proceedings (see point 262).

79. The Convention does not provide any express rule to resolve cases where the courts of two Contracting States concurrently claim jurisdiction in accordance with Article 3(1). Such conflicts of jurisdiction must be an exception, given the necessarily uniform nature of the criteria of jurisdiction used.

Where disputes do arise, to solve them, the courts will be able to take account of:

1.the Convention's system according to which:

(a)each court is obliged to verify its own international jurisdiction in accordance with the Convention;

(b)the principle of Community trust, according to which once the first court of a Contracting State has adopted a decision, the other States are required to recognize it (see points 202 and 220).

2.the possibility of a request for a preliminary ruling to the Court of Justice of the European Communities, guaranteeing the uniformity of the contents of the criteria for international jurisdiction and its appropriate interpretation in the given case;

3.the general principles of procedural law which are valid in all Contracting States; these principles include those derived from other Community Conventions such as the 1968 Brussels Convention.

80. Local insolvency proceedings

Article 3(2) enables territorial proceedings to be opened in the State in which the debtor has an establishment, as defined in Article 2(h), under the following conditions.

In cases where the debtor's centre of main interests is located in a Contracting State, the courts of other Contracting States have no power to open main insolvency proceedings.

However, any of these Contracting States may open territorial proceedings, the effectiveness of which is restricted to the assets situated in that State, if the debtor has an establishment in the territory of that State. The mere presence of assets is not sufficient to open territorial proceedings.

Depending on whether or not main proceedings have been opened, the proceedings shall be secondary or independent territorial proceedings.

81. Article 3(2) does not grant jurisdiction to open territorial proceedings to the courts of a State where the debtor does not have an establishment. The assets located in that State cannot, therefore, be included in territorial proceedings, but revert to the main proceedings, if such have been opened.

82. Should the debtor's centre of main interests be located outside the territory of the Contracting States, it is not within the jurisdiction of any Contracting State to open insolvency proceedings within the scope of the Convention. Article 3(1) and (2) assumes that the centre of main interests is in a Contracting State.

When the centre of main interest does not lie in a Contracting State, national law determines the international jurisdiction of its courts. The effects of such proceedings are not governed by this Convention (see point 44).

83. Secondary territorial insolvency proceedings

Article 3(3) requires that after main proceedings have been opened by the competent court within the meaning of Article 3(1), the subsequent proceedings opened by the court of the State where the establishment is located, in accordance with Article 3(2), are secondary proceedings, subject to Chapter III.

In the event of there being a number of establishments located in different Contracting States, several sets of secondary proceedings may be opened.

The secondary proceedings under Article 3(3) may not be reorganization proceedings, rather they must be winding-up proceedings as mentioned in Annex B. This rule is reaffirmed in Article 27 (see comments re Article 27 (points 211 et seq.)).

84. Independent territorial insolvency proceedings

Article 3(4) deals with situations which exist prior to the opening of main proceedings. This is the result of efforts to reconcile two essentially conflicting approaches.

In line with the philosophy expressed most particularly in Articles 3(1) and (2) and Article 27, the court of the debtor's centre of main interests is the only one having jurisdiction to open main proceedings. These proceedings should naturally encompass all the debtor's assets regardless of the State in which the property is located.

It is only as an exception to the universal proceedings that territorial proceedings may be opened in advance, in order to satisfy "local" creditors as to the assets present in that State. Indeed, it is difficult to imagine that "local" creditors who hold a favourable ranking in the State where the property is located would want to transfer all the assets to another State where their ranking would be less favourable. It is likewise difficult for States without any creditors holding a preferential ranking to accept the transfer of all the assets abroad.

The other approach involves seeking to protect local creditors by allowing national rules on the opening of proceedings to follow their normal course, even in a State where an establishment is located, and even at all times, prior to and regardless of the opening of proceedings in the State of the centre of main interests. This approach takes into account the insolvency of an establishment and the creditors' interest in territorial proceedings or the general interest in territorial proceedings to reorganize an establishment of social and economic importance within that State, and grants less consideration to the principle of the universality of insolvency proceedings.

85. Article 3(4) adopts the following rule:

The courts of a Contracting State having jurisdiction under Article 3(2) may open, prior to the main proceedings, territorial insolvency proceedings called for this reason independent territorial proceedings, in only two cases:

1. The conditions for opening the insolvency proceedings, as set out by the law of the State where the centre of main interests is located, do not allow main proceedings to be opened.

That will be the case if, for example, the debtor cannot be subject to insolvency proceedings, e.g. where the applicable law requires the debtor to be a trader, and this is not the case, or where the debtor is a public company which the law of the State of the centre of main interests does not allow to be declared insolvent.

2.A local creditor or a creditor of the local establishment, within the meaning of Article 3(4)(b), requests territorial proceedings be opened.

The protected creditor to whom this right to request the opening of territorial proceedings is granted is one:

(a) whose habitual residence, domicile and registered office is in the State where the establishment is located,

(b) or whose claim arises from the operation of that establishment (e.g. an employee working for that establishment; a person who entered through the establishment into an undertaking which must be performed in that State; the tax authorities and social security bodies).

Outside these two possible cases, the court having jurisdiction to open the territorial proceedings cannot open proceedings prior to the opening of proceedings in the centre of main interests.

86. The territorial proceedings mentioned in Article 3(4) may be winding-up proceedings or reorganization proceedings mentioned in Annex A or Annex B.

In the event of the subsequent opening of the main proceedings, independent territorial proceedings become secondary proceedings, in accordance with the special rules of Articles 36 and 37 of the Convention.

Furthermore, reorganization proceedings as mentioned in Annex A will, at the request of the liquidator in the main proceedings, be converted into secondary winding-up proceedings, in accordance with Articles 36 and 37 (see points 210, 254 to 261). If the liquidator in the main proceedings does not request this conversion, the territorial proceedings may continue as reorganization proceedings.

Article 4

Law applicable

87. The Convention sets out, for the matters covered by it, uniform rules on conflict of laws which replace national rules of private international law.

When these rules on conflict of laws talk of the "applicable law", they refer to the internal law of the Contracting State designated by the rule, excluding its rules of private international law.

88. General rule on conflict of laws

Article 4 lays down the basic rule on conflict of laws of the Convention. This Article determines the law applicable to the insolvency proceedings, the conduct thereof and their material effects: unless otherwise stated by this Convention, the law of the Contracting State of the opening of the proceedings is applicable (lex concursus).

89. This rule on conflict of laws is valid both for the main proceedings and for local proceedings (secondary or independent territorial proceedings).

To avoid any doubts, Article 28 reiterates this solution for the secondary proceedings. Although Article 28 only considers the secondary proceedings, it is clear that the application of the law of the State of the opening of the proceedings operates as the general conflict of laws rule of the Convention and is also valid for independent territorial proceedings.

90. The law of the State of the opening of proceedings determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

This law governs all the conditions for the opening, conduct and closure of the insolvency proceedings. It stipulates, *inter alia*, who may be subject to insolvency proceedings, the requirements to open them and who may present the petition; it determines the nature and the extent of the debtor's divestment and the assets covered by it; it outlines the organization of the administration of the estate and regulates the designation of the liquidator and his powers; it decides the admissibility of claims and the rules on distribution and preferences; it governs the closure of the proceedings and its consequences, etc.

The substantive effects referred to the competence of the law of the State of the opening by Article 4, are those typical of insolvency law, i.e. effects which are necessary for the insolvency proceedings to fulfil its aims. To this extent, the law of the State of the opening may displace (unless the Convention provides otherwise), the law normally applicable, under the common pre-insolvency rules on conflict of laws, to the act concerned. This happens for instance when Article 4 makes applicable the law of the State of opening of proceedings to invalidate any act (e.g. a contract) detrimental to all the creditors, even if that act is governed under the general rules on conflict of laws (if a contract, those of the 1980 Rome Convention), by the law of a different State.

91. To facilitate its interpretation, Article 4(2) contains a non-exhaustive list of questions that are governed by the law of the State of the opening.

(a) whether a particular debtor by virtue of his status (e.g. trader/non-trader, public law company) may be subject to insolvency proceedings (Article 4(2)(a)). This rule is valid for both the main proceedings and for secondary proceedings, where the solution to the case may be different. This paragraph is linked to Article 3(4)(a) and Article 16(2) (see points 85 and 148);

(b) which assets form part of the estate and the treatment of assets acquired by the debtor after the opening of proceedings;

- (c)the respective powers of the debtor and the liquidator. This paragraph is linked to Article 14 (see point 141);
- (d)the conditions under which set-offs may be invoked. This paragraph is linked to Articles 6 and 9 (see points 107 to 111 and 120 et seq.);
- (e)the effects of the proceedings on current contracts to which the debtor is party (paragraph (e)).
To the extent necessary, the law of the State of the opening displaces the law of the contract determined in accordance with the 1980 Rome Convention. This paragraph is linked to Articles 8 and 10 (see points 116 to 119; 125 et seq);
- (f)the effects of the insolvency proceedings on executions brought by individual creditors, their suspension or prohibition after the opening of collective insolvency proceedings.
However, the effects of the proceedings on lawsuits pending remain subject to the law of the Contracting State where the lawsuit is pending, ex Article 15 (see point 142);
- (g)the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings (i.e. claims arising in the administration and management of the assets which in many systems benefit from preferential payment);

- (h) the rules governing the lodging, verification and admission of claims. It must be borne in mind that Chapter IV of the Convention sets out a number of uniform rules on this subject. As regards claims that are admissible, Article 39 acknowledges "iure conventionis" that Contracting States' public law claims can be lodged in insolvency proceedings opened in other Contracting States. This precept expressly stipulates the right of the tax and social security authorities of any Contracting State to submit their claims in insolvency proceedings opened pursuant to the Convention;
- (i) the ranking (privileges, preferences, etc.) and the rules on distribution of the assets realized. As in all main or secondary proceedings the national law of the State of the opening is applicable, the ranking of a claim may vary for each of the proceedings in which it is lodged;
- (j) the conditions and effects of the closure of proceedings, including closure by composition or equivalent measure;
- (k) the rights of the creditors subsequent to the closure of the proceedings, including any possible discharge of the debtor;
- (l) the costs and expenses of the proceedings;
- (m) the voidness, voidability or unenforceability of legal acts that may be detrimental to all the creditors. The applicable national law determines whether action must be taken to obtain their invalidation or whether the decision to open proceedings automatically entails invalidation. To the extent necessary, the law of the State of the opening displaces the law normally applicable to the act in question. This paragraph is to be taken in conjunction with Article 13 (see point 135).

In the case of secondary proceedings, the local rules on invalidation of a detrimental act shall be applicable only insofar as damage has been caused to the debtor's assets which are in this State (e.g. to the estate of the secondary proceedings). For instance, the act in question (sale, establishment of a right in rem) involves an asset which was located in this State at the relevant time.

92. Exceptions to the general rule on conflicts of law of Article 4

The application, by the courts in the State of the opening of proceedings, of their national insolvency law and the automatic extension of its effects to all the Contracting States (see Articles 16 and 25) may interfere with the rules under which transactions are carried out in these States.

To protect legitimate expectations and the certainty of transactions in States other than that in which proceedings are opened (for in the latter State all the operators have to count on the application of its laws) the Convention provides for a number of exceptions to the general rule:

1. In certain cases, the Convention excludes some rights over assets located abroad from the effects of the insolvency proceedings (as in Articles 5, 6 and 7).

2. In other cases, it ensures that certain effects of the insolvency proceedings are governed not by the law of the State of the opening (F1), but by the law of the State concerned (see Articles 8, 9, 10, 11, 14 and 15). In such cases, the effects to be given to the proceedings opened in other Contracting States are the same effects attributed to a domestic proceedings of equivalent nature (liquidation, composition, or reorganization proceedings) by the law of the State concerned (F2).

93. The exceptions to the application of the law of the State of the opening (Article 4) are referred to in Articles 5 to 15 of the Convention. Apart from Articles 6 and 14, which by systemic arguments must be interpreted in the same way, the exception is made in favour of the law of a "Contracting State".

This does not mean that, by a contrario interpretation, the law of the State of the opening of proceedings is applicable where the State concerned is not a Contracting State. The need to protect legitimate expectations and the certainty of transactions is equally valid in relations with non-Contracting States. The group's intention was simply to regulate these cases in line with the general restriction of the Convention to the intra-Community effect of insolvency proceedings (see point 44). Contracting States are, therefore, free to decide which rules they deem most appropriate in other cases (the same ones as in Articles 5 to 15 of the Convention, or others).

Article 5

Third parties' rights in rem

94. This provision excludes from the effects of the proceedings rights in rem of third parties and creditors in respect of assets belonging to the debtor which, at the time of the opening of proceedings, are situated within the territory of another Contracting State.

If the assets are situated in a non-Contracting State, Article 5 does not govern the issue (see points 44 and 93).

95. In order to understand the functioning of Article 5, account should be taken of the fact that main insolvency proceedings based on Article 3(1) have a universal scope. All the assets of the debtor shall be subject to the main proceedings irrespective of the State where they are situated unless territorial proceedings are opened. The law of the State of the opening of the main proceedings shall determine which of those assets shall be regarded as forming a part of the estate in the main proceedings and which shall be excluded (see Article 4(2)(b)).

A part of those assets may be subject to third parties' rights in rem. The Convention does not make it obligatory for these assets to be included in or excluded from the estate in the main proceedings. The Convention imposes only an obligation to respect third parties' rights in rem over assets located within the territory of a Contracting State different from the State of the opening of proceedings.

The creation, validity and scope of these rights in rem are governed by their own applicable law (in general, the "lex rei sitae" at the relevant time) and cannot be affected by the opening of insolvency proceedings.

This means that although the law of the State of the opening stipulates that all assets are part of the estate, the holder of the right in rem retains all his rights in respect of the assets in question. For instance, the holder of the right in rem may exercise the right to separate the security from the estate and, where necessary, to realize the asset individually to satisfy the claim. On the other hand, the liquidator, even if he is in possession of the asset, cannot take any decision on that asset which might affect the right in rem created on it, without the consent of its holder (see also point 161).

96. Article 5 only applies to the rights in rem created before the opening of proceedings. If they are created after the opening, Article 4 shall apply without exception (without prejudice to Article 14).

97. The fundamental policy pursued is to protect the trade in the State where the assets are situated and legal certainty of the rights over them. Rights in rem have a very important function with regard to credit and the mobilization of wealth. They insulate their holders against the risk of insolvency of the debtor and the interference of third parties. They allow credit to be obtained under conditions that would not be possible without this type of guarantee.

Rights in rem can only properly fulfil their function insofar as they are not more affected by the opening of insolvency proceedings in other Contracting States than they would be by the opening of national insolvency proceedings. This aim could be achieved through alternative solutions which were in fact discussed in the working party. However, to facilitate the administration of the estate the simplicity of the formula laid down in the current Article 5 was preferred by the majority: insolvency proceedings do not affect rights in rem on assets located in other Contracting States.

98. The rule does not "immunize" rights in rem against the debtor's insolvency. If the law of the State where the assets are located allows these rights in rem to be affected in some way, the liquidator (or any other person empowered to do so) may request secondary insolvency proceedings be opened in that State if the debtor has an establishment there. The secondary proceedings are conducted according to national law and allow the liquidator to affect these rights under the same conditions as in purely domestic proceedings.

99. Article 5 states that the proceedings shall not affect rights in rem in respect of assets located in other Contracting States and not that the proceedings shall not affect assets located in another State. As main proceedings are universal (ex. Article 3(1)) they encompass all the debtor's assets.

This is important if the value of the security is greater than the value of the claim guaranteed by the right in rem. The creditor will be then obliged to surrender to the estate any surplus of the proceeds of sale.

Without affecting the economic value of the right or its immediate realisability, it also gives the liquidator the power to decide on the immediate payment of the claim guaranteed, and thus avoid the loss in value that certain assets could suffer when they are realized separately.

100. Article 5 refers to "rights in rem" but does not define what these are. The Convention does not intend to impose its own definition of a right in rem, running the risk of describing as rights in rem legal positions which the law of the State where the assets are located does not consider to be rights in rem, or of not encompassing rights in rem which do not fulfil the conditions of that definition.

The Convention acknowledges the interest of each State in protecting its market's trade, in the form of respect of rights in rem acquired over assets of the debtor located in that country under the law that is applicable before the opening of the insolvency proceedings.

For this reason, the characterization of a right as a right in rem must be sought in the national law which, according to the normal pre-insolvency conflict of law rules, governs rights in rem (in general, the *lex rei sitae* at the relevant time). In this sense, the Convention adopts a "*lege causae*" characterization.

101. The only departure from the above statement is found in Article 5(3), which for the purposes of Article 5, directly and independently of national law, considers as a right in rem any right entered in a public register and enforceable against third parties, allowing a right in rem to be obtained.

102. However, the rationale of Article 5 imposes certain limits to the national qualification of a right in rem. It must be borne in mind that Article 5 represents an important exception as regards the application of the law of the State of the opening and the universal effect of the main proceedings. It must equally be remembered that secondary proceedings are only possible if the debtor has an establishment in that Contracting State. The mere presence of assets is not enough in order to open such proceedings.

An unreasonably wide interpretation of the national concept of a right in rem to include, for instance, rights simply reinforced by a right to claim preferential payment, as is the case for a certain number of privileges, would make the Convention meaningless, and such a wide interpretation is not to be attributed to Article 5.

103. In order to facilitate the application of the Convention and avoid doubts Article 5(2) provides a list of types of rights that are normally considered by national laws as rights in rem.

This list is inspired in two main considerations. The first, that a right which exists only after insolvency proceedings have been opened, but not before, is not a right in rem for the purposes of Article 5 (which protect pre-existing rights).

The second, that a right in rem basically has two characteristics (see also the concept of rights in rem in the Member States in point 166 of the Schlosser Report on the 1968 Brussels Convention):

(a) its direct and immediate relationship with the asset it covers, which remains linked to its satisfaction, without depending on the asset belonging to a person's estate or on the relationship between the holder of the right in rem and another person;

(b)the absolute nature of the allocation of the right to the holder. This means that the person who holds a right in rem can enforce it against anyone who breaches or harms his right without his assent (e.g. such rights are typically protected by actions to recover); that the right can resist the alienation of the asset to a third party (it can be claimed erga omnes, with the restrictions characteristic of the protection of the bona fide purchaser); and that the right can thus resist individual enforcement by third parties and in collective insolvency proceedings (by its separation or individual satisfaction).

104.A right in rem may not only be established with regard to specific assets but also with regard to assets as a whole. Security rights such as the "floating charge" recognised in United Kingdom and Irish law can, therefore, be characterized as a right in rem for the purposes of the Convention. Likewise, rights characterized under national law as rights in rem over intangible assets or over rights are also included (see Article 5(1)).

105.This provision is based on non-fraudulent location of the assets.

106.The establishment of a right in rem in favour of a particular creditor or third party could be an act detrimental to all the creditors. In this case, the general rules of the Convention governing actions for voidness, voidability or unenforceability of legal acts are applicable (see Article 4(2)(m), and Article 13).

Article 6

Set-off

107. This Article deals with set-off in the same way as Article 5 dealt with rights in rem. When under the normally applicable rules on conflict of laws the right to demand the set-off stems from a national law other than the "lex concursus", Article 6 allows the creditor to retain this possibility as an acquired right against the insolvency proceedings: the right to set-off is not affected by the opening of proceedings.

108. Set-off is a part of the law of obligations governed by the relevant rules of private international law regarding the law applicable to obligations. By including two claims which offset each other, the question arises whether the right to set-off stems from:

(a) the cumulative application of laws applicable to the two claims or

(b) the law applicable to the claim of the debtor ("passive" claim in the set-off) against which the creditor intends to set off his counter-claim against the debtor ("active" claim in the set-off).

The Convention opts for this second interpretation when it derives the right to set-off from "the law applicable to the insolvent debtor's claim", (i.e. from the law applicable to the claim where the insolvent debtor is the creditor in relation to the other party).

109. The laws of some Member States altogether restrict or prohibit set-off in insolvency. Article 4 subjects insolvency set-off to the competence of the law of the State of the opening of the insolvency proceedings.

If insolvency proceedings are opened, it falls therefore to the "lex concursus" to govern admissibility and the conditions under which set-off can be exercised against a claim of the debtor.

If the "lex concursus" allows for set-off, no problem will arise and Article 4 should be applied in order to claim the set-off as provided for by the law. On the other hand, if the "lex concursus" does not allow for set-off (e.g. since it requires both claims to be liquidated, matured and payable prior to a certain date), then Article 6 constitutes an exception to the general application of that law in this respect, by permitting the set-off according to the conditions established for insolvency set-off by the law applicable to the insolvent debtor's claim ("passive" claim).

In this way, set-off becomes, in substance, a sort of guarantee governed by a law on which the creditor concerned can rely at the moment of contracting or incurring the claim.

110. Article 6 covers only rights to set-off arising in respect of mutual claims incurred prior to the opening of the insolvency proceedings. After this time, Article 4 is applied without exception to decide whether or not the set-off is admissible.

Contractual set-off implies an agreement subject to its own applicable law according to the 1980 Rome Convention. The same rationale on which Article 5 is based explains that in the event of a contractual set-off agreement covering different claims between two parties, the law of the Contracting State applicable to that agreement will continue to govern the set-off of claims covered by the agreement and incurred prior to the opening of the insolvency proceedings.

111. As in the case of Article 5, any actions detrimental to all the creditors may be corrected by bringing actions for voidness, voidability or unenforceability as set out in Article 4(2)(m).

Article 7
Reservation of title

112. In the same way as Article 5, this provision seeks to protect trade by excluding from the scope of insolvency proceedings the reservation of title on property which, at the time the proceedings were opened, was located in a Contracting State other than the State of the opening.

The remarks made with regard to Article 5 apply here *mutatis mutandis*. The biggest difference between Article 5 and Article 7 concerns Article 7(2) which contains a uniform substantive rule.

113. The first paragraph governs the insolvency of the purchaser of an asset, by allowing the seller to preserve his rights based on the reservation of title. For this to occur, the asset must be located at the time when the insolvency proceedings are opened in a Contracting State other than the one where the proceedings are opened. If its location changes after the opening of the proceedings, this does not affect the application of the provision.

114. The second paragraph covers the insolvency of the seller of an asset after delivery of the asset, allowing the sale to remain valid. If the purchaser continues to make payments, he shall acquire title at the end of the period set out in the contract. For this rule to be applied, it is also a requirement that at the time the insolvency proceedings are opened the asset is located within a State other than the State of the opening of proceedings.

115. Of course, actions for voidness, voidability or unenforceability, as provided for in Article 4(2)(m) can also be brought against these reservations of title.

Article 8

Contracts relating to immovable property

116. Insolvency law may have an impact on current contracts. Thus, for instance, in the case of mutual obligations pending fulfilment, the liquidator may be empowered to decide either on the performance or termination of the contract. The aim of rules of this kind is to protect the estate from the obligation to perform contracts which may be disadvantageous in these new circumstances.

117. The general rule on conflicts of law is that it falls to the law of the Contracting State of the opening of proceedings to regulate the effects of the proceedings on current contracts to which the debtor is a party (Article 4(2)(e)).

To this extent, the applicable national insolvency law interferes with and overlaps the rules applicable to contracts, which derive from the law applicable under the 1980 Rome Convention.

118. This rule, which overall is positive for the general interests of the creditors may be detrimental to other interests. In all the Contracting States, contracts covering immovable property are subject to special rules, both of conflict of laws as well as of international jurisdiction, in order to take into account several interests: those of the parties to the contract (e.g. tenants) and the general interests protected by the State in which the immovable property is to be found.

Protection of these specific interests justify an exception to the application of the law of the State of the opening of proceedings. Hence Article 8 makes the effects of the insolvency proceedings exclusively subject to the law of the Contracting State where the immovable property is located.

Solely means that only the law of the Contracting State of location of the immovable (including its insolvency law), and not the "lex concursus" under Article 4, is applicable to establish these effects.

119. Article 8 not only covers contracts for the use of immovable property (rental, leasing) but also includes contracts covering the transfer of the immovable property (sale).

Article 9

Payment systems and financial markets

120. The intention of Article 9 is for any effects on transactions subject to a payment or settlement system or to a financial market of insolvency proceedings opened in another Contracting State to be the same as those in proceedings under national law. By making the effects of insolvency exclusively subject to the law applicable to the payment system and the financial market, general confidence in these mechanisms is protected.

The aim of this provision is to avoid any modification of the mechanisms for regulating and settling transactions provided for in payment or settlement systems or on the organized financial markets operating in Contracting States, in the event of insolvency of a party to a transaction which would otherwise result if the "lex concursus" applied. The relevant mechanisms include closing out contracts and netting, and insofar as the security is situated in that Contracting State, the realization of securities.

Payment systems and markets involve large-scale transactions and as a consequence have been found to require special rules to guarantee their smooth operation and security. That is why the law governing the particular system or market concerned remains applicable.

A financial market is not defined but is understood to be a market in a Contracting State where financial instruments, other financial assets or commodity futures and options are traded. It is characterized by regular trading and conditions of operation and access and it is subject to the law of the relevant Contracting State, including appropriate supervision, if any, by the regulatory authorities of that Contracting State.

121. Article 9 means that only the law governing the system or market in question can be applied to the relevant transactions affected by an insolvency and not the "lex concursus" as provided by Article 4. Thus, the complex problems of potential conflicts of the two laws are avoided and the certainty of transactions is preserved.

122. For the same reason, any possible voidness, voidability or unenforceability of a payment or transaction carried out under this system or market and which may be detrimental to all the creditors, remains subject to the same solution: the law applicable to the payment system or financial market governs these cases.

123. To determine the law applicable to European payment systems account must be taken of the work in progress in the Community on those systems.

124. The reference to Article 5 means that protection of rights in rem of any kind of creditors or third parties over assets belonging to the debtor is always carried out in the same way under the Convention: by reference to the location of the assets, regardless of the type of creditor or institution which may benefit from its function as a guarantee. Rights in rem affect third parties and uniform treatment of them is essential in order to protect trade.

Article 10
Contracts of employment

125. Article 10 derogates from the general application of the law of the State of the opening of proceedings (Article 4) and makes the effects of the proceedings on employment contracts and on labour relations subject to the law of the Contracting State applicable to the contract of employment, including its law on insolvency.

This Article aims to protect employees and labour relations from the application of a foreign law, different from that which governs the contractual relations between employer and employees. For this reason, effects of the insolvency proceedings on the continuation or termination of the employment relationship and on the rights and obligations of each party under such relationship are to be determined by the law applicable to the contract under the general conflict of laws rules.

126. The 1980 Rome Convention will determine the law applicable to employment contracts (see, in particular, its Articles 6 and 7).

127. The word "solely" emphasizes that only the law applicable to the employment contract is applied in order to establish these effects and not the "lex concursus" as provided by Article 4. Any problem regarding possible conflicts between the two laws is therefore avoided.

128. Insolvency questions other than those relating to the impact of the opening of proceedings on contract and employment relationships remain subject to the general competence of the law of the State of the opening, ex Article 4. Thus, for instance, the following would be covered, the question of whether or not workers' claims arising out of their employment shall be protected by a privilege, the prescribed amount protected and the rank of the privilege if any, etc. In the same way as lodgement, verification and admission of claims, all these questions are subject to the law of the State of the opening (Article 4(2)(h)).

Guaranteed payments of workers' claims in cases of insolvency of the employer, ensured by a national institution under a wage guarantee scheme in the event of insolvency governed by the national law of a Contracting State, are subject to the law of that State.

Article 11

Effects on rights subject to registration

129. The application of the law of the State of the opening (F1) to determine the effects of the insolvency proceedings also on the assets of debtors located in another Contracting State may come into conflict with national registration systems, when this law provides for effects or consequences different from or unknown to the system of the State of registration (e.g. a statutory lien of the general body of creditors over the debtor's property).

130. The Convention does not try to modify the systems either of registration or of rights in rem of the Contracting States. The systems for the registration of property play a significant role in protecting trade and legal certainty. General confidence in its contents and consequences should be protected under the same conditions, whether the insolvency proceedings are opened in the State of registration or in another Contracting State.

To preserve these systems, Article 11 establishes an exception to the application of the law of the State of the opening. This exception is, however, more limited than the exceptions contained in Articles 8, 9 and 10 of the Convention. Contrary to these provisions, Article 11 does not submit the effects of the insolvency proceedings "solely" to the law of the Contracting State under the authority of which the register is kept. This means that the general applicability of the law of the State of the opening in accordance with Article 4 is not displaced. Hence, a sort of cumulative application of both laws is necessary.

Under Article 11, the law of the Contracting State of registration will therefore determine the modifications which, required by the law of the State of the opening, may be prompted by the insolvency proceedings and affect the rights of the debtor over immovable property, ships and aircraft subject to registration, the requisite entries in the register and the consequences thereof. In consequence, the law of the Contracting State of registration decides which effects of the insolvency proceedings are admissible and affect the rights of the debtor subject to registration in that State.

However, this rule does have certain disadvantages. While it makes access to different national registers easier, it means that the effects may be different for each Contracting State. The administration of the insolvency proceedings by a liquidator thus becomes more complex, although it increases in certainty. With that in mind, this rule is limited to registers on immovable property, ships and aircraft.

131. Article 11 does not refer to assets but to rights subject to registration in public registers, the purpose of which is to determine who is the holder or which are the rights in rem over the assets. It also includes systems of registration of deeds relating to immovable property to effect priorities such as the Registry of Deeds which exists in Ireland.

Article 11 refers only to the effects on the rights of the debtor over immovable property, ships or aircraft. For rights in rem, whether registered or not, of creditors or third parties acquired before the opening of the insolvency proceedings, see Article 5.

132. For the concept of "public register", see comments on Article 2.

Article 12

Community patents and trademarks

133. The Agreement relating to Community patents (1989 Luxembourg Agreement), Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark and Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights all create rights which cover the whole territory of the European Community.

This Convention opens up the possibility of insolvency proceedings with universal effect (thus encompassing the whole Community territory) if the debtor's centre of main interests is located in a Contracting State.

However, the Patent Convention contained in the 1989 Luxembourg Agreement (Article 41), the 1993 Regulation on the Community trademark (Article 21), and the 1994 Regulation on Community plant variety rights (Article 25), contain a rule to the effect that a Community right derived therefrom may be included only in the first proceedings (regardless of whether these are main or territorial proceedings) opened in a Contracting State. This rule was logical insofar as common regulations on international insolvency proceedings were lacking. With this Convention it is logical to allocate those Community rights to the main proceedings. Article 12 of the Convention seeks to modify the rule established by the Patent Convention, the Regulation on the Community trademark and the Regulation on Community plant variety rights and to replace it with Article 12.

134. As may be concluded from Article 3(1), Article 12 is operative only when the debtor has his centre of main interests in a Contracting State. In all other cases, i.e. when this centre is located outside the Community, the provisions of the Patent Convention (Article 41), the Regulation on the Community trademark (Article 21) and the Regulation on Community plant variety rights (Article 25) shall be applied.

Article 13
Detrimental acts

135. This provision must be taken in conjunction with Article 4(2)(m). The basic rule of the Convention is that the law of the State of the opening governs, under Article 4, any possible voidness, voidability or unenforceability of acts which may be detrimental to all the creditors' interests. This same law determines the conditions to be met, the manner in which the nullity and voidability function (automatically, by allocating retrospective effects to the proceedings or pursuant to an action taken by the liquidator, etc.) and the legal consequences of nullity and voidability.

136. Article 13 represents a defence against the application of the law of the State of the opening, which must be pursued by the interested party, who must claim it.

It acts as a "veto" against the invalidity of the act decreed by the law of the State of the opening.

This mechanism is easier to apply than other possible solutions based on the cumulative application of the two laws. It is now clear that all the conditions, content and the consequences of the voidability are borrowed from the law of the State of the opening.

The only purpose of Article 13 and the law governing the act concerned is to reject the application of that law in a given case.

137. In this respect, Article 13 provides that the rules of the law of the State of the opening shall not apply when the person who has benefited from the contested act provides proof that:

1. the act in question (e.g. a contract) is subject to the law of a Contracting State other than the State of the opening of the proceedings;

2. the law of that other State does not allow for this act to be challenged by any means. By "any means" it is understood that the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act (e.g. to the contract referred to in paragraph (1)).

"In the relevant case" means that the act should not be capable of being challenged in fact i.e. after taking into account all the concrete circumstances of the case. It is not sufficient to determine whether it can be challenged in the abstract.

138. The aim of Article 13 is to uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against interference from a different "lex concursus".

From the perspective of the protection of legitimate expectations, the operation of Article 13 is justified with regard to acts carried out prior to the opening of the insolvency proceedings, and threatened by either the retroactive nature of the insolvency proceedings opened in another country or actions to set aside previous acts of the debtor brought by the liquidator in those proceedings.

After the proceedings have been opened in a Contracting State, the creditor's reliance on the validity of the transaction under the national law applicable in non-insolvency situations is no longer justified. Thenceforth, all unauthorised disposals by the debtor are in principle ineffective by virtue of the divestment of his powers to dispose of the assets and such effect is recognised in all Contracting States. Article 13 does not protect against such an effect of the insolvency proceedings and it is not applicable to disposals occurring after the opening of the insolvency proceedings.

139. This rule covers both the main proceedings and the secondary proceedings (in each case with regard to the law of the State of the opening of the respective proceedings).

Article 14

Protection of third-party purchasers

140. This provision was initially based on the desire to protect the confidence of third parties in the content of property registers when the debtor, after the insolvency proceedings have been opened, disposes for consideration of an asset from the estate, and the opening of proceedings or the restrictions on the debtor have not yet been entered or referred to in the register in question. The final drafting of this Article goes further and covers all acts of disposal concerning immovable assets which take place after the opening of the insolvency proceedings.

To be protected by Article 14, it is necessary that the debtor dispose of the asset for consideration (e.g. not gratuitously).

141. In principle, any act of disposal by the debtor after the proceedings have been opened shall be ineffective in accordance with the law of the State of the opening (as this law deprives the debtor of his powers of disposal).

However, in order to protect trade and reliance on systems of publication of rights in rem, the protection of bona fide third parties should be no different in respect of proceedings in another Contracting State as compared to domestic proceedings.

If the proceedings opened in another Contracting State do not appear in the local register, the only way adequately to protect confidence in the system of publication regarding rights in rem over assets, without any loopholes, is to make the effects of disposal subject to the law of the Contracting State under the authority of which the register is kept or, in the case of immovable property, to the law of the Contracting State where the immovable property is located.

Property covered by this Article means an immovable asset, ships or aircraft subject to registration in a public register and securities the existence of which presupposes registration (see point 69).

An act of disposal must be understood to include not only transfers of ownership but also the constitution of a right in rem relating to such property.

Article 15

Effects of the insolvency procedure on lawsuits pending

142. The Convention distinguishes between the effects of insolvency on individual enforcement proceedings and those on lawsuits pending.

The effects on individual enforcement actions are governed by the law of the State of the opening (see Article 4(2)(f)) so that the collective insolvency proceedings may stay or prevent any individual enforcement action brought by creditors against the debtor's assets.

Effects of the insolvency proceedings on other legal proceedings concerning the assets or rights of the estate are governed (ex Article 15) by the law of the Contracting State where these proceedings are under way. The procedural law of this State shall decide whether or not the proceedings are to be suspended, how they are to be continued and whether any appropriate procedural modifications are needed in order to reflect the loss or the restriction of the powers of disposal and administration of the debtor and the intervention of the liquidator in his place.

C.CHAPTER II: RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

143.To recognize foreign judgments is to admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down.

The Convention accords immediate recognition of judgments concerning the opening, course and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings.

Recognition is automatic within the system of the Convention. It requires no preliminary decision by a court of the requested State.

144.Article 16 establishes the general principle of recognition, in the territory of the Contracting States (e.g. the Community), of a judgment opening insolvency proceedings adopted by the competent authorities of a Contracting State under Article 3 of the Convention.

145.Only insolvency proceedings within the scope of the Convention benefit from the system of recognition of the Convention. To fall within such scope, the proceedings must be listed in the Annexes to the Convention.

Proceedings not listed in those Annexes shall not be eligible for recognition under the Convention nor shall they prevent the recognition of proceedings provided for in the Convention even though they were opened earlier.

146. The general principle of recognition is valid for all proceedings opened in a Contracting State under Article 3, i.e. for both main proceedings and territorial, either secondary or independent. Obviously, in the second case recognition will be limited to the territorial effects of the proceedings.

147. A judgment opening proceedings need not necessarily be a final judgment (not subject to ordinary appeal) in order to enjoy recognition. Such judgment whether final or provisional shall have effect in the whole territory covered by the Convention as long as it is effective in the State of the opening of proceedings.

The Convention is based on the principle of Community trust and on the "favor recognitionis", so that national borders are no obstacle to the efficient administration of international insolvency proceedings throughout the Community.

148. The Convention imposes an obligation to recognize insolvency proceedings opened in another Contracting State, even when such proceedings cannot be brought against the debtor in that State, due to his professional capacity or to his public or private nature, as in the case of non-traders in certain countries.

Main insolvency proceedings may be opened in a State (F1) in accordance with its own law, although in another Contracting State (F2) insolvency proceedings cannot be brought against the debtor by virtue of his professional capacity (i.e. a non-trader). The second State (F2) in such a case is obliged to recognize and, where appropriate, enforce the foreign judgment. The State requested (F2) cannot invoke public policy in its territory to oppose recognition on those grounds (under Article 26).

Since the main proceedings can be opened only if the debtor has his centre of main interests in the State of the opening, it seems logical that the decision of the law of that State to allow collective insolvency proceedings against that debtor should be respected by the other Member States, whose connection with the debtor is restricted to the existence of an establishment or assets.

However, these other States (i.e. F2) will not be obliged to open local secondary proceedings against that debtor, since the conditions laid down by their insolvency law, which is applicable pursuant to Article 28, have not been fulfilled.

The opposite hypothesis, i.e. the impossibility of opening main proceedings because the law of the contracting State competent under Article 3(1) does not allow it, presents no difficulties. The Convention expressly recognizes the possibility of opening territorial proceedings. Where the law of a State which has jurisdiction under Article 3(2) allows insolvency proceedings against that kind of debtor, it will be possible to open independent territorial proceedings (see Article 3(4)).

Naturally, the territorial proceedings have effects only in the State of the opening of proceedings and do not extend them to the territory of other States (see point 156); they do not therefore affect the situation of the debtor in other States. Only the main proceedings have that effect (see point 212)

149. The relationship between the recognition of main proceedings under Article 3(1) and the possibility of opening territorial proceedings under Article 3(2) is referred to in Article 16(2). The recognition of main proceedings does not preclude the subsequent opening of secondary territorial proceedings (see point 212).

Article 17
Effects of recognition

150. Whereas Article 16 establishes the general principle of the recognition of a judgment opening insolvency proceedings, Article 17 distinguishes between the recognition of main proceedings and that of territorial proceedings.

151. Recognition of the main proceedings

The universality of main proceedings opened under Article 3(1), embracing all the debtor's assets and creditors, implies recognition of the proceedings and their effects in the States in which those assets or creditors are situated. The Convention guarantees this universality through the setting up of a system of mandatory automatic recognition in all Contracting States. The Convention reinforces this by making the consequence of recognition the "extension" to all other Contracting States of the effects attributed to those proceedings by the law of the State of the opening of proceedings.

152. "Automatic recognition" means immediate recognition by virtue of the Convention (ipso iure recognition) without any need to resort to preliminary proceedings to declare it effective.

Since recognition is not subject to prior proceedings, the authorities of the requested State which may be confronted with the judgment opening proceedings may determine incidentally whether it is a judgment under the Convention and whether grounds for refusal under Article 26 exist.

153. Article 17 lays down a model of recognition based on the extension of the effects of the judgment in a Contracting State to the whole territory covered by the Convention. Proceedings opened in another Contracting State will not, as regards their effects, be equated with national proceedings but will be recognized in other Contracting States with the same effects attributed to them by the law of the State of the opening (= "extension model").

The law of the State of the opening (and not the law of the requested State) shall be applicable to determine those effects. This shall apply to all the effects of the proceedings in another Contracting State, both procedural and substantive (see point 90). The substantive effects are included by virtue of the general applicability which the Convention attributes to the law of the State of the opening (see Article 4) and they are therefore subject to the same exceptions as are provided for by the Convention in respect of that law (see Articles 5 et seq.).

154. The system of automatic recognition and the extension model reinforce the universality of the main proceedings. From the time fixed by the law of the State of the opening, the judgment opening proceedings produces its effects with equal force in all Contracting States. The divestment of the debtor, the appointment of the liquidator, the prohibition on individual executions, the inclusion of the debtor's assets in the estate regardless of the State in which they are situated, the obligation to return what has been obtained by individual creditors after opening, etc., are all effects laid down by the law of the State of the opening which are simultaneously applicable in all Contracting States.

155. The recognition of main proceedings under Article 3(1) shall be limited by the opening of territorial proceedings in accordance with Article 3(2).

The main proceedings cannot produce its effects in respect of the assets and legal situations which come within the jurisdiction of territorial proceedings opened. The territorial proceedings protect local interests and for this purpose the national law applies. However, the main proceedings may influence the conduct of territorial proceedings as a result of coordination and subordination rules which derive from the Convention and to which territorial proceedings are subject.

156. Recognition of territorial proceedings

Territorial proceedings can affect only the assets situated in the State of the opening. Recognition cannot imply, therefore, the extension of the effects of those proceedings to property situated in other Contracting States. Recognition of territorial proceedings means admitting the validity of the opening of the local proceedings and of the effects which they produce over the assets located in the territory of the State of the opening, which cannot be challenged in other Contracting States.

This is the case, for example, where the liquidator in those proceedings has to demand the return of assets belonging to the estate in the secondary proceedings which were transferred abroad without authorization after the opening of proceedings.

Moreover the opening of the territorial proceedings limits the extra-territorial effects of the main proceedings which may no longer include the assets situated in the State where those territorial proceedings were opened, except for the surplus assets in the secondary proceedings under Article 35. The main proceedings must observe that limitation.

157. Article 17(2), second sentence, covers the case of territorial proceedings, either secondary or independent, which may conclude by authorizing the debtor to postpone payment or even by discharging the remaining debt.

It may be clearly seen that, in the case of proceedings under Article 3(2), this reduction of creditors' rights can apply only to the debtor's estate situated in the State of the opening of the territorial proceedings. The creditors concerned will, therefore, be able to seek unlimited satisfaction of all their debts from the assets situated in other Contracting States. Naturally, nothing prevents the creditors from voluntarily agreeing to a further reduction of their rights affecting assets situated outside the State of opening of territorial proceedings. However, that supplementary restriction can be relied on only against creditors who have accepted it personally and not by a majority vote. This principle should be seen in conjunction with Article 34(2).

Article 18
Powers of the liquidator

158. The main effect of the recognition of insolvency proceedings opened in a Contracting State is the recognition of the appointment of the liquidator and of his powers in all other Contracting States. The term "liquidator" must be understood in the wide sense of the definition given in Article 2 of the Convention.

159. By virtue of that recognition, the liquidator appointed in proceedings in a Contracting State will be able, in other Contracting States, to exercise the powers conferred on him by the law of the State of the opening.

The liquidator's powers, their nature and their scope will be determined by the law of the State of the opening of the proceedings in respect of which he was appointed. That law also establishes the liquidator's obligations.

160. As the Convention provides for a system of automatic recognition of insolvency proceedings, the appointment of the liquidator and the exercise of his powers are covered by that same automatic effect. Neither the exequatur nor the publication provided for in Article 21 is necessary for the liquidator to be able to exercise his powers in other Contracting States.

161. Within the limits laid down in the Convention, the liquidator in the main proceedings may exercise all his powers in the other Contracting States (i.e. in the whole of the territory of the Community).

In order to remove any doubts, Article 18 expressly stipulates that the liquidator may even transfer assets out of the State in which they are situated. In doing so, the liquidator must respect Articles 5 and 7 of the Convention, since the proceedings cannot affect rights in rem of creditors or third parties over assets situated, at the time of the opening, in a Contracting State other than the State of the opening of proceedings. To the extent that it is required by the right in rem, the removal of those assets to another State may be subject to the consent of the holder of the right in rem.

The creditors can prevent such transfer by requesting the opening of secondary proceedings concerning those assets (provided that the conditions laid down in Article 3(2) and (3) are fulfilled).

162. The powers of the liquidator in the main proceedings are subject to two general restrictions.

163. The first derives from the possible opening of territorial insolvency proceedings in another Contracting State (under Article 3(2)).

This restriction is logical, since the assets cannot be subject to the powers of two different liquidators. Once territorial proceedings have been opened, the direct powers of the liquidator in the main proceedings no longer apply to assets situated in the State of the opening of the territorial proceedings. The liquidator in the territorial proceedings has exclusive powers over those assets. This does not imply that the main liquidator loses all influence over the debtor's estate situated in the other Contracting State, but that that influence must be exercised through the powers conferred on that liquidator by the Convention to coordinate the territorial proceedings and the main proceedings (see Articles 31 to 37).

Article 18 extends this first restriction to cases where provisional protective measures incompatible with the exercise of those powers have been already adopted as a consequence of the request to open territorial proceedings.

The liquidator in the main proceedings is entitled under the Convention to request secondary proceedings (Article 29).

164. The second restriction provided for in Article 18(3) derives from the liquidator's obligation, when exercising his powers, to comply with the law of the State within the territory of which he intends to take action.

(a) The general principle of prohibiting the exercise of coercive power in another State also applies to a foreign liquidator. The latter can take action only in other States if he complies with that principle. Hence Article 18 expressly prohibits direct recourse to coercive measures. Any use of force or coercive action is excluded.

If persons affected by a liquidator's acts do not voluntarily agree to their performance and if coercive measures are required with regard to assets or persons, the liquidator must apply to the authorities of the State where the assets or persons are located to have them adopted and implemented. The Convention allows a foreign liquidator from another Contracting State, on the basis of the automatic recognition of his appointment and his powers, to petition those authorities to adopt distraint measures against such assets or persons in accordance with national law.

(b)The liquidator shall exercise his powers without infringing the laws of the State in which he takes action.

For example, the liquidator may transfer the assets belonging to the estate to another Contracting State. This power may be subject to rules limiting the free movement of goods.

Thus, if an asset is part of the historical and cultural heritage of a Contracting State, it may be subject to an export ban protected under Article 36 of the EC Treaty. This prohibition naturally also applies to the liquidator. With regard to this type of asset, he may not exercise his general power to transfer assets.

(c)With regards to procedures for the realisation of assets, the liquidator shall comply with the law of the State where the assets are located. The law of the State of the opening shall establish the extent of the powers of the liquidator and the manners in which they may be exercised. Only that law can determine, for example, whether the sale of immovable property can be private (person-to-person) or if sale by public auction is necessary. However, once the form of sale has been decided according to that law, the procedures by which the assets are realized must be in accordance with the provisions of national law. In our example, if the law of the State of the opening requires a sale by public auction, the procedure of carrying out the sale in the State where the immovable property is situated shall be determined by the law of the latter State.

165.The liquidator in territorial proceedings is subject to a supplementary restriction. His powers of administration and disposal have the same scope as the proceedings from which they derive, i.e. they are territorial. However, assets subject to these proceedings may have been removed to other Contracting States after the opening of proceedings.

In this case, Article 18(2) clearly states that the liquidator may apply to these other Contracting States and request from their courts the return of the asset or may insist on such transfer for any other purpose useful to the local proceedings. He may also bring any action to set aside which is in the interest of the creditors (see point 224).

166. The Convention contains no rule regarding opposition to the exercise of powers by the liquidator. General rules shall therefore be applicable.

Consequently, the authorities of the State in which the powers are intended to be exercised shall have jurisdiction to take a decision if the grounds for opposition lie in the non-recognition, in accordance with the Convention, of the proceedings opened in another Contracting State or of the judgment appointing the liquidator. This is also the case where the grounds for opposition are a breach by the liquidator of the provisions of the Convention which govern the exercise of his powers in other States, for instance, Article 18(1) or Article 3(3).

If the opposition concerns the substance of the exercise of those powers, i.e. the justification for a measure which the liquidator intends to take, jurisdiction lies with the judicial authorities of the State of the opening of proceedings.

Article 19

Proof of the liquidator's appointment

167. This provision derives from Article 2 of the 1990 Istanbul Convention. In contrast to the draft Community Convention of 1982, it was not thought necessary to establish a uniform model for the certificate attesting the appointment of the liquidator.

168. The proof of the liquidator's appointment may be established by a duly certified copy of the original decision, issued by a person authorized by the State in which the decision originated or by any other certificate issued by the competent court attesting the appointment.

169. The certified copy of the decision or the official certificate of the appointment shall require no legalization or other similar formality, such as the certificate ("apostille") provided for by the 1961 Hague Convention abolishing the requirement of legalization for foreign public documents.

A translation into the official language or languages of the Contracting State in which the liquidator intends to act may be required. This translation shall take into account the requirements established in this State regarding translations of official documents. For example, if we accept the parallel with the provisions of Article 48, second subparagraph, of the 1968 Brussels Convention the translation is certified by a person authorized for that purpose by one of the Contracting States, whether that of the opening of proceedings or that in which the liquidator intends to exercise his powers.

170. The Convention contains no rules regarding the means of proving the scope of the powers of the liquidator.

It seems reasonable that, in the case of doubt or opposition, these powers, based on the law of another Contracting State, are established by the person who invokes them. Proof may be by means of a certificate issued by the Court appointing the liquidator, which shall define his powers, or by any other means of evidence admitted by the law of the State where the liquidator intends to exercise his powers.

Article 20
Return and imputation

171. The Convention considers its geographical scope (the Community) to be a single economic area. The main proceedings shall therefore produce effects within the whole of the territory of the Contracting States. Also for this reason, where the Convention allows for the opening of secondary proceedings, the whole area should be taken as a reference for the distribution of dividends, making it compulsory to take into account the sum obtained in each set of proceedings by means of a sort of consolidated account of the dividends obtained on a European scale. The aim of this Article is to guarantee the equal treatment of all the creditors of a single debtor.

172. Rule regarding return (Article 20(1))

The rule on return is the consequence of the universality of the main proceedings, which encompass all the debtor's assets, wherever they are situated, and affect all the creditors. As a result of this principle of universality, it is evident that a creditor who, after the opening of proceedings, obtains total or partial satisfaction of his claim individually (by means of payment by the debtor or execution of assets situated in other States) breaches the principle of collective satisfaction on which the insolvency proceedings are based. Hence, the obligation to return "what has been obtained". The liquidator may demand either the return of the assets received or the equivalent in money.

173. The previous rule operates within the limits of Articles 5 and 7, which exclude from the scope of the main proceedings rights in rem of creditors and third parties in respect of the debtor's assets situated outside the State of the opening of proceedings at that time. As long as these Articles apply, a creditor who obtains satisfaction of claims guaranteed by rights in rem by realization of the security does not enrich himself to the detriment of the estate and does not breach the principle of collective satisfaction (see comment on Article 5).

174. Rule regarding imputation (Article 20(2))

The Convention allows for the opening of parallel insolvency proceedings (see Article 3). Thus, when a creditor obtains satisfaction in insolvency proceedings opened in another Contracting State, he does not breach a law, but simply exercises a right (see Article 32(1)).

For this reason, Article 20(2) allows a creditor to keep what he has obtained in the first proceedings in which distribution took place. Nevertheless, in order to guarantee the equality of all creditors on a Community level, they may not, once this payment has been received, participate in other distributions until all creditors of the same ranking have obtained equal satisfaction.

175. The method of calculation is relatively simple. It comprises four rules:

1. Nobody may obtain more than 100% of his claims.

2. The total original amount of the claim (100% of its initial value) shall be taken into account, and not the remaining amount (satisfaction obtained in other proceedings is not deducted).

If claims were not taken into account in each of the proceedings at 100% of their amount (without deducting the part satisfied in other proceedings), it would not be possible to guarantee the equal treatment of creditors participating in several proceedings.

The only exception to the second rule is that of claims secured by rights in rem or through a set-off, the secured parts of which are not affected by insolvency proceedings (see Articles 5, 6 and 7). The Convention lays down no rule on whether the amount of the original claim or the remaining claim shall be taken into account; this question is left to the rules of the law of the State of the opening (see Article 4(2)(i)).

3. A claim is not taken into account in the distribution until such time as the creditors with the same ranking have obtained an equal percentage of satisfaction in these proceedings as that obtained by its holder in the first proceedings.

For example, if creditor X in proceedings opened in a Contracting State F1 has obtained 5% on an ordinary unsecured claim with an amount of 75, he cannot take part in the distribution in the proceedings opened in another Contracting State F2 (where he has also lodged his claim) until the ordinary unsecured creditors have obtained 5%. If in F2 the percentage of satisfaction attains 8% for ordinary unsecured creditors, creditor X may participate in it only with regard to the difference, i.e. up to 3% (8% minus 5% already obtained in F1 = 3%). This 3% shall apply to the whole claim (to the 100% of its initial amount of 75), in accordance with the second rule mentioned above.

Conversely, if the first proceedings are in F2 where the creditors obtain a percentage of satisfaction of 8 %, despite also having lodged their claims in the proceedings opened in F1, they shall not participate in the distribution in F1, since the ordinary unsecured creditors there obtain only 5%, whereas they have already obtained 8% in F2.

Thus, regardless of which proceedings take place first, the creditors of both F1 and F2 who have lodged their claims in both proceedings shall obtain an equal final dividend (8% of the total claim).

4. The ranking or category of each claim is determined for each of the proceedings by the law of the State of the opening (Article 4(2)(i)). Since different insolvency laws apply to the different proceedings (each is governed by its own national law), the ranking of the same claim lodged in two different proceedings may not be the same in both. The only ranking or category which is taken into account in order to apply Article 20(2) is that given to the claim by the law governing proceedings in which distribution is to be effected.

Hence, for the calculation of the dividend, only the percentage of satisfaction obtained in other proceedings, and not the rank or category which the claim enjoyed in those other proceedings, is taken into account. Thus in our example, if the claim of creditor X is an ordinary unsecured claim in F1 but it benefits from a preference in F2, it follows that it has already obtained 5% in F1, no matter what the ranking was; this percentage is, for the purposes of calculation, compared to the dividend which the rules in force in F2 apply to preferential claims. If these claims obtain a dividend of 25% in F2, creditor X shall benefit from a dividend of 20% in F2 (25% minus 5% already obtained in F1 = 20%).

176. In practice, if a number of claims have been lodged both in the insolvency proceedings opened in F1 and F2, the liquidator in the F2 proceedings may calculate the distribution in F2 by stages, for each rank. In our example, up to 5% (dividend obtained in F1) he will not take into account the claims already satisfied in F1. Once the claims lodged only in F2 have attained 5%, if there are remaining assets to be distributed he will make a further calculation introducing also the claims already satisfied in F1 together with the claims lodged only in F2, in order to determine the new dividend.

Article 21

Publication

177. The publication of the opening of insolvency proceedings in another Contracting State is not a precondition for the recognition of those proceedings or for the recognition and exercise of the powers of the liquidator appointed in such proceedings.

The principal aim of publication is to contribute to the security of trade in the States where the debtor has assets or where he conducts business, by drawing his creditors' and future contracting parties' attention to the legal situation of the debtor.

178. Although recognition is not dependent on publication of the opening of the proceedings, publication may produce significant legal effects in relation to the evaluation of the behaviour of the persons concerned, within the framework of either the Convention (for example Article 24) or the national law to be applied.

179. The initiative to publish in other States is vested in the liquidator. For this purpose, he will have to evaluate all the circumstances, (e.g. individual creditors cannot be identified) and the need for trade security (e.g. an establishment remains in operation in another State where future creditors should be informed).

This rule shall not prevent the courts of the State of the opening from ordering publication if its national insolvency law provides for this.

180. Any Contracting State in which the debtor has an establishment may provide for mandatory publication of the opening of insolvency proceedings. In no cases may this mandatory publication constitute a precondition for recognition (this would breach the rules of the Convention).

Article 21(2) explicitly states that in the case of mandatory publication, the latter must be arranged by the liquidator or the authority designated by the State of the opening of proceedings. Where necessary, the national law of the State which provides for such mandatory publication will determine the liquidator's liability when the latter has not taken the necessary measures to arrange publication.

181. The Convention establishes no uniform mechanism for publication but stipulates that it should be in accordance with the arrangements laid down by the law of the State in which it is to take place. On the other hand, the Convention does determine what information is to be published: the basic content of the judgment opening proceedings and, where necessary (for example, if there are a number of appointments), the basic content of the decision appointing the liquidator. In both cases, it should always indicate the identity of the liquidator appointed and specify the jurisdiction rule applied (Article 3(1) or Article 3(2)). This does not exclude other items of information which may be of interest to third parties or creditors (deadlines for lodging claims, etc.).

In the case of publication as referred to in Article 21(2), the compulsory information required may not go beyond the information mentioned in paragraph 1 of that Article.

Article 22

Registration in a public register

182. Registration in a public register is not a precondition for recognition of foreign insolvency proceedings or for recognition of the powers conferred on the liquidator appointed in another Contracting State. Nevertheless, the registers play a significant role for the trade security. The trust of third parties acting in good faith on the basis of information contained in these registers is protected in all Member States. For this reason, but also to guarantee the full effectiveness of the insolvency proceedings, the Convention empowers the liquidator to request the registration of the judgment opening insolvency proceedings in another Contracting State.

This rule shall not prevent the courts of the State of the opening from ordering the liquidator to register in other States, if its national insolvency law so provides.

The form and content of the registration shall be subject to the law of the Contracting State under the authority of which the register is kept. Such Contracting State should allow registration of proceedings in another Contracting State under conditions similar to those applied for the registration of national proceedings.

183. The Contracting States cannot demand an exequatur as a precondition for access to the registration of a foreign judgment. Recognition shall be automatic.

Each State may, however, decide if the authority responsible for the register at the time of registration should, incidentally, check whether the decision is recognizable under the Convention.

184. The registration requirement relates to the main proceedings, since by definition the territorial proceedings cannot affect assets situated outside the State of the opening of proceedings.

185. The Contracting States may request mandatory registration in their registers (when the debtor is a holder of registered assets, for example). In no case may such mandatory publication be a precondition for recognition.

Where necessary, the national law of the State of registration will determine the liquidator's liability when the latter has not taken the necessary measures to ensure such registration.

Article 23

Costs

186. The Convention considers the expenditure arising from the publication and registration measures laid down in Articles 21 and 22 as costs incurred in the proceedings. The proposal by some delegations to limit this definition to the expenditure arising from action by the liquidator (Article 21(1) and Article 22(1)) and not to that arising from the mandatory publication or registration requested by a State different from the State of the opening and conduct of proceedings was not approved.

Article 24

Honouring of an obligation to a debtor

187. The automatic recognition of insolvency proceedings opened in another Contracting State, and the lack of any general system of prior publication, guarantee the immediate effectiveness of the judgment opening proceedings in all the Contracting States.

Nevertheless, in some cases, a number of those persons may be unaware of the opening of proceedings and may act in good faith in contradiction with these new circumstances. In this connection, Article 24 provides for a solution to the problem where an obligation is honoured in good faith for the benefit of a debtor, when it should have been honoured for the benefit of the liquidator in the proceedings in another Contracting State. This Article establishes that the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.

Article 24 is therefore based on a double presumption. If the obligation is honoured before the publication provided for in Article 21 has occurred in the State concerned (e.g. the State in which the person honouring the obligation is established or the State in which the obligation is honoured, as the case may be), there shall be a presumption of ignorance. If the obligation is honoured after publication has taken place, there shall be a presumption of awareness. These two presumptions are rebuttable, but under each of them the burden of proof shifts from one party to the other. So, for instance, once publication has taken place, it shall be for the debtor honouring the obligation in question to provide evidence rebutting the presumptions.

188. In Article 24(1) the place where an obligation is honoured means the place where the obligation has been performed in fact by the debtor of the obligation.

Article 25

Recognition and enforceability of other judgments

189. Introduction

The Convention refers firstly to the recognition of the opening of insolvency proceedings (Article 16) and to its effects (Articles 17 to 24).

The recognition of judgments relating to the conduct and closure of the insolvency proceedings and of judgments adopted in the framework of those proceedings is dealt with generally in Article 25. This provision also regulates the enforcement of all judgments, including, where necessary, the judgment opening proceedings, as regards all its consequences except the opening itself (see point 143).

190. To enforce is to put into execution. Enforcement implies the exercise of the State's coercive power to ensure compliance.

The principle of exclusive territorial sovereignty precludes the direct exercise of a State's power within the territory of other States. By virtue of this principle, direct application of coercive powers is limited to the authorities of the State where the assets or persons to which this action relates are situated. The Convention has not altered this state of affairs.

As a consequence, the enforcement of judgments of other Contracting States shall depend on prior authorization by the authorities of the State in which it must be carried out. This authorization is obtained by means of a special procedure: the procedure called *exequatur*.

The *exequatur* does not deal with the enforcement itself, but with the prior authorization needed for enforcement. Enforcement in the strict sense shall be carried out by the competent national authorities by means of the procedures established by the national law for the enforcement of equivalent domestic judgments. The Convention on insolvency proceedings, like the 1968 Brussels Convention, deals only with the first aspect (prior authorization and its conditions).

If the conditions laid down by the Convention are fulfilled, the authorities of the requested State shall be obliged to grant this authorization, pursuant to the Convention. National law thereafter determines the methods by which the judgment of another Contracting State is enforced by the national authorities. The usual methods of coercive enforcement of the national law will be used, adapted, where necessary, to guarantee the "effet utile" of the Convention, i.e. to render effective in other States the specific decision taken by the foreign court.

191. Judgments relating to insolvency proceedings (Article 25(1), first subparagraph)

Judgments relating to the conduct and closure of insolvency proceedings present no specific problem of characterization.

The recognition of these judgments operates in the same way and with the same effects as the judgment opening proceedings which we have already mentioned (see Articles 16 and 17).

The Convention subjects any composition approved by the competent court of the State of the opening to the same system of recognition.

192. As regards the enforcement of all these judgments and, where necessary, of the composition, various possibilities were examined at the negotiations. The idea finally adopted was to use the same system for the enforcement of judgments in civil and commercial matters, as provided for by the 1968 Brussels Convention. This explains the reference in Article 25(1) to the rules on enforcement in the 1968 Brussels Convention.

Thus, the simplified system of exequatur provided for in that Convention will be used for the enforcement of judgments adopted in the framework of insolvency proceedings (see Articles 31 to 51 of the 1968 Brussels Convention; for a thorough analysis of that system see also the reports on that Convention).

As under the 1968 Brussels Convention (see Article 31 thereof), in order for enforcement to take effect in the State requested, the judgment should be already enforceable in the State in which it was given (State of origin) and that effect should not have been suspended there. A judgment cannot produce more effects in other States than in the State of origin.

However, grounds for rejection of the exequatur are taken not from the 1968 Brussels Convention (Article 34(2) of the 1968 Brussels Convention is expressly excluded), but from the Convention on insolvency proceedings (see Article 26).

193. It is important to stress that Article 25(3) excludes from the obligation to recognize and enforce those foreign judgments which might result in a limitation of the personal freedom or postal secrecy of the insolvent debtor or of any other person who may be affected by the limitations derived from the insolvency proceedings.

This is an area which relates directly to fundamental rights and the Contracting States preferred to retain their freedom as to the recognition and enforcement of such decisions, regardless of the Convention on insolvency proceedings. Each State will decide autonomously on the treatment of such decisions when they originate in another Contracting State.

194. Judgments arising from insolvency proceedings (Article 25(1), second subparagraph)

The Convention also governs the recognition and enforcement of judgments arising from insolvency proceedings. These are judgments directly deriving from bankruptcy law which have a direct link to the insolvency proceedings but do not relate to the opening, conduct and closure of insolvency proceedings.

Recognition and enforcement of such judgments are always governed by the Convention whether they are adopted by the bankruptcy court or by an ordinary court, as could be the case under national law.

195. The *raison d'être* of this provision derives from the Judgment of the Court of Justice of 22 February 1979 (Case 133/78) (*Gourdain v. Nadler* [1979] ECR p. 733). Called upon to interpret Article 1(2) of the 1968 Brussels Convention (which excludes the field of bankruptcy, winding-up of insolvent companies, compositions and analogous proceedings from its scope), the Court of Justice adopted a criterion to define bankruptcy based on the nature of the action undertaken. According to this criterion, actions the direct legal basis of which is the insolvency law and which are closely linked with the insolvency proceedings are not covered by the 1968 Brussels Convention. The character of the judicial body which decides on this action is of no importance.

In accordance with this decision of the Court of Justice, such actions should be subject to the Convention on insolvency proceedings or, otherwise, in the overall Convention rules there might be unjustifiable gaps between the general Convention and the specific Convention. For this reason, Article 25(1), second subparagraph, of the Convention on insolvency proceedings expressly adopts the same criterion of delimitation.

196. In order for the Convention on insolvency proceedings to apply it is necessary that the action undertaken directly derives from insolvency law and be closely connected with the insolvency proceedings.

Such is the case of actions which are based on (and not only affected by) insolvency law and are only possible during the insolvency proceedings or in direct relation with them. It includes actions to set aside acts detrimental to the general body of creditors (see Article 13); actions on the personal liability of directors based upon insolvency law, i.e. the "action en complément pour insuffisance d'actif" vis-à-vis the managers of the company provided by the French Law, which the Court of Justice of the European Communities considered as a bankruptcy action in its Judgment of 22 February 1978, Case 133/78; actions relating to the admission or the ranking of a claim; disputes between the liquidator and the debtor on whether an asset belongs to the bankrupt's estate, etc.

However, actions deriving from law other than that relating to insolvency should not be included, even though they may be affected by the opening of proceedings (actively or passively). Such is the case of actions on the existence or the validity under general law of a claim (e.g. a contract) or relating to its amount; actions to recover another's property the holder of which is the debtor; and, in general, actions that the debtor could have undertaken even without the opening of insolvency proceedings.

197. The purpose of Article 25(2) is to avoid gaps between the Convention on insolvency proceedings and the 1968 Brussels Convention. The exclusion of insolvency proceedings as provided for in Article 1(2) of the 1968 Brussels Convention should be interpreted in accordance with the definition of insolvency proceedings given by the Convention on insolvency proceedings and the criteria incorporated in Article 25 thereof.

198.Preservation measures (Article 25(1), third subparagraph)

The same system of recognition and enforcement shall apply to preservation measures ordered by a court having jurisdiction under Article 3(1) after the request for the opening of insolvency proceedings.

Article 25 covers preservation measures adopted both before and after the opening of insolvency proceedings, Article 25(1) third subparagraph ensures that from the moment of the request of the opening of insolvency proceedings covered by the Convention, all preservation measures necessary to protect the future effectiveness of those proceedings fall under the system of this Convention.

195.The reason for this rule lies in the case law of the Court of Justice of the European Communities. According to the judgment of 27 March 1979 (Case 143/78, De Cavel v. De Cavel [1979] ECR p. 1055), provisional orders and protective measures shall be included in the scope of the 1968 Brussels Convention, not by virtue of "their own nature" but of "the nature of the rights which they serve to protect". Since insolvency proceedings are expressly excluded from the scope of the 1968 Brussels Convention (Article 1 subparagraph 2), that Convention cannot apply to measures adopted prior to the opening of insolvency proceedings to guarantee its future effectiveness. In view of the practical significance of preservation measures in insolvency matters it seemed logical to establish a rule expressly including those measures in the scope of the Convention.

200. The resulting system for preservation measures is similar to the one laid down by the 1968 Brussels Convention for preservation measures in civil and commercial matters (see, however, point 207). This solution is of immediate practical importance. There are many examples of preservation measures that should have extraterritorial scope and cover the whole Community (e.g. after the request for the opening of proceedings and with sufficient grounds, attempted fraudulent concealment of assets, the judge who has jurisdiction under Article 3(1) issues a provisional injunction prohibiting the disposal of assets by the debtor).

201. To understand the recognition and enforcement system for preservation measures, it must be taken into account that this Convention (as well as the 1968 Brussels Convention) governs both jurisdiction for adopting binding judgments (which is attributed to the courts of the State where the centre of the debtor's main interests is situated (F1)) and the recognition and enforcement of such judgments in other Contracting States.

The court having jurisdiction under Article 3(1) also has jurisdiction to decide, for example, the seizure of the debtor's assets, even though they are situated abroad, or any other preservation measure. This decision shall be entitled, according to Article 25, to its recognition and enforcement in the Contracting State where the assets concerned are situated (F2).

Recognition and enforcement of that decision always fall under the exclusive authority of the courts of the State where the measure is to be carried out (F2).

The courts in F2 will only verify that it is a decision covered by the Convention, that it emanates from the judge who claims jurisdiction under Article 3(1) and that the said measure does not breach public policy. It is not necessary, nor may it be requested, that the requirements laid down by the national law of F2 for the direct adoption of equivalent preservation measures be fulfilled.

Once the exequatur has been granted according to the Convention, the enforcement itself shall be done using the mechanisms of enforcement available under the domestic law of F2 (see point 190).

Article 26

Public policy

202. Defences against recognition and enforcement – Introduction

The Convention is based on the principle of Community trust and on the general legal presumption that the foreign judgment is valid. For this reason it establishes that the only ground for opposing recognition is that the foreign judgment is contrary to the public policy of the requested State. As a consequence:

1. The foreign judgment cannot be the subject of review as regards its substance (révision au fond).

All questions regarding the substance must be discussed before the courts of the State of the opening of proceedings. In the State where recognition or enforcement is requested, the court may only decide whether the foreign judgment will have effects contrary to its public policy.

2. The Convention contains no provisions as to the verification of the international jurisdiction of the court of the State of origin (the court in the State of the opening of proceedings which has jurisdiction under Article 3 of the Convention). The courts of the requested States may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a Contracting State which claims jurisdiction under Article 3 of the Convention.

It is for the judicial authorities of the State in which the judgment originated (F1) to verify and control its international jurisdiction under the Convention. Any interested party seeking to challenge the jurisdiction of a national court must go to the State of the opening of proceedings to appeal against the decision asserting jurisdiction. The court may refer the interpretation of Article 3 (international jurisdiction) to the Court of Justice of the European Communities for a preliminary ruling (see Article 44).

203.Public Policy

The exception in Article 26 is the traditional exception that a judgment of a foreign court need not be recognised or enforced if such recognition or enforcement is contrary to the public policy in the Contracting State in which recognition or enforcement is sought.

204.The public policy exception ought to operate only in exceptional cases. For this reason Article 26 requires recognition or enforcement of the foreign judgment to be "manifestly" contrary to public policy.

Furthermore, Article 26 does not require the compatibility with public policy of the rule or principle applied by the foreign court to be ascertained in the abstract, but that the result of recognition or enforcement of the judgment offends against public policy. Verification of conformity with public policy is directed towards the result of the recognition or enforcement, which means that all the circumstances peculiar to the case, including the connection with the requested State, are relevant.

205.Public policy derives from national law, and therefore the concept does not necessarily have a uniform content throughout the Community. Public policy is based on the fundamental principles of the law of the recognizing State. It involves, in particular, constitutionally protected rights and freedoms, and fundamental policies of the requested State, including those of the Community.

However, public policy cannot be used by Contracting States to unilaterally challenge the system of the Convention. Unreasonably wide interpretations of public policy are not covered by Article 26. (See also point 208).

206. Public policy operates as a general clause as regards recognition and enforcement, covering fundamental principles of both substance and procedure.

Public policy may thus protect participants or persons concerned by the proceedings against failures to observe due process. Public policy does not involve a general control of the correctness of the procedure followed in another Contracting State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings. Rights of participation and non-discrimination play a special role in the case of plans to reorganize businesses or compositions, in relation to creditors whose participation is hindered or who are the subject of unfounded discrimination.

The 1968 Brussels Convention deals separately, in Article 27, with the conditions concerning the serving of documents and the time necessary to prepare the defence, which form part of (but do not exhaust) the guarantees of the right of defence. However, in view of the special nature of insolvency proceedings, which are collective proceedings with special rules of individual notice (Article 40) and publicity (Article 21), and taking into account that the most important criterion of international jurisdiction is the State of the debtor's centre of main interests, which in principle will normally be that of the domicile or seat of the debtor, the group preferred to leave these conditions to case law.

However, if within the context of insolvency proceedings individual decisions are taken vis-à-vis a specific creditor, it seems reasonable to provide guarantees equivalent to those laid down in Article 27 of the 1968 Brussels Convention.

207. All the Contracting States provide for the possibility of taking, under certain urgent circumstances, ex parte preservation measures without an ex ante hearing of the party concerned. Naturally, for these measures to be constitutional, in most States they are subject to special requirements guaranteeing respect of due process (e.g. cumulatively, evidence of a good prima facie case, serious urgency, lodging of a guarantee by the applicant, immediate notification of the person concerned and the real possibility of challenging the adoption of the measures).

The Convention does not rule out the possibility of such measures being recognized "by virtue of their nature". Whether they are recognized (and, where appropriate, enforced) or not depends on whether or not they are compatible with the public policy of the requested State in which the judgment is to take effect (F2).

208. For the reasons explained in point 193, the Convention excludes judgments affecting personal freedom or postal secrecy from the obligation of recognition and enforcement, so that the States will not be obliged to resort to this exemption clause (Article 25(3)).

Conversely, as stated in point 148, in order to prevent the use of public policy to paralyse such recognition or enforcement, the Convention does not allow the use of the status of the debtor (e.g. trader/non-trader) to prevent recognition of a foreign judgment (second subparagraph of Article 16(1)).

209. Public policy may result in total or partial rejection of the foreign judgments.

210. The Portuguese Republic indicated in a unilateral statement made at the meeting of the Council of the European Union on 25 September 1995 that, under the conditions set out in Article 26, Portuguese public policy might be invoked to defend important local interests against the application of Article 37, which concerns the conversion of territorial proceedings opened before the main proceedings, where those interests are not sufficiently taken into account in such conversion.

D. CHAPTER III: SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of insolvency proceedings

211. The Convention permits the opening of local proceedings by the courts of the State where the debtor has an establishment (Article 3(2)).

After main proceedings have been opened in a Contracting State, those local proceedings can only be "secondary" proceedings.

Secondary proceedings are governed by national law. The Convention, however, modifies the conditions established by the national law for the opening of insolvency proceedings in two aspects:

1. The national law requirement of insolvency of the debtor need not be met, insofar as the judgment opening main insolvency proceedings in another Contracting State is recognized.
2. The right to request the opening of insolvency proceedings is directly given by the Convention to the liquidator of the main proceedings.

The remaining conditions are those of the national law (see Articles 28 and 29(2)) without modifications, i.e. if local insolvency proceedings can be opened on account of the status of the debtor, persons empowered to request the opening, etc.

212. The judgment opening insolvency proceedings by the court of the State in which the centre of the debtor's main interests is situated has the specific effect of allowing territorial proceedings to be opened in the State where the debtor has an establishment, without the court of the State in which the establishment is situated having to examine the insolvency of the debtor.

213. The court where the opening of secondary proceedings is requested examines whether the proceedings opened in another Contracting State and by virtue of which the opening of territorial proceedings is requested are covered by Article 16: i.e. the judgment opens a set of insolvency proceedings as listed in Annex A, it is delivered by a court which has declared that it has jurisdiction within the meaning of Article 3(1) and it is effective.

Moreover, the court examines its international jurisdiction for opening territorial proceedings, as well as its domestic jurisdiction, and, concerning those aspects not covered by the Convention, the conditions for opening proceedings provided for by national legislation.

214. The proceedings by virtue of which the opening of secondary proceedings is requested must be proceedings included in Annex A to the Convention.

They must be proceedings based on the debtor's insolvency (see point 49(b), fourth and fifth subparagraphs for the problem posed by winding-up proceedings in Ireland and the United Kingdom).

215. The proceedings by virtue of which the opening of secondary proceedings is requested must be opened by a court of a Contracting State which has jurisdiction, as provided for in Article 3(1): such a court has verified that the centre of the debtor's main interests is situated in that State and it bases its jurisdiction on those grounds to open proceedings which may claim to be the main proceedings.

The court which is required to open secondary proceedings cannot verify the correctness of the appraisal of the first court, whose judgment benefits from the trust placed in judgments delivered by Community courts.

216. The court where the opening of secondary proceedings is requested also examines whether the foreign judgment is effective.

217. If the judgment opens an insolvency proceeding mentioned in Annex A, acknowledges that it constitutes the opening of main proceedings and has begun to be effective, that judgment is recognized within the meaning of Article 16.

The requirement for opening secondary proceedings laid down by the Convention is thus met.

218. In consequence, the court where the opening of secondary proceedings is requested does not have to examine the debtor's insolvency.

219. Furthermore, the court requested to open secondary proceedings examines its jurisdiction within the meaning of Article 3(2).

The debtor must have an establishment as defined in Article 2(h) on the territory in question. If there is no establishment, no secondary proceedings will be opened.

In the latter case, the main proceedings will produce their full effects on the territory where the debtor does not have an establishment, but does have assets. Chapter II of the Convention comes into play and the liquidator in the main proceedings may exercise all his powers on that territory. Thus, for instance, as the mere existence of a credit balance in a bank account does not constitute an establishment, the liquidator in the main proceedings may, subject in particular to the rights in rem of third parties referred to in Article 5, order the transfer of such money to the State of the opening in order to distribute it amongst the creditors involved in the main proceedings.

220. In examining its international jurisdiction within the meaning of Article 3(2), the court appraises the facts to determine whether the debtor has an establishment in that territory. In fact, the court may be led to consider that the debtor's activities in that territory constitute more than a simple establishment and could have been considered as the centre of the debtor's main interests.

The principle of trust attached to decisions of courts within the Community does not allow those courts to call into question the appraisal of the court that has declared itself competent in accordance with Article 3(1) (see point 215).

A court which establishes that the judgment opening the main proceedings has the quality of a recognized judgment and that the debtor has a place of activity in its territory that can be considered to be an establishment will be led to open territorial secondary proceedings.

221. In accordance with Article 3(3), secondary insolvency proceedings opened after the main proceedings must be winding-up proceedings within the meaning of Article 2(c). Their purpose is to realize the debtor's assets. The proceedings are mentioned in Annex B to the Convention.

The court cannot open insolvency proceedings the purpose of which is the reorganization of the debtor's business or of his financial situation.

The discussions on the Convention have finally resulted in the inclusion of both winding-up proceedings and reorganization proceedings in the main insolvency proceedings.

In the case of proven insolvency at the centre of the debtor's main interests, it is difficult to conceive, under certain legal systems in the Community, of an establishment dependent on the insolvent person being separately the subject of reorganization. On the other hand, coordination between the main proceedings and the secondary reorganization proceedings was regarded by most Contracting States as so complex technically as to be difficult to carry out.

In order to confer the widest possible scope on the Convention by recognizing not only winding-up proceedings – accepted from the beginning of discussion as proceedings to be recognized – but also reorganization proceedings, it was decided to allow only secondary winding-up proceedings.

This solution shows the dependency of the secondary proceedings vis-à-vis the main proceedings of a universal nature.

222. National legislation determines more specifically the court which has territorial jurisdiction.

It should be noted that the Convention deals with international jurisdiction but does not specify which court has jurisdiction among the courts of the Contracting State in which an establishment is situated.

States shall ensure that their legislation designates the court which has territorial jurisdiction to open secondary proceedings.

223. The court also applies its national law regarding the conditions for opening proceedings which are not the subject of a rule of the Convention (Article 4(2)).

National law determines the persons against whom insolvency proceedings may be brought (Article 4(2)(a)). Where, for example, national legislation does not permit insolvency proceedings against a person who does not have the capacity of a trader, or against a public undertaking, the possibility of secondary proceedings is excluded.

224. In accordance with Article 3(2), secondary proceedings only produce effects with regard to the debtor's assets situated in the territory of the State where the establishment is situated.

The secondary liquidator has, however, the right to act outside his territory in order to recover an asset moved out of that State after the opening of the secondary proceedings or in fraud against the creditors of those proceedings. (Article 18(2)). He is also allowed to bring actions in other States for the voidness, voidability or unenforceability of detrimental legal acts (Article 4(2)(m) and Article 13). The purpose of these actions outside the territory is, in fact, the return of assets which were legally situated in the territory of the proceedings at the time of the opening or which, without fraud, would have been situated in the territory of the proceedings at the time of the opening.

The action of the secondary liquidator in the matter of the return of assets which are actually situated abroad but which should normally be included in the secondary proceedings is to be assessed on the basis of the law of the secondary proceedings, pursuant in particular to Article 4(2)(m), subject to Article 13 (see points 91(l) and 135 to 139).

Article 28
Applicable law

225. This Article expressly stipulates that, save as otherwise provided by the Convention, the law of the State in which secondary proceedings are opened shall apply to those proceedings.

In fact, this reiterates Article 4, which is interpreted as meaning that the law applicable to the main proceedings is the law of the State where the main proceedings are opened, and the law applicable to the secondary proceedings is the law of the State of the opening of the secondary proceedings.

Article 29
Right to request the opening of proceedings

226. The Convention authorizes the liquidator in the main proceedings to request the opening of secondary proceedings. The temporary administrator who, according to national law, may be appointed after the request of the opening of the main insolvency proceedings but before the opening itself, is not covered by Article 29(a) (see point 262).

The liquidator in secondary proceedings has, however, no right derived from the Convention to request the opening of other secondary proceedings.

This rule states the relationship of dependence of the secondary proceedings upon the main proceedings.

227. Furthermore, the persons and authorities empowered by national law to request the opening of the insolvency proceedings referred to in Annex B are also entitled to request the opening of secondary proceedings.

The right of these persons and therefore the right of the creditors to bring about proceedings is not limited by the requirement of a specific interest.

The provision envisaged in the discussions, whereby only the creditors who would benefit from a more favourable legal status in the secondary proceedings than in the main proceedings (for example, a more favourable ranking) could request the opening of secondary proceedings, has been deleted.

On the other hand, Article 29(b) confers the right to have proceedings opened on any person, without distinction.

It should be noted that the right to request the opening of territorial proceedings before the opening of the main proceedings is limited to those proceedings referred to in Article 3(4)(b) (see point 85).

Article 30

Advance payment of costs and expenses

228. Various legislations rule out the possibility of insolvency proceedings where the debtor's assets are insufficient to cover in whole or in part the costs and expenses of the proceedings.

The Convention takes these legislations into account.

The provision in Article 30 is understood to mean that where national law does not require sufficient assets in order to open insolvency proceedings, it cannot introduce such a requirement for secondary proceedings only.

Should national law rule out insolvency proceedings where assets are insufficient, the Convention upholds this law and allows the court to require from the applicant, including the liquidator, an advance payment of costs, or an appropriate security. The terms "may require" do not confer a power on the court but mean that national legislation continues to apply.

Article 31

Duty to cooperate and communicate information

229. The main proceedings and the secondary proceedings are interdependent proceedings which concern a debtor with several centres of activity and assets spread over several territories.

The debtor's creditors participate, or may have an interest in participating, in several proceedings. Cooperation and information between the liquidators is thus necessary to ensure the smooth course of operations in the various proceedings.

230. The exchange of information between the liquidators concerns in particular:

- the assets,
- the actions planned or under way in order to recover assets: actions to obtain payment or actions for set aside,
- possibilities for liquidating assets,
- claims lodged,
- verification of claims and disputes concerning them,
 - the ranking of creditors,
 - planned reorganization measures,
 - proposed compositions,
 - plans for the allocation of dividends,
 - the progress of operations in the proceedings.

231. The duty to communicate information may be limited by national legislation on data exchange, e.g. by legislation relating to the protection of computerized personal data.

232. The duty of the liquidators to exchange information is complemented by the obligation to cooperate with each other. The liquidators have a duty to act in concert with a view to the development of proceedings and their coordination, and to facilitate their respective work.

233. Article 31(3) expressly mentions a specific obligation of information and cooperation that affects the liquidator in the secondary proceedings, on the grounds of primacy of the main proceedings over the secondary proceedings. The liquidator in the secondary proceedings must give the liquidator in the main proceedings the opportunity to submit proposals on the realization or use of the assets in the secondary proceedings. The secondary liquidator must therefore inform the main liquidator of any use or realization of these assets.

This obligation may enable the main liquidator, for example, to prevent the sale of assets involved in the secondary proceedings, the preservation of which may be deemed advisable from the viewpoint of the reorganization of the business at the centre of main interests and to request a stay of the liquidation through the application of Article 33.

The obligation considered in Article 31(3) refers to important assets or decisions (such as continuation or cessation of the activities of the establishment) in the secondary proceedings. It should not be interpreted in such a broad way as in practice to paralyse the work of the liquidator in the secondary proceedings.

234. Where appropriate, the applicable national law will determine the liquidator's liability when the latter has not respected the duties arising from Article 31.

Article 32
Exercise of creditors' rights

235. Pursuant to Article 4(2)(h), the law of the State of the opening of the proceedings determines the rules governing the lodging of claims.

However, national law concerning the creditors entitled to lodge claims is replaced by the provision in Article 32(1), which entitles any creditor to lodge his claim in the main proceedings and in any secondary proceedings.

The creditor is entitled to lodge claims in the proceedings of his choice, even in several proceedings.

The right to lodge claims of creditors with their domicile, habitual residence, or registered office in a Contracting State other than the State of the opening of the proceedings is restated in Article 39. For comments on the scope of that Article, (see points 265-270).

236. Article 32(2) establishes the liquidator's right to lodge in other proceedings claims which have already been lodged in his proceedings. The Convention modifies national legislation concerning the lodging of claims, simply by adding a right for the liquidator to lodge claims (see point 237).

Both the liquidator in the main proceedings and each liquidator in secondary proceedings may lodge claims in the other proceedings.

The aim of this provision is to facilitate the exercise of the rights of those creditors who lodge claims in certain proceedings and to facilitate that their claims are also lodged by the liquidator in other proceedings, and finally, to permit the liquidators to reinforce their influence in other proceedings.

237. The rights of the creditors are preserved insofar as they may oppose the lodging of their claims in other proceedings by the liquidator or withdraw any previous lodgement in other proceedings.

The Convention allows creditors the right to oppose a claim lodged in other proceedings by the liquidator.

On the other hand, the right to withdraw a claim lodged by the liquidator is governed by the law applicable to the proceedings in which the claim has been presented: creditors' rights are subject to the law of the State in which the proceedings are opened and it is a question of determining the rights of creditors in the proceedings in which the claim has been presented.

Insofar as the liquidator's claim is lodged on behalf of the creditor, the issue of withdrawal is not a new one, and national laws establish the creditor's right to withdraw the claim lodged.

238. The lodging of a claim by the liquidator has the same effects as the lodging of a claim by the creditor: the liquidator acts on behalf of the creditor and in his stead. The Convention mentions this right of the liquidator to lodge claims.

However, national rules concerning the period for lodging, the consequences of delayed lodging, the admissibility and well-foundedness of the lodging and the expenses linked to the verification of the claims remain unchanged (see point 267).

239. Under Article 32(2), liquidators should lodge in other proceedings claims which have already been lodged in their own proceedings. The obligation to lodge such claims exists insofar as it is in the general interests of all the creditors or of a class of creditors.

It is effective subject to the individual creditor's right to oppose the lodging of the claim.

The creditor may have various reasons for opposing the lodging of his claim in proceedings other than those he has selected. For example, as the liquidator's claim is lodged on his behalf, and as national law determines the rules for the lodging and verification of claims, including the costs, the creditor may run the risk in the other proceedings of incurring costs which he is not willing to bear.

Appraisal of the specific interest in lodging claims rests with the creditor, who must defend his interests himself. In a way, he has already made a choice when lodging his claim in a certain State.

Specific appraisal of the interest involves an examination in accordance with the law applicable to the claim and, as regards the status of the claim, in accordance with the legislation of the State in which the lodging is envisaged (Article 4(2)(h)).

This specific appraisal for each claim would involve a difficult task for the liquidator, and would be a costly and lengthy procedure.

However, the aim of the Convention is different. Under Article 32(2) the liquidator's task to lodge exists only when it is in the general interest of all creditors in his proceedings or of a class of them.

For example, if the liquidator finds that the assets to be distributed in other proceedings are so significant that even the ordinary unsecured creditors in his proceedings may receive a dividend, in competition with the ordinary unsecured creditors lodging claims in the other proceedings, the lodging of the claim may be useful and will take place.

Moreover, he will also lodge a claim where a creditor, rather than lodging a claim himself, has informed the liquidator of the interest of the lodging of his claim.

He will obviously not lodge a claim if the lodgement would be irrevocably delayed and therefore not appropriate.

The liquidator's task, thus delimited, may improve the situation of the creditors, without complicating the proceedings to the detriment of creditors.

240. Article 32(3) empowers any liquidator to participate in other proceedings. The aim of the provision is to better ensure the presence of creditors and the expression of their interests through the liquidator.

In order to resolve the frequent absence of creditors, the Convention allows the liquidator to attend creditors' meetings.

The text stipulates that the liquidator shall participate in other proceedings "on the same basis as a creditor". Obviously, the liquidator has the right to express his opinion in the course of the proceedings, and more specifically at the meeting of creditors involved in the other proceedings. However, the Convention does not establish the specific content of the liquidator's right to participate and does not determine how the liquidator shall exercise the rights of the creditors in his proceedings.

It should be noted that the provisions permitting the liquidator who lodges claims already lodged in the other proceedings to exercise the voting right deriving from a claim lodged, and the provisions concerning the simultaneous exercise by several liquidators of the voting right arising from a claim, were rejected in the course of negotiations.

Participation by the liquidator may be regulated by national law.

Article 33
Stay of liquidation

241. At the request of the liquidator in the main proceedings, the process of liquidation in the secondary proceedings may be stayed in whole or in part.

This provision establishes the primacy of the main proceedings, but it equally takes into account the interests of the creditors in the secondary proceedings.

242. The liquidator in the main proceedings submits a request for the stay of liquidation in the secondary proceedings.

The court may not refuse the stay except if it is manifestly not in the interests of the creditors in the main proceedings.

The grounds for request of a stay may be appraised only in relation to the interests of the creditors in the main proceedings.

243. The interests of the creditors in the main proceedings in the stay of liquidation that the court takes into consideration can assume different aspects. For example, the preservation of the estate situated in the State of the secondary proceedings may be useful with a view to selling the main business or the secondary establishment to a purchaser or with a view to a composition. The safeguarding of some of the elements of the assets, useful within a reorganization, or with a view to a sale "en masse" together with some of the assets involved in the main proceedings may justify a partial stay on the liquidation.

244. The court may take into account the interests of all the creditors in the secondary proceedings, as well as those of certain groups of creditors, imposing on the liquidator in the main proceedings a guarantee which it determines as appropriate, before ordering the stay.

245. The stay is limited to a maximum of three months. Once this period is over, it may be extended for another three months maximum each time. The number of successive extensions is not limited.

The liquidation process which is restarted after a stay can be stayed again, and the stay can be renewed. The number of new stays is not limited.

246. The decision on a stay does not terminate the liquidation process. The effects brought about by the opening of proceedings pursuant to the law of the State of the opening of proceedings, e.g. as regards the exercise of individual actions, come into play. The liquidation process simply does not continue.

247. Where the stay no longer appears to be justified, the court terminates it.

A stay may be terminated at any moment.

The court may act:

–at the request of the liquidator in the main proceedings, or

–of its own motion, or

–at the request of the liquidator in the secondary proceedings, or

–at the request of a creditor.

If, in particular, the interests of the creditors in the main proceedings, or those of the creditors in the secondary proceedings no longer appear to justify the stay, it is to be terminated.

Consideration of the interests of the creditors in the secondary proceedings may lead by themselves to an end to the stay.

Article 34

Measures ending secondary insolvency proceedings

248. If the law of the State in which the secondary proceedings are opened allows insolvency proceedings to be closed by means of a rescue plan, a composition, or a comparable measure, all those stipulated by that law, may propose such a measure. In addition, the Convention empowers the liquidator in the main proceedings to propose it himself.

249. Under rescue plans, compositions or comparable measures, the creditors may accept a rescheduling of debts or waive some of their rights and the debtor may undertake to meet certain conditions. All of which may affect the interests in the main proceedings. For this reason, the Convention requires that, to become final, such a measure must obtain the consent of the liquidator in the main proceedings.

In adopting his decision, the liquidator may take into consideration all the interests of the creditors in the main proceedings, including the interests in reorganizing and continuing the main business.

Should, however, the liquidator in the main proceedings oppose the rescue plan, the composition or a comparable measure in the secondary proceedings, the Convention permits his agreement to be waived, and the secondary proceedings may be closed if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

The concept of financial interests is more restrictive than that of the interest of the creditors in the main proceedings, which may, for instance, justify a stay on secondary proceedings and which is examined in point 243.

The financial interests are estimated by evaluating the effects which the rescue plan or the composition has on the dividend to be paid to the creditors in the main proceedings. If those creditors could not reasonably have expected to receive more, after the transfer of any surplus of the assets remaining in the secondary proceedings (ex Article 35), in the absence of a rescue plan or a composition, their financial interests are not thereby affected.

250. The effects of secondary proceedings are confined to assets situated within the territory of the State in which they have been opened.

Consequently, a rescue plan or a composition restricting creditors' rights may apply only to the assets covered by the secondary proceedings and not to the debtor's other assets situated outside that State.

A composition confined in its effects to the assets involved in the proceedings shall be arrived at under the conditions laid down by the applicable law and, where appropriate, by a majority decision of the creditors. The rights of all the creditors, including the minority creditors who disagree with the measure, would be affected as regards the assets relevant to those proceedings.

A composition restricting creditors' rights may be reached in the secondary proceedings with effects on assets not covered by those proceedings, provided that it is agreed to by every creditor concerned by that measure, i.e. having an interest affected by the measure.

251. In the event of a stay of the process of liquidation in the secondary proceedings only a measure for a composition proposed by the liquidator in the main proceedings, or by the debtor with that liquidator's agreement, may be put to the vote or approved.

The stay is ordered at the request of the liquidator in the main proceedings on account of the interests of the creditors in those proceedings. During this period, the course of the main proceedings must not be disrupted by measures not agreed to by the liquidator.

Efforts to bring about the reorganization of the main business may have led to a stay.

Article 34(3), prohibiting for the duration of the stay any composition not proposed by the liquidator in the main proceedings or by the debtor with his agreement, enables the interests of the creditors who brought about the stay to be taken into consideration (see point 243).

Article 35

Assets remaining in the secondary proceedings

252.If the assets in the secondary proceedings are sufficient to meet all claims allowed in them, any assets not distributed are to be transferred to the main proceedings.

The liquidator shall transfer the remaining assets to the liquidator in the main proceedings.

The transfer of any remaining assets to the main proceedings reflects the primary nature of those proceedings.

253.Assets will be distributed amongst all creditors whose claims are allowed in the secondary proceedings. The Convention allows creditors to lodge claims in any proceedings, so that even creditors with preferential claims in the main proceedings who might be ordinary unsecured creditors in the secondary proceedings will have an incentive to lodge claims in order, at least, to have their claims met in the same way and at the same time as other ordinary unsecured creditors.

The scale of the assets to be distributed will attract creditors. If the assets were such that any surplus remains after distribution amongst all creditors whose claims were admitted to these proceedings, only those claims not lodged or not admitted will remain unsatisfied and may be affected by the transfer of the remaining assets to the main proceedings.

Article 36

Subsequent opening of the main proceedings

254. Should a court in the State in which the centre of the debtor's main interests is located, open insolvency proceedings in accordance with Article 3(1), after independent territorial proceedings have been opened by a court in a State in which there is an establishment, pursuant to Article 3(2), the proceedings opened at the place of the centre of main interests will be the main proceedings, while the proceedings previously opened at the place of the establishment will have to be necessarily regarded as secondary proceedings.

255. Insofar as the progress of the independent territorial proceedings, opened first, so permits, the rules for coordination between the main proceedings and the secondary proceedings as laid down in Articles 31 to 35 are to be followed.

Article 37

Conversion of earlier proceedings

256. Pursuant to Articles 3(3) and 27, secondary proceedings opened at the place in which an establishment is situated after the main proceedings, are to be winding-up proceedings within the meaning of Article 2(c), as listed in Annex B.

Where, prior to the opening of main proceedings, independent territorial insolvency proceedings listed in Annex A but not in Annex B are opened, these latter proceedings may be converted into winding-up proceedings listed in Annex B in the event of main proceedings being opened.

257. Under the Convention, the liquidator in the main proceedings shall be entitled to request that independent territorial reorganization proceedings, as mentioned in Annex A, be converted into secondary winding-up proceedings.

The Convention does not prohibit the law of a Contracting State competent under Article 3(4) from allowing the liquidator in the main proceedings simply to request the closure of independent territorial reorganization proceedings under the conditions laid down by that law.

258. The court is not obliged to order conversion of the proceedings at the liquidator's request. It is necessary that the conversion proves to be in the interests of the creditors in the main proceedings.

This provision reflects the primary nature of the main proceedings. (See also point 210).

259. If conversion is not requested by the liquidator or ordered by the court, territorial proceedings may continue as reorganization proceedings.

260. As a result of conversion, the proceedings will be conducted as secondary winding-up insolvency proceedings in accordance with Article 36.

261. Should any territorial proceedings opened prior to main proceedings in a State where an establishment is situated not be proceedings listed in Annex A, they will not be covered by the Convention.

Main proceedings that are opened after the territorial proceedings have all the effects laid down in the Convention; the liquidator in the main proceedings is allowed to exercise his powers in other Contracting States and to request the opening of secondary proceedings. Consequently, these territorial proceedings may not continue. The national law must adopt the appropriate solution that would conform with the provisions of the Convention: that could for example be the closing of the territorial proceedings.

Article 38
Preservation measures

262. In order to avoid any change in the debtor's estate to the detriment of creditors from the date on which the opening of insolvency proceedings is requested to the date on which the judgment opening them is handed down, certain laws provide for the appointment of a temporary administrator.

Article 29 authorizes the liquidator in the main proceedings, but not such temporary administrator, to request the opening of secondary proceedings in any other Contracting State where the debtor possesses an establishment.

However, as a pre-opening stage of secondary insolvency proceedings, Article 38 allows the temporary administrator designated by a court competent to open main proceedings to request measures to secure and preserve the debtor's assets situated in any other Contracting State, provided for under the law of this State for the period between the request for the opening of insolvency proceedings and the opening itself. As a pre-opening stage of secondary proceedings, Article 38 presupposes the existence of an establishment of the debtor in that Contracting State (see Article 3(2)). For the same reason, the preservation measures available will be those which, under the national insolvency law of that State, correspond to winding-up proceedings.

Once appointed, the liquidator in the main proceedings will decide whether or not to request the opening of secondary proceedings.

If the request is made, the national courts of the State of the opening of secondary proceedings will decide on the continuation or modification of such measures. Until that moment or, also, if the opening of secondary proceedings is not finally requested, the preservation measures taken over the assets of the debtor situated in that country will be subordinated to the decisions taken by the court competent under Article 3(1), which benefit from the system of recognition and enforcement of the Convention, in similar terms as those already explained in point 78 of this report.

263. The position of a temporary administrator appointed after the request, but before the opening, of the main insolvency proceedings has to be seen in relation to the provisional task of preserving the assets which is entrusted to him. Such temporary administrator, whose task is more limited, does not correspond exactly with the definition in Article 2(b) of a liquidator in insolvency proceedings and is not necessarily listed in Annex C.

Article 38 allows the temporary administrator to request in the country where the debtor possesses an establishment preservation measures of a more general character than those contemplated in point 78, fourth paragraph, of this report.

E. CHAPTER IV: PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

264. Chapter IV specifies the information which the court or the liquidator is required to provide to creditors and the rules for lodging claims.

These provisions are applicable both to main proceedings and to territorial (independent or secondary) insolvency proceedings.

Article 39
Right to lodge claims

265. Article 39 establishes a rule of substantive law, laying down the right of foreign creditors, i.e. of any creditor who has his habitual residence, domicile or registered office in another Contracting State, to lodge claims in writing in insolvency proceedings. This provision derogates, in the way specified below, from the application of national law, pursuant to Article 4(2)(h).

To clear up any doubts, it is specified that the right of any foreign creditor to lodge claims includes the tax authorities and social security authorities of other Contracting States.

It should be noted that Article 32 allows all creditors to participate in the main or secondary proceedings, as they choose, and even in several proceedings (see point 235).

266. Establishing the right of foreign creditors to lodge claims means that lodgement of their claims cannot be disallowed on the grounds that the creditor is situated abroad or that the claim is governed by foreign public law.

267. However, under Article 4(2)(h), the national law of the State of the opening will govern the time limit for lodging claims, the effect of a late lodgement, and the admissibility and well-foundedness of the lodgement.

268. In addition, the national law of each proceedings determines the costs, to the charge of a creditor, attached to the claim and to the verification of the debts.

The prudent creditor will take into account the rules relevant to the costs, and will appreciate the interest that a claim presents. He will examine the ranking that the law of the proceedings accords to his claim and the importance of the assets that will be distributed.

269. The right to lodge claims for creditors situated in the State in which proceedings are opened is governed by national law.

Moreover, the Convention does not concern itself with the rights of creditors situated outside the Contracting States. The right of creditors from outside the Community to lodge claims is governed by national law.

270. The Convention gives creditors the right to lodge claims in writing, but it does not prevent national law from permitting claims to be lodged in any other more favourable form for creditors.

Article 40
Duty to inform creditors

271. The court having jurisdiction or the liquidator must, without delay, inform known creditors who have their habitual residence, domicile or registered office in the other Contracting States of the opening of insolvency proceedings and of the need to lodge their claims.

The Convention aims to improve the situation of intra-Community creditors situated outside the State in which proceedings are opened.

The liquidator's duty to inform creditors situated in the State in which proceedings are opened is governed by national law.

The Convention does not take into consideration creditors from outside the Community to whom the national law of the State in which the proceedings are opened applies.

272. Article 40(2) lays down the form and the content to be taken by the information provided for creditors.

The liquidator is required to send a notice to each creditor. This notice has to state the time limits for lodging claims, the legal consequences laid down for failing to meet those time limits and the person or body with whom claims must be lodged. It must specify whether creditors with preferential claims or claims secured in rem are required to lodge them.

The compulsory contents of the notice as laid down in the Convention are designed to protect foreign creditors; national laws may not reduce the contents of the notice. A national law may stipulate additional information in the interests of creditors.

Article 41

Content of the lodgement of a claim

273. Under Article 4(2)(h), the lodging of claims is subject to the law of the State of the opening of proceedings.

Article 41 constitutes, together with Articles 39 and 42(2), an exception to that rule insofar as it stipulates the content of claims lodged by creditors situated in another Contracting State.

The requirements set out in Article 41 are intended to identify the claim which is sought to be lodged. As this provision is meant to facilitate the exercise of intra-Community creditors' rights, national legislation may impose no additional conditions on the content of the lodgement of claims by foreign creditors protected by the Convention.

According to the Convention, a creditor may lodge his claim in writing (Article 39), supplying copies of supporting documents, if any, stating:

- the nature of the claim,
- the date on which it arose,
- its amount.

It must also specify any preference, security right or reservation of title alleged, as well as the assets covered by the guarantee invoked.

274. Under Article 4(2)(h), however, national law governs the verification and admission of claims and determines the procedure by which a creditor must establish his claim in order to have it admitted to the proceedings.

Article 42
Languages

275. The information for creditors regarding the opening of proceedings for their debtor's insolvency and the lodging of claims is to be given in an official language of the State of the opening of proceedings.

In order to help those creditors who do not understand the language of the State in which proceedings are opened, the information notice has to be headed "Invitation to lodge a claim. Time limits to be observed". This heading is to be given in all the official languages of the Community.

The heading, drawn up by the Secretariat of the Council of the European Union, will be published together with the Convention and the report.

276. Creditors from other Contracting States are allowed to lodge claims in an official language of the State in which they have their habitual residence, domicile or registered office.

However, their written statement must be headed "Lodgement of claim" in a language of the State in which proceedings are opened.

In order to avoid delay in lodging claims and unnecessary lodgement costs, claims may be lodged in the creditor's language or, to be more exact, in the language of the State in which he lives or carries on his business.

277. Bearing in mind the scale of intra-Community trade and interpenetration of economies, especially in border regions, as well as the understanding of one another's languages, a systematic requirement that claims be lodged in an official language of the State of the proceedings may run counter to the interests of creditors without being really necessary.

Use of the creditor's language is therefore the rule; a translation into the official language may be required in the course of the proceedings if this proves necessary.

F.CHAPTER V:INTERPRETATION BY THE COURT OF JUSTICE OF THE
EUROPEAN COMMUNITIES

278.The conferral of jurisdiction on the Court of Justice to give rulings on interpretation is not an innovation of the Convention on insolvency proceedings. The system of conferral follows the system established by Article 177 of the EC Treaty and adopted by the Protocols of 3 June 1971 concerning the interpretation by the Court of Justice of the 1968 Brussels Convention, and the Protocols of 19 December 1988 concerning the interpretation of the 1980 Rome Convention. Both Protocols were examined in the reports by Mr P. Jenard and Mr A. Tizziano (see OJ No C 189 of 28 July 1990 and No C 219 of 3 September 1990). We refer to those reports for further details.

Article 43

Jurisdiction of the Court of Justice

279.By virtue of this rule new powers of interpretation are conferred on the Court of Justice of the European Communities, supplementing its existing powers. In addition to this Convention and its Annexes, this jurisdiction also applies to future Conventions on accession by States which become Members of the European Union. Article 50 requires the new Members to follow the system of the Convention on insolvency proceedings and to make such adjustments and amendments as may be necessary. This explains the reference to future Conventions.

This jurisdiction covers the actual rules for the conferral of powers, so that it is for the Court of Justice to interpret the rules determining the scope of its jurisdiction or the procedures by which it may be exercised.

280. Jurisdiction in matters of interpretation means that the Court of Justice rules only on the interpretation of the text of the Convention and it is for the national court to apply the rules according to this interpretation and to give a judgment on the substance of the matter.

281. In contrast to the 1968 Brussels Convention and the 1980 Rome Convention, the conferral of jurisdiction to interpret is to be found in the text of the Convention and not in a separate Protocol. This emphasizes the close relationship between this Convention and the Community legal system and the significance of the uniform interpretation of those rules.

282. Both the Protocol on the Statute of the Court of Justice and the Rules of Procedure of the Court of Justice shall apply.

283. The Convention provides for two procedural channels through which the Court of Justice can resolve any problem of interpretation. The first involves preliminary ruling proceedings, as laid down by Article 44 of the Convention following the model of Article 177 of the EC Treaty. The second, included in Article 45 of the Convention, could be termed "proceedings in the interests of the law".

Article 44

Preliminary ruling proceedings

284. These are proceedings whereby a national court before which a case is brought requests the Court of Justice of the European Communities to give a preliminary ruling on the interpretation of a provision of the Convention or its Annexes, the application of which in the case in point has raised questions which must be resolved in order for a decision to be given on the substance of the matter.

285. The Convention determines the national courts which make such a request to the Court of Justice. Only the expressly designated courts are duly empowered, i.e. the higher law courts (such as the Tribunal Supremo in Spain, the Cour de Cassation in France, etc.) which are listed in Article 44(a), and other courts when acting as courts of appeal. In the second case it is not necessary for the court to be officially entitled a "Court of Appeal". However, it must be involved in hearing appeals against judgments of a lower court. The power to request a preliminary ruling on interpretation is not granted to the courts of first instance.

286. The question must be one raised in a case pending before the court which submits the request for interpretation. The Court of Justice therefore resolves the questions of interpretation concerning cases pending before a national court.

287. It must be a question on which the national court considers a decision on interpretation to be "necessary" for the judgment, i.e. it must be a problem of interpretation on which the solution to the case depends. If the different possibilities of interpretation lead to the same result, this requirement would not be fulfilled. The national court must assess in each individual case whether or not this need exists.

288. National courts have the power to submit questions of interpretation of their own motion to the Court of Justice. A request by a party is not necessary. If such a request is made the national court is not obliged to refer to the Court of Justice.

289. This Convention does not oblige national courts to submit questions of interpretation to the Court of Justice but it simply allows them to make such requests if all the abovementioned requirements are fulfilled.

The need for speed in the conduct of insolvency proceedings explains the choice of a flexible formula which allows the national courts to decide on whether a preliminary ruling is appropriate. The Convention does not impose any criteria.

The national court may take into account the estimated time needed for a ruling by the Court of Justice, the general significance of the question for the proceedings, the formal request of the parties directly affected (as we know, this does not bind the national court), etc.

290. The Convention does not mention a possible suspensive effect of the preliminary ruling on the insolvency proceedings until such time as the Court of Justice settles the problem of interpretation.

The question of the average time for obtaining preliminary rulings is a serious problem in the area of insolvency proceedings.

291. In order to solve the question of suspensive effect, several facts should be taken into account:

1. The jurisdiction of the Court of Justice derives directly from the powers conferred on it by the Convention on insolvency proceedings and its scope is defined by the latter.
2. This conferral of jurisdiction is aimed at better fulfilling the specific objectives of the Convention on insolvency proceedings. The advantages of uniformity of interpretation must be counterbalanced by the need for efficiency in insolvency proceedings.

3. Time is a crucial factor in insolvency proceedings. They are opened as a consequence of a financial crisis. Promptness of action is imperative in order to avoid a depreciation of existing assets. The suspension of the insolvency proceedings may even preclude the possibility of reorganization. For this reason, many national legislations exclude the suspensive effect of appeals to higher courts in the case of insolvency proceedings. In addition, the collective nature of insolvency proceedings implies that a partial problem should not necessarily alter the main course of the proceedings.

292. In this context, the Convention leaves it to the national law of the State of the opening of proceedings to determine whether preliminary ruling proceedings before the Court of Justice should have suspensive effect. As there is no formal obligation to submit the question of interpretation to the Court of Justice, the most appropriate solution seems to be to confer on the national court the power to decide on whether or not it is necessary to interrupt the insolvency proceedings.

Article 45

Proceedings brought by a competent authority

293. These proceedings can be described as proceedings brought "in the interests of the law", since the solution to proceedings under way does not depend on the ruling; it is designed to guarantee uniformity of interpretation in the future, when the national courts of different Contracting States have handed down contradictory interpretations of the rules of the Convention.

294. The request to the Court of Justice shall be brought by the Procurators-General of the Supreme Courts of Appeal of the Contracting States or any other authority designated by a Contracting State.

295. In order that this national authority may make a request to the Court of Justice of the European Communities, it is necessary for a national court of the same State to have given a final judgment (*res judicata*) which contradicts the interpretation given by the Court of Justice or by the courts of other Contracting States mentioned in Article 44 (the higher courts or those acting as appeal courts).

296. The ruling on the interpretation given by the Court of Justice of the European Communities does not affect the judgments which gave rise to it. Its aim is merely to clarify the interpretation for the future, without creating definitive binding precedent.

297. Article 45 incorporates proceedings established by the 1971 Protocols on the 1968 Brussels Convention and by the 1988 Protocols on the 1980 Rome Convention. Further comments may be found in the respective reports (see point 278).

Article 46

Reservations

298. The possibility of entering a reservation is not at the discretion of the State, but depends on the existence of an impediment for constitutional reasons relating to the conferral of jurisdiction.

299. The rationale of this reservation is to allow one Member State to minimize the risk of constitutional difficulties at the ratification stage of the Convention, which it felt might arise through the conferral of jurisdiction on the Court of Justice of the European Communities. The difficulties would arise in the event of the Convention being deemed to go beyond the limits of the objectives defined by Article 220 of the EC Treaty.

On the other hand, it was felt by other Contracting States that conferral of jurisdiction for interpretation on the Court of Justice is fundamental to the proper functioning of the system set up by the Convention on insolvency proceedings. A uniform interpretation by this Court is necessary to ensure that the rights and obligations deriving from the Convention are the same for all persons, irrespective of the Contracting State in which the party or person concerned is located. Hence, to mitigate as far as possible such risk, it was agreed that the scope of the Convention should be strictly limited to the intra-Community effects of the insolvency proceedings covered by the Convention. Thus, the perfect adaptation of the Convention to the scope of Article 220 of the Treaty of Rome would counterbalance the extension of its content to the rules on conflict of laws, without which the system of recognition of insolvency proceedings would distort legal certainty within the Community (see point 42).

G.CHAPTER VI:TRANSITIONAL AND FINAL PROVISIONS TERRITORIAL APPLICATION

300.The Convention has no provisions governing territorial application. Consequently, the general rules of public international law, i.e. Article 29 of the 1969 Vienna Convention on the Law of Treaties are applicable.

301.This means that, in principle, the Convention on insolvency proceedings applies to the whole territory of the Contracting States. This includes non-European territories which are an integral part of the territory of these States. However, the autonomy of these territories can vary widely. Consequently, the Contracting States may exclude or reserve the application of the Convention to these territories by means of a declaration to that effect. This is the case, for example, with the Netherlands in relation to the Netherlands Antilles and Aruba.

302.For the same reason, the Convention does not apply to those territories whose international relations are assumed by any of the Contracting States, but which are not an integral part of their territory, being a separate entity. In principle, the Convention does not apply to them, no matter whether they are European or non-European territories. Should a Contracting State with such responsibility wish to extend the scope of the Convention to those territories, extension would only take effect if no other Contracting State opposed it.

Article 47
Applicability in time

303. Article 47 establishes two rules concerning the time of the application of the Convention.

The Convention is applicable only to insolvency proceedings opened after the entry into force of the Convention. Acts done by the debtor before the entry into force of the Convention shall continue to be governed by the law which was applicable to them at the time they were done.

These two rules were prompted by the concern not to alter existing situations and relations which were governed by specific legal rules at the time of the introduction of the new rules of the Convention into the legal systems of the Contracting States.

304. The Convention applies to insolvency proceedings opened after the entry into force of the Convention; it does not apply to proceedings opened beforehand.

The Convention allows the opening of several sets of proceedings some of which may be opened before and some after entry into force.

If proceedings are opened on the basis of the debtor's centre of main interests after the entry into force of the Convention, it could have been thought that, in view of the primacy of the main proceedings in the operation of the Convention, the latter

would apply even if proceedings had previously been opened away from the centre of main interests. This solution was not adopted, because it might disturb the course of proceedings opened in accordance with the law applicable at the time of opening. Reorganization proceedings opened in a State where the debtor's centre of main interests is not situated would have to be converted. Rules on conflict of laws would where appropriate have to be modified in the course of proceedings by the application of those in the Convention. Proceedings of a universal nature opened in accordance with the criteria of international jurisdiction laid down in the national law applicable would, where appropriate, be classified as territorial proceedings if, within the meaning of the Convention, the centre of main interests was not situated in the State of the opening of the earlier proceedings.

If earlier proceedings were opened in the State considered by the Convention as being the State where the debtor's centre of main interests is located, those proceedings will not be covered by the Convention. Before the entry into force of the Convention these proceedings may produce effects outside the State of the opening pursuant to the rules applicable under the different national laws. In the case of the earlier opening of proceedings in the State of the centre of main interests, proceedings opened after entry into force in the State where the debtor has an establishment are not subject to the Convention.

The rule in Article 47 has an absolute character: if insolvency proceedings are opened against a given debtor prior to the entry into force of the Convention in a Contracting State, any proceedings opened after the entry into force are not subject to the Convention, irrespective of whether such later proceedings are main or secondary proceedings within the meaning of the Convention.

305. In order to determine whether proceedings are opened before or after the entry into force of the Convention, the concept of the time of opening of proceedings, as established by the Convention, applies (see also point 68). Insolvency proceedings opened in advance do not come within the scope of the Convention if the judgment opening proceedings produced effects before the entry into force of the Convention.

306. The law applicable to the acts done by the debtor before the entry into force of the Convention continues to govern these acts.

This rule is prompted by the concern to avoid making the acts of the debtor subject to new rules and is aimed at keeping the relations to which the debtor is party subject to the law which governed his acts.

As regards the purpose of the rule, the determination of the acts done by the debtor and the time at which they are done are governed by the applicable law.

Article 48

Relationship to other Conventions

307. Article 48 establishes the relationship between the new Convention on insolvency proceedings and other international instruments which govern the Private International Law questions of international insolvencies, i.e. jurisdiction to open insolvency proceedings, law applicable to the proceedings and their effects, and the recognition and enforcement in other States of such proceedings. Article 48 deals with:

1. the relationship between the Convention and Treaties already concluded between certain Contracting States, in Article 48(1);

2. the relationship between the Convention and Treaties already concluded with third States, in Article 48(3).

308. Article 48(1) contains a list of the Conventions which will be superseded after the entry into force of the Convention on Insolvency Proceedings as between the States which are party to it. Such replacement will be subject to:

1. the provisions of Article 48(1) itself, pursuant to which these Conventions will continue to take effect in matters to which this Convention does not apply;

2.the provisions of Article 48(2) relating to insolvency proceedings opened before the entry into force of this Convention, which shall continue to be governed by the Conventions referred to in the list of Article 48(1), where applicable (see also Article 47).

309.The list of previous Conventions superseded, as between the Contracting States, by this Convention includes the 1990 Istanbul Convention, and the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 11 November 1933.

310.Article 48(3) concerns the problem of the compatibility of the Convention on Insolvency Proceedings with Treaties already concluded between a Contracting State and a third State.

To the extent that the application of this Convention would be irreconcilable with obligations arising out of Conventions or other international Agreements already concluded with a third State, the Convention on Insolvency Proceedings will not apply. To determine if the application of this Convention is or not irreconcilable with the obligations arising out of another existing Convention, it should be examined whether they entail legal consequences which are mutually exclusive.

The Convention on Insolvency Proceedings is only applicable when the debtor's centre of main interests is in the territory of a Contracting State. Furthermore, its provisions are restricted to relations with other Contracting States (see point 44). Hence, conflicts with other Conventions will seldom arise.

Article 49

Ratification and entry into force

311. The Convention shall be deposited with the Secretary-General of the Council of the European Union.

312. The decision-making process allowing a State to bind itself by the Convention shall be governed by the national law of each State. The Convention shall be subject to ratification, acceptance or approval by the signatory States.

313. The Convention shall enter into force on the first day of the sixth month following that of the last deposit of the instrument of ratification, acceptance or approval.

Article 50

Accession to the Convention

314. The future Member States of the European Union shall be required to accept this Convention as a basis for the negotiations necessary to ensure the implementation of Article 220 of the EC Treaty.

A special Convention may be concluded between the Contracting States and the future Member State for the purpose of introducing the necessary adjustments.

Article 51

Notification by the depositary

315. The Secretary-General of the Council of the European Union shall notify the signatory States of the deposit of each instrument of ratification, acceptance or approval of the Convention, the date of entry into force, and any other act, notification or communication relating to this Convention.

Article 52

Duration of the Convention

316. The Convention shall remain in force for an unlimited duration.

It does not contain any particular provision governing withdrawal of a State from the Convention. Any withdrawal is subject to the general law of international treaties.

Article 53

Revision or evaluation of the Convention

317. The Convention shall be the subject of a conference for the revision or evaluation of this Convention if any Contracting State so requests.

In the case of such request from a State the President of the Council of the European Union must convene the conference.

318.If no evaluation conference is held at the request of a Contracting State in the ten years that follow entry into force, the President of the Council of the European Union shall convene such a conference.

Article 54

Amendment of the Annexes

319.Each Contracting State may amend Annexes A, B and C which list the insolvency proceedings that may be the subject of main proceedings (list A: reorganization proceedings and winding-up proceedings) or of secondary proceedings (list B: winding-up proceedings), as well as the persons or organs which can assume the functions of a liquidator (list C).

The right of the States to amend the lists is subject to two restrictions.

The new proceedings included in lists A or B must correspond to the definitions of the proceedings given in Article 1(1) and Article 2(a) (list A, see points 48 and 62) and Article 2(c) (list B, see point 64).

320.Each Contracting State may amend the Annexes at any time.

The State shall address to the Secretary-General of the Council of the European Union, the depositary of the Convention under Article 49(1), a declaration containing the amendment which it wishes to make to an Annex.

321. The depositary of the Convention will notify the signatory States and the Contracting States of the content of any such declaration.

322. The amendment that a State wishes to make to an Annex must be subject to the acceptance by the Contracting or signatory States. It is not necessary for the States to communicate their acceptance expressly: if any State has not objected to the amendment within three months from the date of notification of the amending declaration, the amendment of the Annex shall be deemed to be accepted.

Even if the Convention does not expressly stipulate this, the objection of a State should be notified to the depositary of the Convention who received the amending declaration. The depositary shall notify the communicated objection to the Contracting States (see Article 51(c)). Where an objection is communicated by a State, the amendment will not come into force. A solution to a divergence between two States could be sought by convening of a conference for revision.

323. The declaration for the amendment of an Annex which was not objected to shall come into force on the first day of the month after the three-month period following the notification of the amending declaration to the Contracting and signatory States by the depositary.

Article 55

Deposit of the Convention

324. The Convention shall be drawn up in twelve languages; all texts shall be equally authentic.

The Convention shall be deposited with the Secretary-General of the Council of the European Union.