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Report on the Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings

by

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S U M M A R Y

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CHAPTER I - PRELIMINARY REMARKS

This Convention supplements the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("General Convention") signed in Brussels on 27 September 1968 and amended by the Convention on the Accession of the United Kingdom, Denmark and Ireland signed in Luxembourg on 9 October 1978.[1] Bankruptcies, compositions and other analogous procedures were excluded from the scope of the Judgments Convention. The common origin of these two Conventions is Article 220 of the Treaty establishing the EEC by which the Member States had agreed "to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of ordinary courts or tribunals and of arbitration awards".

As is pointed out in a note from the Commission of the European Economic Community sent on 22 October 1959 to the Member States requesting them to undertake negotiations, "a genuine internal market between the six States will not be achieved unless sufficient legal protection is ensured. Disturbances and difficulties in the economic life of the Community are to be feared unless it is possible to ensure the recognition and enforcement, if necessary by recourse to the courts, of individual rights which will arise from the formation of multiple legal relationships. Since judicial power depends on the sovereignty of the Member States and the effects of judicial acts are limited, even in civil and commercial matters, to national territory, judicial protection and, therefore, legal certainty in the Common Market, depend essentially on the adoption between the Member States of a satisfactory solution as regards recognition and enforcement of judicial decisions". As a result of this note the Committee of Permanent Representatives decided, on 8 February 1960, to set up a Working Party of experts.

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1 O.J.E.C. No L 304 of October 1978 - Reports by Mr. JENARD and Mr. SCHLOSSER : O.J.E.C. No. C.59 of March 1979.

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This Working Party, composed of governmental delegates from the six, subsequently nine, countries and observers from the Benelux Commission for the study of the unification of law and from the Hague Conference on Private International Law, has been assisted by the departments of the Commission. It held its first meeting in Brussels from 11 to 13 July, 1960. In view of the complexity of the problems posed by bankruptcy, and the concern not to delay work on the General Convention, it was considered preferable not to provide for the recognition and enforcement of bankruptcy decisions in the latter but to draw up a special Convention relating to bankruptcy and proceedings which must be grouped with it either by reason of their similarity or because their aim was to forestall bankruptcy and to prevent declarations of bankruptcy. It was agreed, however, that this Convention was to be guided as far as possible by the principles laid down in the General Convention.

For this purpose, and under the authority originally of a Plenary Joint Committee presided over by Professor BÜLOW, then Secretary of State at the Federal German Ministry of Justice, a Working Party on Bankruptcy was set up which has been chaired, since 1963, by Mr. NOËL, Counsellor of the French Cour de Cassation, by Mr. ABILDTRUP in 1978 and by Mr. LEMONTEY since 1979.

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A list of the experts who have participated in the work of the Working Party is annexed to this Report.

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CHAPTER II - REASONS FOR THE CONVENTION

The same grounds which justified the drawing up of the General Convention may also be advanced in favour of the Bankruptcy Convention.

What is generally true for individual proceedings in civil and commercial matters applies with even greater force to collective proceedings, national rules in respect of which are extremely complex, particularly as they are entwined with different branches of the law.

A. Differences in international bankruptcy law in the Member States

The question arises in international law of whether a bankruptcy[2] decision given in a certain State should take effect wherever a debtor has property or creditors, which implies that a single procedure can be followed, or whether, on the contrary, the debtor may be declared bankrupt in each of the States where his insolvency has been established, at least to the extent that a foreign bankruptcy decision has not been made enforceable there. The first concept is that of the unity and the universality of the bankruptcy, whereas the second is based on the principle of territoriality and involves multiple bankruptcies whereby the same debtor can be declared bankrupt in several countries.

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2 For sake of convenience, and subject to what will be said in Chapter II concerning the scope of the Convention, the term "Bankruptcy" (faillite) is used. It goes without saying that depending on the circumstances it might be a case, for example, of a preliminary composition, judicial arrangement or suspension of payments procedure.

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The substantive law of the Member States of the European Community is divided between these two concepts.[3] Those States (Luxembourg and, more recently, Belgium) which consider that bankruptcy deprives the debtor of legal capacity have retained, as has Danish law, the principle of universality, whereas the French courts, which regard bankruptcy as an enforcement procedure, are inclined to adopt that of territoriality. German, United Kingdom, Italian and Dutch law take account of both systems.

The two opposed concepts, the territorial or the universal character of bankruptcy, give rise in international law to complex problems, either in connection with the opening of international bankruptcy proceedings in a given country or in connection with the recognition and enforcement in the same country of bankruptcies declared abroad.

In the first place, the rules of international jurisdiction will diverge according to the system adopted. Applied as strictly as possible, the principle of universality and of unity would lead to a situation in which the matter could only be brought before the court of the place where the debtor's principal establishment was situated. Conversely, and also taken to its logical conclusion, the territoriality of bankruptcy would enable a debtor to be declared bankrupt in any country where assets were situated.

In this regard, although under the laws of certain countries such as Belgium only the court of the domicile or of the principal establishment of the debtor has jurisdiction (Article 440 Commercial Code), it is sufficient under the laws or according to the case laws of the other Member States of the European Community, in the absence of domicile in, or a principal establishment on their

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3 Travers, "Le Droit commercial International" 1935, t. VII, n° 11031; La Faillite, in Travaux du Com. fr. du DIP 1936-37 p. 9 et seq.; VALENSI, Répertoire de Droit Inter. of NIBOYET and LAPRADELLE, V° Faillite, n° 8 et seq.; Alberic ROLIN in Rec. des Cours de l'Acad. de La Haye, 1926, t. IV, p. 22 et seq.; SAFA, La Faillite en DIP, Beirut, 1954; MÜLLER-FREIENFELS, Auslandskonkurs und Inlandsfolgen, in: Vom deutschen zum europäischen Recht, Festschrift für Hans Dölle, Band II, p. 359 et seq.

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territory, that there is a secondary establishment or that a commercial or professional activity is carried on (Art. 2, F.W., of the Netherlands 30 September 1893, Sections 1 (2) and 4 (1) of the Bankruptcy Act 1914 and Sections 218 of the Companies Act 1948) or even that certain assets exist, (paragraphs 71 and 238 German KO) (Article 9 (2) Italian Bankruptcy Law of 16 March 1942). The French courts here managed, by the far-reaching application of Art. 1 of Decree n° 67.1120 of 22.12.1967 to international relations or by relying on the provisions of Articles 14 and 15 of the Civil Code, to exercise their own jurisdiction solely on the strength of the location of a debt in France.[4]

Moreover, the recognition and enforcement of foreign judgments is governed by very different rules in each of the Member States. On this subject, reference should be made to the very thorough Reports drawn up by Mr. JENARD and Mr. SCHLOSSER on the General Convention.[5] It will be sufficient to recall, by way of example, that in the Netherlands the Code of Civil Procedure lays down the principle that foreign judgements cannot be rendered enforceable within the Kingdom except by virtue of a treaty. In the absence of a treaty, disputes must be brought afresh before the Dutch Courts (Art. 431 of the Code of Civil Procedure).

It follows from these differences that, outside the State in which it was given, a decision declaring a debtor bankrupt remains, in general, without effect or produces only limited effects until it has been rendered enforceable there.[6]

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4 GAVALDA, L'état actuel du droit international de la faillite, in Trav. Comité fr. de DIP, 1962/64, p. 215; TROCHU, Conflits de lois et conflits de juridictions en matière de faillite, SIROY 1967, p. 82; HUSS, op. cit. p. 632. Certain Italian authors, like SATTA (Instituzioni di diritto fallimentare) and PROVINCIALI (Manuale di diritto fallimentare) take the same view.

5 O.J.E.C/ C. 59 of 5 March 1979.

6 NADELMANN, Codification of Conflicts rules for bankruptcy, Ann. Suisse droit international 1974, p. 57 et seq.

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In the absence of enforcement, it is necessary for the debtor to be declared bankrupt in every country in which he has assets or may incur fresh liabilities. Multiple bankruptcies are far from satisfactory, as a result first and foremost of the fact that cessation of the debtor's power to deal with his property and suspension of individual proceedings are not contemporaneous everywhere. The accumulation in each country of assets and liabilities, the ratio between which can vary considerably, also leads to very unequal distributions. True, creditors are permitted to claim in each bankruptcy, but this involves considerable expenditure and numerous difficulties. Finally, the multiplicity of procedures increases costs unduly.

The advantage of a law based on conventions in this field was already recognised at the end of the seventeenth century and since then many conventions have been entered into, including the Franco-Swiss Convention of 15 June 1869 replacing the previous conventions of 1803 and 1828, the Treaty concluded between France and Belgium on 8 July 1899, the Convention between Belgium and the Netherlands of 28 March 1925 and the Franco-Italian Convention dated 3 June 1930 replacing the Franco-Sardinian Treaty of 1760 confirmed by the declaration on interpretation of 1 September 1860.

But although it may be a step forward, the conclusion of bilateral agreements or trilateral treaties, such as the Scandinavian Convention of 7 November 1933 or the Benelux Treaty of 24 November 1961, can only provide an unsatisfactory solution to the problem of bankruptcy in international law. Numerous studies have therefore been undertaken with a view to drawing up multilateral conventions containing provisions calculated to reduce the drawbacks resulting from differences between national laws. It is sufficient to mention, apart from the Bustamante Code adopted in Havana on 28 February 1928 by the Sixth Pan-American Conference (Articles 414 to 422), the studies of the Institute of International Law (Sessions held in 1888, 1894, and 1912) and those of the Hague Conference on Private International Law. In particular, the Fifth and Sixth Conferences on Private International Law held in 1925 and 1928, appeared to have achieved considerable progress by producing a general draft convention, which has not, however, been ratified.

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Pending the appearance of universal or, at least, very wide scope, the adoption of which is still fraught with difficulties, it was necessary to settle the problem of bankruptcies within the European Economic Community.[7]

B. Economic advantages of a Community Convention

Since the laws of the nine countries of the Community differed appreciably on a number of important points (conditions governing the opening of bankruptcy, their effects, the course of the proceedings and, in particular the suspect period)[8], the task to be accomplished was necessarily a long-term one and the question that arose at the outset was whether such an attempt was fully justified from a practical point of view.

The uncertainty of international bankruptcy law on many important points, for example, secured debts, and the scarcity of case law on the subject, is explained by the fact that up to the present only a very small number of bankruptcies have genuinely had international repercussions. Almost the only bankruptcies of this kind that have occurred in the last few decades are those of Barcelona Traction, Intra Bank and Rolls Royce. Transnational undertakings rarely become insolvent. Moreover, for various reasons, not all of a legal nature, commercial activities abroad are often carried on by subsidiary companies, legally distinct from the parent company.

However, the effect of the Common Market must be precisely to bring about a radical change in this situation. The Member States of the European Economic Community have agreed to establish between themselves a genuine and vast internal market conforming to the rules of free competition. Every effort must therefore be made not only to eliminate obstacles to the functioning of this market, but also to promote its development.

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7 It should be noted that the transformation of national units into a wider federation has generally entailed the drawing up of uniform rules. Thus, the United States Constitution of 1787 deprived the various States of the right to legislate in the field of bankruptcy. Under the Canadian Constitution of 1867, as under the Swiss Constitution of 1874, bankruptcy legislation became a matter for the Federal authorities.

8 Ganshof, le droit de la faillite dans les Etats de la CEE, Bruxelles 1970.

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Thus, the Treaty of Rome provides for the free movement of persons, goods, capital and services. Freedom of establishment and freedom to provide services, coordination of company law and the implementation of the other provisions of Article 220 of the Treaty of Rome relating to the mutual recognition of companies, the retention of legal personality in the event of the transfer of a company's seat and the possibility of mergers between companies governed by different national laws, not to mention the future European company (société anonyme européenne), which will doubtless own property in several Member States, must ensure the mobility of undertakings and encourage them to carry on their activities in other Community countries ie the form of establishments or branches. Thus the assets and creditors of many undertakings will increasingly be spread over different States. However, in a system of free competition, the existence of the Common Market alone is no guarantee that all undertakings will prosper.[9] If some undertakings are not in a position to meet their obligations, the effects of bankruptcy or similar measures taken against them will extend beyond the frontiers of a single State.

C. The shortcomings of existing Conventions

At present, the only bankruptcy conventions in existence between the nine Member States of the European Economic Community are the five enumerated in Article 76 of this Convention. In addition, there is the Benelux Treaty, which has never come into force.

An examination of the five conventions in force reveals profound differences between them. On the one hand, some, like the Franco-Belgian Convention of 1899, the Belgo-Netherlands Convention of 1925 and the Benelux Treaty of 1961, contain direct rules of jurisdiction, whereas the Franco-Italian Convention of 1930 does not in principle contain such rules.

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9 HOUIN, Problèmes posés par la faillite dans le Marché Commun, Journal des Trib. (Belgium) 21 May 1961.

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Moreover, some of these conventions allow recognition and enforcement only of decisions that have become conclusive, whereas the Benelux Treaty, for example, applies to all enforceable judgments In the field of bankruptcy, in order to prevent any possibility of fraud, decisions are automatically enforceable, that is to say, irrespective of any rights of appeal.[10]

Also, treaties like the Franco-Belgian Treaty restrict the scope of their provisions to bankruptcies involving nationals of the Contracting States.

Finally, some of the conventions in force contain only very fragmentary provisions on bankruptcy and are for this reason difficult to apply.

The members of a single economic Community therefore required a multilateral convention laying down common rules.

D. General scheme of the Convention

1) Several approaches were open to the draftsmen of the Convention.

In addition to the solutions drawn from the principles of the territoriality or the universality of the bankruptcy, another solution could be found by attempting, within the framework of Article 100 of the Treaty of Rome, to achieve if not unification, at least harmonization or approximation of the laws of the nine countries. In the circumstances, this undertaking would have been far too ambitious, precisely because of the differences between national laws; moreover, bankruptcy is an institution of public policy which is concerned with the law of persons, company law, property law, rules of procedure and methods of enforcement. At the very least, such unification presupposed the unification of the law of obligations, which constitutes one of the principal tasks facing the European Community.[11]

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10 Art. 107 of the French decree of 22.12.1967. Art. 465 Belgian Commercial Code and Article 16 of the Italian bankruptcy law.

11 See, for example, Directive nº 7060/80 SOC 156

Accordingly, the members of the Working Party acknowledged, as soon as work was commenced, that any systematic attempt to unify the law of bankruptcy would take a very long time, and they unanimously agreed, after receiving a favourable opinion from numerous professional organizations, both European and national,[12] to draw up a convention recognising the unity and universality of bankruptcies. The aim of the Convention therefore is not to create a "European" type of bankruptcy or to modify the substantive rules of national laws. Its fundamental purpose is to give effect at European level to bankruptcies by settling conflicts that arise between the laws and between the courts of different Contracting States.[13]

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12 This means, inter alia, the union of Industries of the European Community, the Standing Conference of Chambers of Commerce of the EEC, the Standing Conference of the Belgian, French and Italian Chambers of Commerce and Industry. The Banking Federation of the EEC avoided taking sides in the conflict regarding the system to be adopted. Cf. also the International Colloquium of European Jurists held in Nice in June 1960 (Rev. Inter Dt. Comparé 1960, p. 782).

13 Cf. some of the articles which have already appeared on the draft Convention : BÖHLE-STAMSCHRÄDER, Von einem Konkursabkobben der EWG-Staaten (1964); BERGES, Kommt es zu einem EWG-Konkursablommen ? in Konkurs-Treuhand u-Schiedsgerichtswesen, 1965, p. 73-79; W.G. BELINFANTE, Faillissementsrecht in de EEG in Europ. monografieën, n° 4 of Dec. 1965; J. NOËL and J. LEMONTEY, Aperçus sur le projet de Convention européenne relative à la faillite, in Rev. Trim. Dt. européen 1968, p. 703-19 and 1975, p. 159-180; articles by M. WESER and J. VAN DER GUCHT, in Jurisp. Com. Belgique 1968, p. 150, 264, 361 and 607; HIRSCH : Vers l'universalite de la faillite au sein du Marché Commun, in Cahiers Dt. europ. 1970, p. 50-60. See also "Idées nouvelles dans le droit de la faillite" Trav. de la IVème Journée d'études juridiques Jean DABIN de Louvain (Bruxelles 1969) et les problèmes internationaux de la faillite and le Marché Commun, Padua 1971 (Actes du Colloque international Milan, June 1970); PASTOR RIDRUEJO, la faillite en DIP, Rec. Cours Accad. Dt. Int., 1971, II, p. 141; GANSHOF, l'élaboration d'un droit européen de la faillite dans le cadre de la CEE, Cahiers St. Europ. 1971, p. 146; MUNCH, Udkastet til EF-Konvention om konkurs, Ugeskrift for Retsvaesen, 2 September 1972; M. HUNTER, Draft Bankruptcy Convention of the EEC, Int. and Com. Law Quat. 1972, p. 682; J. VOULGARIS, De la compétence jud. internationale en matière de faillite dans le cadre de la CEE ..., CLUNET 1974, p. 52; M. WESER, Convention Communautaire sur la compétence jud. et l'exécution des jugements, Bruxelles 1975.

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The question arises, however, whether it was necessary to choose only "European bankruptcies", that is to say, those having repercussions on the territory of other member countries. This limitation, which might have been justified by the desire to refain from implementing very complex rules unnecessarily, had to be abandoned, since it is not always possible to tell, at the time a bankruptcy is declared, whether it will have international implications or not. The situation of property representing the debtor's assets is not the only factor to be considered; the location of claims, and the fact that the bankruptcy could take effect with regard to acts done by the debtor abroad must also be taken into account. These diverse implications do not necessarily appear as soon as the proceedings are instituted. Moreover, the Convention contains some uniform rules and it was not possible to contemplate having in consequence two sets of substantive rules. Most particularly, moreover, the chief advantage of the Convention, which is based on the principles of unity and universality, is to ensure, immediately and in every country that the debtor's power to deal with his property ceases from the moment he is declared bankrupt, the bankruptcy entailing the voidability of his acts, disposals or administrative measures with the result that it would have been disastrous if the debtor had been able to take advantage of the ostensibly national character of the bankruptcy to make arrangements for his insolvency in the other member countries.

2) The principal difficulties encountened by the Working Party of Experts, which called for important decisions, arose in connection with the determination of the competent court and the choice of the applicable law, and with the machinery for enforcement.

a. The unity and universality of tha bankruptcy presuppose that jurisdiction is exercised by the courts of a single State. From the outset, it had been agreed that the rules to be adopted governing the jurisdiction of courts must be direct rules of jurisdiction. But it was still necessary to work out a criterion applicable to traders and non-traders, to natural persons and legal persons. This is why the Working Party adopted, as the main criterion, the debtor's centre of administration. If there is no such place within the Community, jurisdiction will be based on the existence of an establishment on its territory.

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Since the order of importance of these criterion does not exclude the possibility of conflicts of jurisdiction, the Convention contains rules on this subject that are as complete as possible.

b. The unity and universality of the bankruptcy suggest recongition, as a general rule, of the application of the lex fori concursus. However, although this choice of the applicable law raises few difficulties in relation to the conditions governing the opening, organisation and course of the bankruptcy, it was necessary, precisely because of the substantive differences between the laws in question, to afford creditors and their third parties protection apart from advertising the bankruptcy throughout Europe. For this reason the Working Party adopted another law, which seemed to it the most appropriate one for that purpose. Furthermore, in matters of such importance as set-off, and the validity as against the general body of creditors of clauses of reservation of title, it would have been unsatisfactory to adhere to a conflict rule which would, moreover, have been very difficult to choose. To apply the law governing set-off (or sale) would have resulted in considerable uncertainty and discriminatory treatment in the same set of bankruptcy proceedings; to choose the law of the bankruptcy, which ultimately depends on the place where proceedings are instituted, would have undermined commercial certainty. On these points the Working Party has drawn up uniform rules designed to replace, once the Convention has come into force, the corresponding provisions of national bankruptcy laws. These uniform rules may, on secondary points, be accompanied by certain reservations, the list of which is exhaustive.

The problem of determining the law applicable to secured claims and rights of preference obviously constituted a major difficulty for the draftsmen of a Convention based on the unity and universality of the bankruptcy, since bankruptcy is a collective procedure for the realization of the assets and is designed to satisfy creditors' claims according to their ranking. Although the application of the lex rei sitae to special rights of preference, a solution in

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conformity with the provisions of the different systeme of private international law, does not appear ro raise great difficulties,[14] the question is by contrast extremely controversial in relation to general rights of preference. There are three traditional points of view- according to the first view, the lex rei sitae should be applied exclusively, according to the second view, only the law of the bankruptcy is relevant and the third view is that a middle course should be adopted and both applied simultaneously.

Faced with the impossibility, firstly of working out a solution that is entirely satisfactory from the point of view of private international law and, secondly, of considering in the immediate future, the harmonization of rights of preference, the Working Party confined itself to recognising existing national practices by subjecting the assessment, extent and classification of general rights of preference to the law of the place where the encumbered property is situated. It pointed out, however, that in civil and commercial matters, creditors could invoke against assets situated in each of the Contracting States, the general rights of preference provided for by the law of that State in respect of the debts owed to them.

As a result of making general rights of preference subject to the law of the situs, it became necessary to establish, for accounting purposes, as many sub-estates as there are Contracting States on whose territory there are assets to be realised. It was therefore necessary to depart from the principle of the unity of the bankruptcy to some extent, but this disadvantage has been offset by drawing up rules for distribution that are sufficiently detailed to take account of the fact that the same debt might be secured in several countries for different amounts or by securities of different kinds or ranking.

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14 German Law does not recognise the concept of "special rights of preference" but only the exclusion from the bankruptcy of certain assets for the benefit of certain creditors (Absonderungsrecht) (cf. observations on Art. 43).

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c. Another important decision to be taken by the Working Party concerned the machinery for recognition and enforcement of bankruptcy decisions. One of the fundamental principles adopted by the Working Party and directly derived from the adoption of the rules on the unity and the universality of the bankruptcy, was that the decision declaring the debtor bankrupt and subsequent decisions must take effect in all the Contracting States. Once this principle had been accepted, the question arose whether it was necessary to subject these decisions to a procedure for enforcement or whether it was possible to give them full effect without any prior formality, merely by laying down a procedure for terminating, in certain exceptional cases, the automatic effects of a bankruptcy in a Contracting State.

There are serious drawbacks to an "exequatur" procedure as a precondition for any recognition or enforcement measure since in bankruptcy time is of the essence. The debtor must not be allowed any opportunity to transfer his assets elsewhere; likewise, certain creditors who are better informed must be prevented from taking swift action to the detriment of the others. This explains why, in most of the States, every bankruptcy decision is, in principle, provisionally enforceable. No doubt it would have been possible to restrict the "exequatur" that would have resulted from a much simolified procedure based on the General Convention (Article 31) solely to measures for realizing the debtor's assets, whilst providing for the automatic recognition of the principal effects of the bankruptcy, such as the cessation of the debtor's power to deal with his property and the suspension of individual proceedings.

However, it was necessary to bear in mind that the machinery implemented by the Convention, concerning both the jurisdiction of courts and the choice of law, which is binding on the court hearing the bankruptcy, would have reduced to a minimum the role of the court of enforcement and would not have justified compulsory recourse to an "exequatur" procedure, however simplified. Moreover, bankruptcy takes effect erga omnes and the only legitimate objector to an application for enforcement would have been the debtor, hardly qualified, after being declared bankrupt, to represent his creditors, and all too often tempted to take advantage of every opportunity afforded by such a procedure to delay matters.

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In order to ensure that bankruptcies are fully effective, and that provision is made only for such control as is necessary and having agreed to the mutual confidence between the judicial institutions of the Contracting States, which is the basis of the Convention, the Working Party has unanimously endorsed the principle of automatic enforcement, whilst allowing, where necessary, recourse to an action to challenge the bankruptcy which already exists in some systems of private international law. The advantage of the system of challenging the bankruptcy is that there is no break in the continuity of the effects of bankruptcy, and that it will be a matter, for the person seeking to oppose recognition and enforcement to decide, at his own risk, whether to take such action.

However, as far as decisions on disputes arising from the bankruptcy are concerned, and to avoid practical difficulties where it becomes necessary to effect compulsory enforcement against third parties, the Working Party had to agree to prior apposition of national enforcement orders in accordance with the General Convention.

It remained for the Working Party of Experts to define the conditions in which action to challenge the bankruptcy might be taken and its effects.

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Some further comments are called for.

It has already been observed that the Convention was in the field of private international law and that its draftsmen had finally abandoned the attempt to harmonize the substantive laws of bankruptcy even with regard to those aspects where harmonization was most called for. It is, however, to be hoped that the outline uniform law contained in the Convention to ensure that the latter is applied as effectively as possible will help to bring about a more comprehensive approximation of the laws of the EEC Member States more rapidly.

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The aim of the European Economic Community is to set up a vast internal market enjoying freedom of establishment and freedom of competition. But this market must not be distorted by differences between the measures adopted to ensure lawfulness and fairness in competition in trade. In this regard, it is necessary, for the reasons partially set out above, to supplement the convention in at least two respects.

To begin with, although national laws are, as they stand, sufficiently close with regard to the conditions governing the opening of the bankruptcy stricto sensu, this does not apply to the other proceedings referred to in the Convention, for example, the conditions governing judicial arrangements, preliminary compositions or suspension of payments. It is to be hoped that national measures which enable a debtor who has defaulted to avoid the realization of his assets and to pursue his activities will soon be harmonized. This also applies to disqualifications and restrictions of the rights of those directing or managing companies, resulting from the bankruptcy of the latter.

The Convention does not deal with the criminal aspects of bankruptcy. The inclusion of provisions of a penal character would have encumbered its general layout and delayed its completion. It should, however, be noted that the application of the Convention will inevitably raise many problems in this respect, particularly with regard to the institution of proceedings for criminal bankruptcy and similar offences, in countries other than that where the bankruptcy was opened, in which, according to the laws of those States, the adjudication of bankruptcy, and not merely the cessation of payments is a constituent element of the offence.

It seems logical that an adjudication of bankruptcy which takes effect automatically under civil law in the other Contracting States could also enable criminal proceedings to be instituted in those States. Otherwise, the unacceptable conclusion would have to be drawn that offences connected with bankruptcy, which are not amongst the least serious, would often remain unpunished. It is therefore to be hoped that a supplementary measure will be negotiated resulting, if not in Community rules on offences connected with bankruptcy or on the prosecution of such offences, at any rate in a satisfactory coordination of the geographical application of the various criminal laws.

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CHAPTER III - THE SCOPE OF THE CONVENTION

Title 1 defines the scope of the Convention.

According to Articles 1 and 2, the Convention is to apply to bankruptcy, compositions and other analogous proceedings. In principle it relates to natural persons, companies and firms and legal persons against whose assets bankruptcy proceedings may be instituted, irrespective of the nationality of the parties. It has a binding character, with the result that the proceedings are universal and exclusive.

1. - Bankruptcy, composition and analogous proceedings

The terms employed in the title of the Convention, the third paragraph of the preamble and the first paragraph of Article 1 are, for reasons of terminological concordance, the same as those already used in the Brussels Convention of 27 September 1968 (Article 1 (2))[15] with regard to matters excluded from the scope of that convention, which tally with those employed in the Hague Convention of 1 February 1971 relating to the recognition and enforcement of foreign judgments in civil and commercial matters (Article 1(5)).

Although useful, this terminology does not, however, define the precise scope of the convention, which in actual fact encompasses proceedings designed to achieve different, and even opposed, objectives but whose common aim- subject to the reservation mentioned below- is to deal with the financial difficulties of undertakings.

The convention applies not only to bankruptcy or the realization of assets in the French sense, which constitutes its first objective, but also to the other analogous proceedings which are based, under the different laws, on cessation of payments, insolvency, excessive indebtedness or blows to the of debtor's credit, and entail the intervention of the judicial authorities which results both in the suspension of individual proceedings and the compulsory and collective realization of the debtor's assets.

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15 See the report by Mr. JENARD, p. 11 and by Mr. SCHLOSSER, n° 53 and 54.

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However, the convention also applies to the compositions and schemes of arrangement referred to in Article 1(b) of the Protocol. This covers various proceedings, including "traditional" proceedings for example, those which result in compositions (règlement judiciaire, Vergleichsverfahren, etc.) or exceptional proceedings, for which provision has recently been made in national laws, which, whether or not based on insolvency, are designed to rescue certain undertakings in view of their economic importance (provisional suspension of proceedings under French law) or their activities in the credit or insurance sectors (for example KWG and VAG proceedings under German law, noodregeling under Dutch law and amministrazione straordinaria under Italian law). The wide range of these proceedings is reflected by the fact that they can be of a legal or administrative nature, or both (see, for the consequences, Article 55).

A specific problem arose in connection with the liquidation of companies in the United Kingdom and in Ireland, which is not covered by the Bankruptcy Acts[16]. Companies are subject to winding up in accordance with the Companies Acts even where they have not been registered. Winding-up proceedings are not peculiar to insolvency but can take several forms and are based on various grounds. The common feature of all winding-up proceedings is the realization of the company's assets and the distribution of the proceeds amongst those entitled to them (members and creditors) in order to bring about the company's dissolution.

A clear distinction must be drawn between compulsory winding up and voluntary winding up. The latter is carried out without any intervention by the court by the members of the company, who appointed a liquidator. Only a variant of this form of winding up, which applies to cases of insolvency, namely creditors' voluntary winding up, comes within the scope of the convention.

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16 See the report by Mr. SCHLOSSER, n° 55 et seq.

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Conversely, the dissolution of a company by the court, stricto sensu, namely compulsory winding-up, presupposes the filing of a petition by the company or a creditor, but may be based on grounds other than insolvency (reduction in the number of members below the statutory minimum, cessation or prolonged interruption of its activities and, in general, whenever the court considers that it is just and equitable to wind up the company). As a result of the practical impossibility of distinguishing between these cases covered by the compulsory winding-up order, the Working Party has included this procedure without attempting to draw any distinction in relation to insolvency, which accounts for 95% of the cases in which such proceedings are initiated[17].

Disputes which may arise from amicable or out-of-court compositions of a purely contractual nature come within the scope of the General Convention. In view of its character, the same is true of personal insolvency ("deconfiture") under French law[18].

To simplify the wording of the articles of the convention, the term "bankruptcy" has been adopted throughout. According to Article 1(2), however, these articles also apply to the other proceedings governed by the convention. It became apparent that, as a general rule, it was unnecessary to adopt special provisions with regard to these proceedings, either because the provisions relating to bankruptcy are, in view of their subject matter, distinct from other proceedings (for example, cessation of the debtor's power to deal with his property, suspect period and realization of the assets) or because the application ot these provisions, mutatis mutandis, does not involve any difficulty.

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17 This solution runs counter to the one included in the General Convention and given prominence in the English version of point 2 of the second paragraph of Article 1 of the latter, which reads "proceedings relating to the winding-up of insolvent companies..." (See the Report by Mr. SCHLOSSER, n° 57). If the company is solvent, compulsory winding-up is covered by both conventions...).

18 Thus contractual agreements of various kinds between a debtor in financial difficulties and creditors (deeds of arrangement) exist in the laws of the different component parts of the United Kingdom. Only the proceedings which exist in Northern Ireland have been included, since they involve the approval of the court.

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It has been otherwise provided, according to the actual wording of Article 1(2), only in :

- Article 6(2) in respect of the transfer, while a composition is in progress, of the centre of administration;

- Article 52, in respect of the date for determining the situation of property charged with rights of preference or secured rights with a view to their satisfaction;

- Article 54 in respect of the invalidity as against preferential or secured creditors of certain effects of proceedings other than bankruptcy;

- Articles 56, 60 and 67 in respect of the enforcement of compositions approved by the court and of certain orders for enforcement in favour of creditors;

- Article 81 in respect of the incorporation of the uniform laws into national law;

- Article IV of the Protocol in respect of the contents of extracts from judgments for publication.

Reference should be made here to the fact that the Convention is also applicable to certain actions arising directly from the bankruptcy or on which the bankruptcy has a special bearing and which are exhaustively set out in Articles 11[19] and 15 (vis attractiva concursus). Other actions that can arise under the laws of the Member States as a result of the "vis attractiva" are excluded from the "Bankruptcy" Convention and come within the scope of the General Convention.

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19 This solution was arrived at by the Court of Justice in its judgement of the case of Nadler by interpreting Article 1 of the General Convention: C.J.E.C. 22/2/1979 Case 133/78; Opinion of Reischl, (1979) ECR 733 and Rev. crit. DIP 1979, p. 657 n. LEMONTEY.

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II. - Undertakings concerned; problem posed by insurance undertakings

The convention applies to all undertakings which may form the subject-matter of one of the proceedings referred to in the Protocol.

Under Article 1(3), only direct insurance companies covered by the first Coordination Directives of 24 July 1973 (indemnity insurance) and 5 March 1979 (life assurance) are provisionally excluded from the convention.

The grounds for this exclusion are not based on the fact that, according to the above mentionned irectives, insurance undertakings are subject to supervision exercised by the public authorities by means of a coordinated authorization procedure. That is also the case, since the adoption of Directive 77/780 of 12 December 1977, with regard to credit establishments, which have nevertheless been included in the convention. Insurance companies differ from such establishments, however, in that the withdrawal of authorization in the event of insolvency entails the compulsory initiation of special proceedings, more or less administrative in nature or excluding bankruptcy depending on the State concerned, designed primarily to guarantee uniform protection for insurance creditors. Once the problems peculiar to insurance undertakings, which are complicated by the concentration of the assets of the guarantee fund in the country where the undertaking has its seat, have been resolved by the directive on the liquidation of companies which is being drawn up, the convention will also apply to the implementation throughout the Community of the special compulsory winding-up procedure for insurance undertakings, and of proceedings governed by ordinary law, to the extent allowed under the directive, just as it will to the special proceedings provided for in the Protocol in respect of other categories of undertakings;

However, re-insurance companies, which do not give rise to such problems, are, except for certain mutual insurance companies referred to in the last paragraph of Article 1, covered by the convention in the normal way.

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III. Mandatory Nature of the Convention

The Convention aims to harmonize, as regards bankruptcy and winding up the rules of contracting states concerning conflict of laws and jurisdiction, and the joint declaration which appears at the end of the Convention recalls the desire to "ensure that the Convention is applied as effectively as possible".

Whilst Article 1 does not expressly say so, the Convention, which is entended to establish a distinct legal framework.

Amongst the Member States of the Community, is automatically applicable. Government experts have, particularly in title II of the Convention, elaborated a precise body of rules as to jurisdiction, the application of which should not be frustated by the negligence or ignorance of the parties. This principle, spelt out in Articles 13 and 14 on conflicts of jurisdiction, presumes that judges of contracting states will ascertain that they have international jurisdiction.
Apart from the fact that rules of international jurisdiction come within the scope of public policy, for example in Germany and Italy, bankruptcy is per se a matter of public policy and this feature extends in national law, even to rules of territorial jurisdiction.
The court must therefore apply these provisions even if they are not relied upon by the parties. The same binding character extends to recognition and enforcement[20].

IV. Irrelevance of the nationality of the parties

Unlike certain other conventions, this convention, according to Article 1, applies irrespective of the nationality of the parties. The term "party" must be understood in a very wide sense. No account is taken of the nationality of the debtor and there must be no discrimination against creditors or third parties on the grounds of their nationality (cf. Article 7 of the Treaty of Rome).

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20 See in connection with Articles 26 and 31 of the General Convention, CJEC 30 November 1976, Case 42/76.

The Working Party of experts might conceivably have exceeded its terms of reference, since Article 220 of the Treaty of Rome prescribes that States should enter into negotiations with a view to securing "for the benefit of their nationals" the simplification of formalities governing the recognition and enforcement of judgments.

But the solution adopted meets the same requirements as those which guided the draftsmen of the General Convention (Article 2) and which have already been analysed by Mr. JENARD in his Report[21] (q.v.).

A specific provision, which was desired by several delegations, would not, however, be purposeless in respect of certain national provisions, such as paragraph 5 of the German KO, which, in certain circumstances, provides for discrimination[22].

V. Single, universal and exclusive character of proceedings opened

Article 2 contains the principle of the unity and exclusive character of the proceedings referred to in the convention. Subject to what is said below regarding jurisdiction, only one set of proceedings must in principle be instituted, and the measures adopted in one State take effect in the others, thereby precluding the opening in those States of any other proceedings provided for in the convention until the first proceedings have been terminated. However, this rule clearly does not preclude the opening of several proceedings in the original State and their recognition in the other States. Article II of the Protocol specifies, in the case of certain United Kingdom proceedings, when such proceedings are to be regarded as having been opened.

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21 JENARD, op. cit. p. 14.

22 Cf. NADELMANN, De la discrimination, dans les lois sur la faillite, contre les créances dites étrangères, Rev. Trim. Droit Commercial, 1973, p. 741.

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It has not been possible to prevent all proceedings from overlapping especially where the courts of different States claim jurisdiction. The unity of the bankruptcy means precisely that, where there are several judgements, only one will be recognised at European level pursuant to the rules laid down in Articles 51 and 52 and will be enforced.

Furthermore, it is necessary to read Article 2 in conjunction with Articles 6 (1), 66 and 78. Article 6(1), for reasons which will be discussed later, provides for cumulative jurisdiction, provisionally, in the event of the transfer of the centre of administration within the EEC. Article 66 makes provision for a bankruptcy to have purely territorial effects in the event of a foreign judgment being declared void in a Contracting State. Finally, Article 78 relaties to international undertakings entered into with a non-member State prior to the convention where two bankruptcy decisions, one given in an EEC Member State and the other in a non-member country, are enforceable in the same State; this exception derives from the general principles of public international law.

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CHAPTER IV - THE JURISDICTION OF THE COURTS

I. General considerations

In implementing the principle of the unity of the bankruptcy, the convention provides for rules of direct and general jurisdiction and has recourse to an independent Community criterion for determining jurisdiction, the debtor's centre of administration.

A. Jurisdiction - direct and general

Where it was a matter of resolving the problem of territorial jurisdiction, the Working Party of Experts had to choose between indirect and direct rules.

Indirect rules of jurisdiction would not have been compatible with the principle of the unity and the universality of the bankruptcy, since they are relevant only at the recognition and enforcement stage. They would not have prevented multiple bankruptcies from continuing to be declared throughout the EEC. Only the system of direct jurisdiction could be adopted and it was necessary to apply it without taking account of the nationality of the debtor or his creditors to ensure the absolute and uniform recognition and enforcement of bankruptcy decisions.

A new solution was therefore adopted:

The system of direct jurisdiction is founded on the principle of the debtor's centre of administration. This rule is based directly on the generally accepted principle of "actor sequitur forum rei". It excludes exorbitant rules of jurisdiction such as those laid down in Articles 14 and 15 of the French and Luxembourg Civil Codes, which have been retained simply to deal with residual cases (Art. 5).

The convention thus defines the direct jurisdiction of the courts of a State but not that of any particular court in that State. From this point of view, therefore, the Member States' national rules remain applicable. It is for this reason that in Article 3 et seq. of the convention the term "the courts of any Contracting States in which..." is used. It is therefore a matter of "general" jurisdiction and not of "special" jurisdiction.

B. The criterion of the debtor's centre of administration

The choice of the criterion for determing jurisdiction to be included in the convention was the subject of long discussions within the working Party.

An examination of the existing laws[23] and conventions on this matter reveals that, in the case of natural persons, jurisdiction is generally exercised by the court of their domicile, i.e. in the case of traders, by the court of their principal commercial establishment; with regard to companies, it is in principle the court of the place where the company's head office is situated which must declare the company bankrupt.

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23 Belgium: Articles 440 Code Com, 36 and 631 Code judiciaire.
Denmark: Laws Nos. 51 of 25/3/1872 (most recently amended in 1975) and 123 of 15/4/1930 (amended in 1952). A new law entered into force on 1/4/1978.
F.R.G.: §§ 71(1) and 238(2)KO; § 2(1) VglO.
France: Article 1 of Decree No. 67-1120 of 22/12/1967.
Ireland: Sections 213, 256, 344 and 345 Companies Act, 1963.
Italy: Articles 9, 161 and 187 1.f. (Royal Decree of 16/3/1942).
Luxembourg: Articles 440 Code Com. -L. 2/7/1870) and 3(1) of the Law of 14/4/1886 amended in 1911.
Netherlands: Articles 2 and 214 F.W. (Law of 30/9/1893).
United Kingdom: Sections 1(1) and (2) and 4(1) Bankruptcy Act, 1914. Section 218 Companies Act, 1948.

Three solutions were studied by the Working Party:

- to grant jurisdiction to the court of the State where the debtor's principal commercial establishment is situated or, in the absence of such an establishment, to the court of his domicile, especially in the case of non-traders. However, although in Belgium and Luxembourg, where the court with jurisdiction is that of the debtor's domicile, the term "domicile" is used in legal literature and in case law in a commercial sense, that is not the case in the Netherlands, where every distinction between traders and non-traders has been abolished and, according to case law, only the civil law concept of domicile was intended as far as natural persons were concerned;

- to provide, following the example of the Benelux Treaty (Article 22), for the jurisdiction of the court of the principal commercial establishment and of the domicile, any conflict between two courts which base their jurisdiction on one or the other being resolved by recourse to the principle of which court is seised first. However, the main drawback to this solution was that it increased the number of courts having jurisdiction and enabled proceedings to be brought before a court which might be badly situated geographically for the purpose of opening the bankruptcy and supervising the course of the proceedings;

- to introduce a new criterion which had the dual advantage of defining the permanent and undisputed seat of the debtor's economic activities while at the same time best respecting the established criteria of national laws.

Only the last solution was finally deemed to be satisfactory. The criterion that has been adopted is that of the "centre of administration", a term derived from the works of certain authors and from texts prepared by the Institute of International Law in Paris in 1894 and in Brussels in 1902, as well as from the 1930 Franco-Italian Convention (Article 28) and the 1979 Franco-Austrian Convention[24]. Article 3(2) of the Convention contains a definition of the centre of administration, which constitutes an essential element. Accordingly, it calls for a detailed examination.

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24 It is true that in these texts the term "siège principal des affaires" is used (cf. Yearbook of the Institute of International Law, Vol. XIII, p. 279) L. Humblet is the first author to speak of "centre des affaires" (Traité des faillites 1880, No. 1042). A. Rolin has substituted it in commercial matters for that of domicile (op.cit. p. 49) - cf. Leurquin: La notion de centre des affaires dans le droit européen de la faillite, Mem. Louvain 1969 and especially p. 112 et seq.

The centre of administration is "the place (a) where the debtor usually (e) administers (b) his main (d) interests (c)".

(a) "place": this is a physical criterion for determining territorial location. It should be recalled that, under Article 1 of the Convention, the latter is applicable regardless of the nationality of the parties. The place may, moreover, be situated outside the EEC.

(b) "where the debtor administers...": this term was adopted in preference to "manages" and is sufficiently neutral to be applied to natural and legal persons, to traders and non-traders. Everyone administers his property. This element of the definition juxtaposes a physical criterion and an intellectual criterion (administering by taking decisions). The centre of operations should therefore be ruled out.

In the case of subsidiary companies, the place from which instructions for the management and administration of business are given must also be excluded. The centre of administration of a company is the place where it has its main centre for administering and managing its affairs, even if the decisions taken there comply with instructions given by shareholders residing elsewhere.

With regard, more particularly, to firms, companies and legal persons, Article 3 (2) raises a straightforward presumption: "this place shall be presumed" until the contrary is proved, "to be their registered office". Since the objectives concerned differ from those relating to the recognition of companies, the Working Party has not referred to the criteria contained in Article 58 of the Treaty of Rome supplemented by the General Programmes of 18 December 1961 relating to the abolition of restrictions on freedom of establishment and services.
These criteria have been laid down in order to ensure that companies which really belong to the Community benefit from freedom of establishment, as provided for in the Treaty, by being placed on the same footing as national companies.

The centre of administration therefore corresponds for companies and legal persons to their actual head office[25] in accordance with the bankruptcy laws of several EEC States. Proof to rebut the presumption in Article 3(2) must, where necessary, be adduced by the company itself where the registered office is not situated in the same place as the actual head office and only the latter is to be taken into account for the purpose of determining the location of the centre of administration. This will also be the case in the Contracting States where the concept of registered office either does not correspond or no longer corresponds to the Community concept of the centre of administration.

However, as a result of the administrative supervision exercised over insurance companies and credit institutions, it can be said that, in the case of such companies and institutions, the two concepts coincide (Article 3(3)[26].

(c) "interests": The Working Party agreed to avoid the word "business" which is too suggestive of commercial or industrial activity. Of course, defining jurisdiction, it is the place where the "administration" is situated and not where the interests are situated that is important.

(d) "main": in a case where the debtor carries on several activities from different centres of administration, the one from which he administers his main interests is the relevant one.

(e) "usually": this term implies continuity in the same way as it qualifies the concepts of residence or profession in the definition which is often given of a trader.

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25 Cf The Hague Convention of 1.6.1956 (Article 2 (3) and the Brussels Convention of 29.2.63 (Article 5): these Conventions define the actual head office as the place where the central administration is established. Article 262 of the Draft Regulation on the Statute for a European Company, however, transforms the presumption in Article 3(2) into an absolute rule in view of the safeguards provided by the incorporation of the European Company.

26 Where an insurance company has its seat outside the EEC, "the oldest establishment" in the EEC may be assimilated to the head office of an undertaking in the EEC in the event of the company requesting its solvency margin to be verified in relation to the whole business which it carries on within the Community (Articles 26 and 27 of the First Council Directive of 24 July 1973). By analogy, the oldest establishment could be assimilated to the centre of administration for the purposes of this convention.

Thus the concept of centre of administration, that is to say the actual place from which the one-man business or the firm or company is managed, often comes very close to satisfying the broadly divergent criteria for determining jurisdiction laid down in the Member States: it seems to correspond fairly exactly to the definition in French case Law of the principal establishment in the case of traders who are natural persons[27] and the definition in Italian case law of the principal seat of the undertaking[28].

In the case of a debtor whose principal commercial establishment is situated in Antwerp, whose centre of administration is in Rotterdam, and who is resident at The Hague, the Convention merely retains the exclusive jurisdiction of the Dutch courts in general, and the Dutch rule relating to the special jurisdiction of the court of the domicile may be applied.

The Working Party wished to approximate the various national laws and to avoid creating, in relation to those laws, an entirely new law which would be difficult to incorporate in national law.

The courts will, however, have to be on their guard against the possibility of being misled by apparent similarities. This calls for two remarks.

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27 Paris 14. 11. 1957 D. 1958, p. 277, note by Houin "place where the trader administers his activities, where he concludes contracts with his suppliers, bankers and clients, and, therefore, where his legal and external centre of administration is situated". Art. 1 of the Decree of 22. 12. 1967, adopting the terms of the former Art. 437 of the Code Com., also uses in relation to companies the expression "principal establishment" where the head office is not situated in France. It is clear that this expression must be understood to mean a secondary establishment or a branch and, in the case of there being more than one establishment in France, the principle or most important establishment.

28 According to Italian case law, -Cassazione 19 January 1963, No. 64; 28 June 1961 No. 1563), the "principle seat of the company's operations" should be understood as meaning the actual centre of the company's commercial life, i.e. the place where its management and administrative bodies are situated and where it carries on all its activities or at least its principal activity with regard to the operation of the company, even though its official registered office is situated elsewhere.

The centre of administration, which is the pivot around which the machinery of the convention revolves, must be, for the reasons expressed above, in principle the primary criterion to be observed, if necessary, by the court of its own motion, for all bankruptcies to be opened in the Contracting States.

This concept must be examined from a Community point of view and in the true spirit of the Convention, and not by reference to the lex fori[29], in order to avoid, as far as possible, differences of interpretation and conflicts of jurisdiction which are particularly undesireable in bankruptcy matters. For guidance, it should be pointed out here that it follows from the definition in Article 3 that at any given moment there should be only one centre of acministration, whether it is situated within or outside the European Communities[30]. Articles 13(2) and 58 cover situations where this is not the case.

II. Examination of the Sections of Title II of the Convention

Section I - General provisions

This first section establishes the essential differences giving rise to the rules of jurisdiction provided for in the Convention.

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29 As regards the autonomous, and therefore uniform, nature of the concepts used by the "General Convention", cf the decisions of the Court of Justice since the judgement of 14. 10. 1876 in Case 29/76 "Eurocontrol".

30 Cf. the opinion of Prof. Beitzke, Doc. EEC 4958/IV/62 F p. 18. Difficulties might exist for certain international companies, such as the Franco-German "Union charbonnière Sarro-Lorraine (Saarlor) in respect of which the Treaty of 27 October 1956 on the Saar (Art. 84) provides for two registered offices, and an SE, which might have a number of registered offices. (Art. 5 of the draft regulation).

Articles 3 - 5:

The basic principle of the Convention rests on a hierarchy of rules of jurisdiction at the head of which is the centre of administration.

1. If a debtor, a natural or legal person, has his centre of administration in one of the EEC States, e.g. Italy, the Italian courts have exclusive jurisdiction to declare the bankruptcy open, conduct the bankruptcy proceedings and pronounce their closure. All the courts of the other Contracting States must therefore declare, if necessary of their own motion, that they have no jurisdiction, subject to the provisions of Article 13 (1).

2. Suppose on the other hand that the debtor does not have a "centre" in any of the EEC States, it being located in the United States or having been transferred there more than one year earlier (cf. Article 7 below), but has a single "establishment" either in Germany or in Belgium; in this case only the German or Belgian courts necessarily have jurisdiction to open bankruptcy proceedings which will take effect in the other EEC States[31].

Article 4(2) has attempted to define "establishment". This definition, which is fairly concise, puts forward a legal factor and a substantive factor. Firstly, the activities are carried on directly by the head of the undertaking or his representative, which implies, in the latter case, that although the establishment may have a certain degree of independence vis-à-vis the registered office, it is necessarily directly dependent on it; consequently, since the establishment has no legal personality of its own, it cannot

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31 This being contrary to Belgian law (which bases the jurisdiction of the Belgian courts solely on the situation in Belgium of the domicile or principal establishment of the debtor: Art. 440 C. Com.) and German law (which in a similar case would include in the assets only property found in Germany, the principle of territoriality derived from 238 par. 1 K.O.).

have separate debts. Secondly, the secondary activities have to show a certain degree of continuity or repetition, which appears to exclude a temporary or provisional installation[32].

The same undertaking, whether an individual, a firm or a company, may have establishments in several Member States. In this case the courts of these different States have equal jurisdiction whatever the relative size of the establishments. It might have seemed more logical to give exclusive jurisdiction to the courts of the country in which the largest establishment is situated. Overriding practical considerations, however, precluded such a solution, which would have required difficult checks with a risk of delaying the opening of proceedings unduly. Thus, when the centre of administration is not on EEC territory, the mere presence of an establishment gives jurisdiction subject to the provisions regulating conflicts of jurisdiction which will be examined later.

The convention, which lays down general rules of jurisdiction, did not need to take account of the situation where several establishments exist in the same State. It is then the internal provisions which determine which court of this State should have jurisdiction, without any need to refer to Article 13(2), which relates to the existence of establishments in several Member States.

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32 Cf. Cabrillac, Unity or plurality of the concept of "branch" under private law, Commercial law studies presented to Joseph Hamel, 1961, p. 119 et **seq.** This definition should be compared with the interpretation given by the Court of Justice to the concepts of branch, agency or other establishment used in Article 5(5) of the General Convention and considered equivalent, which "implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension". -Judgement of 22/11/78 in Case 33/78, Ets Somafer, (1978) ECR 2183, Opinion of Advocate-General Mayras, Clunet 1979, p. 672, note Huet).

This subsidiary rule of jurisdiction, which is based on the existence of an establishment, is subject to an important exception which is encountered again later in relation to the recognition of judgements and is derived from Article 78 mentioned above. It effectively concerns only France, which is linked with Switzerland, the Principality of Monaco and Austria by conventions which lay down rules of direct jurisdiction and ensure the unity of the bankruptcy.

3. It is only in the absence of a centre of administration and of an establishment in the EEC that the subsidiary connecting criteria endorsed by the legislation or case law of the Member States for opening bankruptcy proceedings may be applied exclusively ("purely national" jurisdiction)[40].

An express provision was necessary in Article 5 to avoid a narrow interpretation to the effect that these purely national jurisdictions were abolished as a consequence of the exclusive nature of Articles 3 and 4. This will be the case in particular with rules which allow one of the parties to be summoned before the national courts by reason of his nationality, the existence of assets or his last domicile (cf. Art. 9(1) and Secs. 71, 236 and 238 KO) or of debts (French case law)[33]. Only the laws of Belgium, Denmark and Ireland do not recognize the possibility and consequently Article 5 will be of no significance to them. However, judgements given on the basis of these jurisdictions, which are often considered exorbitant, will not fall within the scope ofof the convention. They may, however, be enforced in the other Member States on the basis of bilateral conventions (Art. 76) or the general law. It may also be observed that these purely national rules of jurisdiction will be the only ones permitting possible pronouncement of bankruptcy in the case provided for in Article 66 of the Convention.

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33 All legislations contain provisions for bankruptcy after death, particularly by providing for a fixed time for opening bankruptcy proceedings. German legislation is different from the others particularly in so far as it relates to the conditions for opening a bankruptcy, the petition for opening and jurisdiction (Nachlasskonkurs Secs 214 et seq. KO). It is the same in Dutch law (Article 198 and 202 FW.). Article 9 of the convention expressly provides for bankruptcy of the estate of a deceased person.

This provision is, however, not mandatory but merely permissive; for whilst in certain systems of law such as the French "règlement judiciaire" (scheme of arrangement) the cancellation of the "concordat" revives the former procedure of "règlement judiciaire" and leads of necessity to all the creditors being in a state of union. In other legislations, such as that of the Netherlands, the final approval of the composition in bankruptcy or in suspension of payment in principle closes the proceedings, and although the cancellation of the composition may nevertheless be pronounced, such cancellation does not automatically entail the resumption of the former procedure of bankruptcy or suspension of payment.

It was not therefore a question of modifying the various internal laws relating to the jurisdiction and powers of the original court which had opened proceedings other than bankruptcy; this is what is meant by the expression "retain jurisdiction to substitute"; the neutral term of "substitution" thus applies to the conversion of a scheme of arrangement into realization of assets (Article 79 of the French law of 13 July 1967), to subsequent bankruptcy (Anschlusskonkurs), etc.

The only difficulty to be resolved was that arising from the existence of new debts resulting from new business activities in the country of transfer, incurred by a debtor benefiting from a composition. The Working Party agreed on a solution which departs from the normal operation of the rules of jurisdiction laid down by the convention only if the original court, whose jurisdiction is virtually paramount, itself takes appropriate action on the debtor's new situation in good time. The rule included in the last sentence of Article 6(3) therefore became necessary to avoid the possible survival of the former proceedings which, but for this provision, would have had to be considered to take priority.

If bankruptcy or any other measure has been pronounced in the country of transfer, the court which formerly had jurisdiction in the country of origin "ceases to have it" in the sense that although it may cancel the composition, it no longer has power to convert, for example, a scheme

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of arrangement into realization of assets. Any decision nevertheless pronouncing such a conversion would have to be declared invalid (cf. p. 136 below, Article 58). The composition creditors will be able to prove their unsatisfied debts in the new bankruptcy. Conversely, the new creditors will have to prove for debts arising in the former proceedings if these proceedings have been resumed before new ones have begun.

Section II - Special provisions

This section contains special provisions relating to jurisdiction, firstly in the case of certain categories ofdebtors of a particular capacity (Article 10) and secondly members and managers of firms, companies or legal persons (Art. 11 and 12).

Article 10 must be read in conjuction with Article 62 in order better to understand the system which is after all fairly simple, applicable where the particular capacity of the debtor or of certain undertakings forms an obstacle, in certain Contracting States, to the opening of one of the procedures provided for in the Convention. This system rests on the distinction between jurisdiction to open the bankruptcy of these debtors and the recognition of such a bankruptcy.

The problem is, above all, that of the bankruptcy of non-traders or "small businessmen" within the meaning of Italian law[34].

It is well known that, as regards the opening of bankruptcy proceedings against non-traders, the laws of the Member States are divided. Belgian and Luxembourg law regard the prohibition of bankruptcy of non-traders as a principle of public policy whereas German, Danish and Netherlands law, like the common law systems, make no distinction according to the category

34 "Small business" means one whose income is less than the taxable minimul or in which the invested capital does not exceed 900 000 lire (FERRARA, Il Fallimento n° 69) cf. also Articles 2083 and 2195 of the Italian Civil Code.

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of the debtor. The development of Netherlands law is characteristic in this respect; not only has it allowed, by the F.W. of 1893, bankruptcy of non-traders, but it has gradually removed any distinction between traders and non-traders and has abolished the concept of a commercial act; the new Civil Code will ambrace all commercial law and the Commercial Code will be repealed. Since the law of 13.7.1967 France has accupied an intermediate position. Although it now allows the realization of assets owned by legal persons in private law, even non-traders, it has retained for natural persons the distinction between traders and non-traders[35].

On the other hand, the case laws of States which do not allow the opening on their territory of bankruptcy proceedings against a non-trader do not raise any obstacle against the recognition of foreign bankruptcies of non-traders, since public policy in the international sense has different requirements according to whether it is a question of giving effect on national territory to a situation properly created abroad or directly creating it there[36]. This particular application to bankruptcy of the idea of the attenuated effect of public policy is accepted in modern legal works, which see in it a consequence of the universality of bankruptcy.

To restrict the convention to bankruptcies of traders, as certain conventions have done[37], would have struck an unjustified blow at the fundamental principle of universality. Article 10 therefore provides simply for a possible shift of jurisdiction if the non-trader has his centre of administration in a country which prohibits bankruptcy of a non-trader.

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35 Save in the special legislation applicable in the three departments of Alsace-Lorraine. French law also allows the extension of realization of assets of companies to their directors and managers who are not always traders in law (Articles 100 and 101 of the 1967 Law).

36 Civ. 20.5.1967, Rev. crit. DIP 1968, p. 87, note GAVALDA; CLUNET 1967, p. 629, note BREDIN; Jur. com. Belgique 1968; IV. p. 493, note LEMONTEY.

37 The draft convention prepared by The Hague Conference in 1925-28 did indeed envisage the reciprocal recognition and enforcement of bankruptcy decisions in relation to non-traders, but left it open to each State to limit the effects of the Treaty to trading debtors (Article 9(2)). The Benelux Treaty is applicable to proceedings relating to traders alone and makes provision for rules governing qualification (Art. 28).

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However, according to Article 62, which obviously reserves the case in Article 10(2), an action to challenge the bankruptcy may not be brought in any Contracting State on the grounds that the foreign bankruptcy judgement is contrary to public policy for the sole reason that it concerned a non-trader (Art. 62(2)(d)).

Some examples will give a better understanding of the combination of these two rules:

- If a non-trader has his centre of administration in Germany, or, in the absence of a centre in the EEC, has an establishment in Germany, his bankruptcy can be opened in Germany and will take effect in all the other Contracting States.
- If this debtor has his centre of administration in France and an establishment in Germany, the bankruptcy can be opened in Germany (Article 10(1)) and will take effect in the other States, with the exception of France (Article 10(2)).
- If the same debtor has two establishments within EEC territory, one in Germany and the other in France, his bankruptcy can be opened only in Germany but will take effect in all the other Contracting States including France (combination of Articles 10 and 62).

Thus, although there is no imposition of a uniform system of bankruptcy of non-traders, the enforcement of a foreign bankruptcy decision will be ineffective only in the country where the centre of administration is located if such a measure could not be taken there.

Given the general nature of the terms used in Article 10, the same reasoning has to be applied to all other legal situations where the law governing the centre of administration does not permit the opening of the bankruptcy of an undertaking, or any of the other proceedings referred to in the Protocol, whereas this would be possible in one or more other Contracting States.

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It may involve, for example, banks or other financial establishments, building societies or, as is the case in France, undertakings treated in the same way as insurance undertakings with regard to the supervision exercised over them (capitalization and savings undertakings.....) or the winding-up conditions (deferred credit undertakings). It could also involve insurance undertakings themselves if the future directive on winding up allowed each national law the possibility of opening residual bankruptcy proceedings.

Articles 11 and 12 deal with the financial consequences, from the point of view of jurisdiction alone, of the bankruptcy of a company or legal person for directors or certain members. These are original provisions which, to our knowledge, have no precedent in previous conventions, apart from the Franco-Austrian Convention of 27 February 1979 (Article 4) which, on many points, is based on the Community draft. The aim is to centralize on the courts of the country of the bankruptcy, for obvious reasons of principle and convenience, most of the individual property implications arising from the bankruptcy of a company. In the event of bankruptcy, this jurisdiction based on the forum delecti becomes exclusive, whereas in cases other than bankruptcy it would be only optional (Article 5 of the General Convention). It is, in fact, a case of the application of the vis attractiva consursus which is the subject of Article 15, which Article 11 could have followed.

The first provision relates to all actions concerning liability made available to the general body of creditors or the company itself where they have suffered loss or damage as a result of the management of one, several or all of its managers or directors. Such actions may include both actions for civil liability under the general law and those specially provided for under company law (company actions, including those brought by shareholders individually).

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They may again be those provided for under certain laws on bankruptcy, such as the so-called "action en comblement du passif social" (action to make good a deficiency in the company's assets) under French law[38]. Individual actions which can be brought for personal and separate damage are not therefore covered.

The expression "persons who have directed or managed the affairs of that firm", used in sub-paragraph (a), refers to all those who have participated de facto or de jure in the management or direction, whether overtly or covertly. Such directors may be either natural or legal persons. It excludes, however, the supervisory bodies, unless they intervene in the management or direction of the company.

The second provision concerns the particular case of the effects of the bankruptcy of companies or firms on their members where the latter are, under the law governing the company or firm, personally jointly and severally liable: commercial partnerships (partnerships, limited partnerships) or joint ventures, etc... The laws of several States lay down that the bankruptcy of such companies or firms necessarily results in that of the members[39], which is opened by the same court. The idea of "liability of members for the debts of the company...." apparently covers both the case of individual proceedings (a case which in principle is already covered in part in sub-paragraph (a)) and the opening of collective proceedings; the "joint bankruptcy" of the members is in fact only an aspect of their legal liability for the debts of the company or firm. Such a solution is called for on the grounds of unity of the system and applicable law; it would be scandalous if those members jointly and severally liable with their centre of administration in the country of the bankruptcy of the company or firm were to be declared bankrupt while the others could not be.

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38 Cf. Articles 99 of the Law of 13.7.1967 and 95 to 97 of the Decree of 22.12.67. See also the judgement of the Court of Justice in Case 133/78 NADLER, see note 19 above.

39 Cf. Articles 97 of the French Law of 1967, 4 (2) of the Netherlands F.W. and 147 of the Italian Bankruptcy Law. See also, for Belgian case law, COPPENS, L'extension de la faillite du maître de la société in "Idées nouvelles dans le droit de la faillite" Trav. IVe Journée d'études juridiques Jean DABIN (Brussels 1969) p. 171 et seq.

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However, the idea of "extensions" of the bankruptcy of companies to their directors, which is recognized under certain laws[40], is not derived from the provisions of Article 10 but from the general rules of jurisdiction in the convention.

This being said, it should emphasised that the provisions of Article 11 relate only to jurisdiction to hear actions for liability. They are without prejudice to the law applicable to such actions. The judgements thus delivered are recognized and enforced, like those resulting from Article 15, in the manner prescribed in Article 67, i.e. by having the General Convention applied to them, and not in accordance with the mechanisms defined in Article 56 and 60.

The jurisdiction defined in Article 11 is subject to derogation when its raison d'être does not exist. The normal rules of jurisdiction provided for in Articles 3 to 9 of the convention may already have been applied to the bankruptcy of a member or director in respect of business of his own distinct from that of the company. In this case, Article 12 lays down a rule of convenience to avoid a situation where creditors who have already claimed in the bankruptcy of the company have to claim individually once again.

Claims in the bankruptcy of the director ore then made only by the liquidator in the company bankrupt on behalf of the general body of creditors and for the amount of the sums held recoverable.

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40 These are the extensions provided for in Articles 100 (non-payment of the debts of the company in the event of an order to make good the deficiency) and 101 of the French Law of 1967 (directors behaving as if the company were personal business). More or less similar results are obtained in Luxembourg and Belgium by means of fiction and figureheads, in Italy by using the concepts of "covert member" or "despost", in the Federal Republic of Germany by the theory of "Durchgriffshaftung".

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Section III - Conflicts of jurisdiction

Preliminary remarks

Conflicts of jurisdiction or conflicts between courts give rise to different problems and present differing degrees of difficulty depending on whether several courts consider that they have concurrent jurisdiction (conflicting claims of jurisdiction) or none considers itself competent (conflicting disclaimers of jurisdiction).

Under national law these conflicts are effectively resolved by a number of procedural devices. When a matter is brought before the court, the rule of priority or the interests of the sound administration of justice result in one of the two courts referring the matter to the other. Any conflict of jurisdiction which persists is resolved by the procedure for referring the matter to a higher court. When judgment is given, the priority rule together with the force of the judgment which has become final and beyond appeal, makes it possible for only one judgment to be recognized. Finally, the French procedure of "contredit" (a technique common to the disclaimer procedure and to that of referral of proceedings) and the "regolamento di competenza" also make it possible to obtain, from the outset, a prompt ruling on any plea averring a lack of jurisdiction, through mandatory determination of the competent court[41].

Application at international level of the rule of the priority of the bringing of proceedings or the judgment delivered will probably resolve relatively satisfactorily conflicting claims of jurisdiction between courts having concurrent jurisdiction according to Articles 3 to 9 of the Convention.

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41 It should be pointed out in this connection that according to Article 96 of the new Code of Civil Procedure on application of the "contredit" procedure in international matters, the Cour d'appel cannot rule on the jurisdiction of a foreign court; in such a case it must confine itself to establishing the lack of jurisdiction of the French court.

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The ranking of jurisdictions provided for in these articles must naturally result in the elimination of conflicting claims of jurisdiction even where the jurisdictions are not concurrent.

It must be observed, however, that the criterion of priority is not the most rational solution when deciding between two courts, each of which is seised pursuant to Article 3 (conflict between centres of administration). It has, however, the advantage of speed. A procedure for referral of proceedings or the mandatory award of jurisdiction, which would be preferable, would presuppose the existence of an international court which alone could resolve conflicting disclaimers of jurisdiction where conflicting judgments are given. At present, however, there is no international court with such powers[42]. Recourse to the Court of Justice of the European Communities, which appears to be the court best qualified, would entail an extension of its powers which are defined at present in the Treaty of Rome. It has been pointed out, however, that conflicts of jurisdiction can frequently be resolved by uniform interpretation of the criteria governing jurisdiction, which is the subject of Title VI, taken from the Protocol of 3 June 1971.

Be that as it may, the Working Party has endeavoured to frame rules for resolving the greatest possible number of conflicts and for preventing at least duplication of legal proceedings[43] and denial of justice. Observance of these rules must be ensured through the exhaustion of legal remedies at national level.

- Articles 13 and 14. Three types of case must be clearly distinguished in this connection.

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42 The international regulations proposed in 1959 by the International Law Association provided for an International Tribunal.

43 The term Lis Pendens has not been used, in contrast to its use in Article 21 of the General Convention, since there can be Lis Pendens only where the cause of action and the parties in both courts are the same. In the situation covered by the Bankruptcy Convention, bankruptcy petitions, while directed at the same debtor are, in most cases, not lodged in the different countries by the same creditor or creditors.

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1. The first is where one court seised pursuant, for example, to Articles 4 (establishment) or 5 (purely national jurisdiction) considers, either at the request of one of the parties, or of its own motion as required by the Convention, that the courts of another State have jurisdiction which is better founded than its own because, depending on the circumstances, the centre of administration or an establishment is situated in that State.

Articles 3 to 8, which regulate jurisdiction by determining the ranking of courts by establishing their relative primacy, and the derogations provided for in the subsequent articles, alone make a solution possible.

Article 14, however, which can be applied where only one court is seised, contains two provisions designed to prevent conflicting disclaimers of jurisdiction.

In the first place, rather than confining itself to declining jurisdiction with the risk that no other court will regard itself as competent, the court seised is entitled to stay the proceedings and fix e period within which the court which appears to have jurisdiction may be seised. The choice between these two solutions depends on the circumstances of the case and especially on the extent to which the court seised clearly lacks jurisdiction.

Secondly, Article 14(2), contains a provision already to be found, though differently worded, in several conventions[44], the aim of which is to avoid successive disclaimers of jurisdiction, resulting in a denial of justice.

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44 See the Germano-Belgian Convention of 30 June 1958 (Article 5(1)); Convention of The Hague on the recognition and enforcement or foreign judgments in civil and commercial matters (Article 9); General Convention (Article 28(2)).

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It might perhaps have appeared desirable, in the event of a conflicting disclaimer of jurisdiction, for the court which stays proceedings pursuant to Article 14(1) to be able to order interim measures modelled on those provided for under German (106 KO and 12 VglO) and Netherlands law (Article 7 FW) or even open the bankruptcy provisionally.

Agreement was not possible, however, on the actual principle of such a bankruptcy opened provisionally, since certain delegations saw more drawbacks than advantages in it. The principal objection was that it would be difficult to accept that a court which regarded itself as not having jurisdiction should nevertheless be able to open a bankruptcy which, if it could not be pursued later in the country in which it had been opened, would be very damaging to the debtor's interests. Interim measures, varying in scope from one Contracting State to another, would produce effects broadly similar to those of a bankruptcy and it seemed, moreover, difficult to introduce such measures at international level, with the result that the matter has been left to be dealt with under each national legal system.

2. The first paragraph of Article 13 deals with cases where courts of different Contracting States with non-coordinate jurisdictions pursuant to Articles 3 to 8 have actually been seised[45]. The provision is based on the principle that the court of inferior jurisdiction must in principle declare that it lacks jurisdiction if there is a court in the EEC whose jurisdiction is preferable. This is further confirmation of the principle embolied in Articles 3 to 8. This reiteration is useful, however, in that it makes it easier to envisage the possibility of the jurisdiction of the court which appears to be preferable being contested or contestable. It is stipulated that the court whose jurisdiction is inferior, instead of disclaiming jurisdiction immediately, shall stay the proceedings in order to take account of the decision to be given by the other court. This provision thus makes it possible again to eliminate the risk of conflicting disclaimers of jurisdiction.

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45 Article 13 deliberately avoids use of the concept of "bringing proceedings" which would have been difficult to define in the case of a bankruptcy opened by a court of its own motion. The expression chosen in both paragraphs of this Article: "courts ... are considering whether to open bankruptcy proceedings" does not therefore prejudge the different procedural concepts under the national legal systems.

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If, in spite of these provisions, competing courts each declare the same debtor bankrupt, either because one of them is unaware of the existence of a court whose jurisdiction should prevail, or because the rules referred to above have not been observed, there is then a conflict of judgments which can be resolved by Article 57 on recognition; the reader is referred to the relevant commentary.

3. The second paragraph of Article 13 deals with the situation in which two or more courts of Contracting States having concurrent jurisdiction are seised (e.g. on the basis of two centres of administration under Article 6 or, more frequently, two establishments). Preference is then given to the court which opened the bankruptcy first[46] and the other courts must stay proceedings until the first judgment can no longer be the subject of any of the appeal proceedings set out in Article XII of the Protocol.

The situation where a bankruptcy has, nevertheless, been opened by more than one court is covered by Article 58 which deals with recognition.

The consequent alignment between the two paragraphs of Article 13, and the solutions for conflicts of jurisdiction together with the rules one recognition effectively safeguard the unity of the bankruptcy.

It should also be added that these provisions clearly do not apply where successive bankruptcies are spread over a period of time, but only to bankruptcies relating to the same assets and in respect of debts which, while not identical, are at least similar or coexistent.

Let us take a few examples to illustrate these different provisions which highlight the arrangements for staying proceedings common to them.

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46 See, in this connection, the Benelux Treaty (Article 6(3)) and Article 565 of the Belgian Judicial Code. Section 71(2) KO and Article 100 of the French NCPC give preference to the first application.

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First example: If the court in Milan, the city in which a company has its head office and the court in Lyons, the place where that company has an establishment, are both seised, the Lyons court must declare that it lacks jurisdiction and withdraw in favour of the Milan court, or if it is claimed before the latter than the Milan head office is fictitious and that the centre of administration is in fact in Paris, it must stay proceedings until a final decision has been taken on the jurisdiction of the Milan court. If the jurisdiction of the latter is confirmed after all available means of appeal have been exhausted, the Lyons court will terminate the proceedings and decline jurisdiction in favour of the Milan court after deciding on the costs of the proceedings in Lyons. If, on the contrary, it is confirmed that the centre of administration of the company is in fact in France and not in Milan, the Milan court will declare that it lacks jurisdiction and the French national rules on conflicts of jurisdiction will determine which French court will ultimately have to rule on the application.

Second example: Let us suppose now that the company had its centre of administration in Milan but that this had been transferred to Lyons. The Italian creditors petition for the bankruptcy of the company in Milan within the six-month period provided for in Article 6 of the Convention, while, at the same time, the company makes a declaration of suspension of payments to the Lyons court. The two courts are equally entitled to deal with the matter but one one of them, the Milan court for example, has opened the bankruptcy, the other, the Lyons court in this case, must stay proceedings until no further appeal lies against the Milan decisions or until all modes of appeal have been exhausted. If the rule stipulating the stay of proceedings has not been observed by the Lyons court and it has ordered the administration in insolvency of the company, the bankruptcy opened in Milan will nevertheless be the only one recognized and enforced in all the Contracting States pursuant to Article 58(1) and the Lyons court will, at the instigation of the liquidator who first takes action, have to declare that its own judgment is without effect and void (see p. 136 below re Art. 58).

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To sum up, the different arrangements in the Convention are organized in such a way as to resolve all conflicts of concurrent jurisdiction.

The general principle of the ranking of the connecting criteria, the stay of proceedings by the court whose jurisdiction does not prevail or which is seised although the bankruptcy has already been opened in another EEC country must provide a satisfactory solution to the problem of a conflict between courts of different Contracting States.

If it should happen, however, in spite of these rules, that two decisions to open bankruptcy proceedings are taken, the Convention provides that the judgment which is delivered later or which is given by the court whose jurisdiction does not prevail, must not be recognized nor be effective.

Section IV - Actions arising from the bankruptcy

Article 15 is based, at international level, on the theory of the "vis attractiva concursus", recognized to varying degrees by the national legal systems, and according to which the court which opened the bankruptcy has sole jurisdiction to deal not only with the bankruptcy proceedings, but also with disputes arising out of the bankruptcy. Apart from the question of jurisdiction, the chied advantage of this theory lies in the fact that such disputes are subject to the procedural arrangements governing the bankruptcy, especially in relation to the legal remedies available.

The Benelux Treaty (Article 22(4)) has already conferred jurisdiction on the court in which the bankruptcy is opened to decide on "all actions arising directly out of the bankruptcy"[47]. The mere inclusion in the Convention of a general provision of this kind would not be sufficient, however.

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47 See also Resolutions of the Institute of International Law adopted at its meeting in 1902 (Article 7), the Franco-Italian Convention of 1930 (Article 25) and the 1960 International Symposium of European Lawyers (RIDC 1960 p. 782). The General Convention does not necessarily exclude from its field of application all disputes relating to a bankruptcy; only those which derive directly from the bankruptcy are excluded (see JENARD, Report p. 12, SCHLOSSER, Report nº 54; see also p. 20 above).

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In practice, German and Netherlands law scarcely or no longer recognize the "vis attractiva concursus". The national laws of the other Member States, in most cases supplemented by case law which can be uncertain, differ considerably as to the meaning and effect of the concept "actions arising or deriving directly from the bankruptcy.

Not define expressly proceedings which, without strictly forming part of the bankruptcy procedure, must be regarded as having arisen from it, would have meant that certain cases would have been governed neither by the Bankruptcy Convention nor by the General Convention. The authors of the draft Convention agreed therefore on the principle of a common exhaustive list of actions and disputes which will come within the exclusive jurisdiction of the State in which the court which opened the bankruptcy is situated. Here again the system of general jurisdiction is the only one capable of resolving the majority of the difficulties that result from apportioning jurisdiction between the different courts in a single State, especially if that State does not recognize the vis attractiva concursus or sets little store by it, so that Article 15 incorporates, at the level of international jurisdiction, one aspect only of the vis attractiva concursus, the concentration of territorial jurisdiction. The other aspect, concentration of jurisdiction based on the ratione materiae is determined by national rules alone.

It should be noted, finally, that the vis attractiva concursus thus envisaged is, in principle, a rule of jurisdiction and procedure only. It does does not prejudge the law applicable to disputes falling within its scope, as this law will be determined by the law of the State in which the bankruptcy was opened including its conflict rules (see Article 37 with regard to actions to set aside frauds on creditors). It should be noted that in the majority of cases the law of the bankruptcy will apply directly to the substance of the case by virtue of the special attaching force of bankruptcy and the purpose of the institution, as for example, with regard to actions to challenge the suspect period.

Actions arising from the bankruptcy are those whose object is to determine the assets in the bankruptcy or which concern the liabilities and their administration.

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(1) and (2) Claims as to the invalidity of transactions against the general body of creditors and payments or recoveries arising therefrom

This item on the common list is typical of actions arising from the bankruptcy in that they involve the rules peculiar to bankruptcy.

The actions involved are those:

- sanctioning cessation of the debtor's power to deal with his property after the bankruptcy (see Article 20);
- challenging certain transactions entered into by the debtor in fraud of the rights of his creditors prior to the bankruptcy: actions to set aside such transactions (see Article 37) or "suspect period" actions similar to them;
- for payment or recovery arising from them provided they are instituted against the first purchaser.

The vis attractiva concursus will apply even if the transactions in dispute relate to immovable property. In opting for this solution the Committee considered that in the case in point the question is not to ascertain whether the transaction is valid of itself according to the general provisions of the civil law of the lex rei sitae, but whether, according to the provisions of the law of the State where the bankruptcy was opened, it may or may not be invoked against the general body of creditors.

The invalidity as against the general body of creditors of an act of the bankrupt is subject to different rules in the various Contracting States. Germanlaw provides, in principle, that there is an obligation to restore that which has been transferred, donated or abandoned by the bankrupt (see Section 37(1)KO). The purchaser must, in principle, restore the assets to the position that would have existed if the transaction had not been entered into. It is ultimately possible that recovery might be sought by means of proceedings instituted by the liquidator on behalf of the general body of creditors against the purchaser in order to oblige him to agree to a compulsory sale by auction of the immovable property to be restored. In that case, the compulsory sale by auction can take place without ownership

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of the property first being retransferred. In the case of a transfer of immovable property situated in the Federal Republic of Germany, the provisions of German law must be observed: the consent of the seller and purchaser and registration in the land register of the change in the legal situation are necessary (Section 873(1), Section 925(1) of the German Civil Code). In addition, and depending on the circumstances of each particular case, other conditions may be required, e.g. authorization by public authorities (e.g. in town planning matters). It should be pointed out, moreover, that when mortgages or land charges in respect of immovable property are retransferred or where such rights are cancelled or waived the provisions of the law of property and the legal rules relating to the land register provided for under German law must be observed, and that these derogate in part from those relating to the transfer of ownership. As regards claims as to the invalidity of transactions entered into during the suspect period, the defendant is specifically ordered to produce the declarations of intent required of him and to carry out the acts incumbent on him. Once such a judgment has become final it replaces, according to Section 894(1), first sentence of the ZPO (Rules of Civil Procedure), those declarations of intent. Where a judgment is enforceable provisionally only, it gives authority to record a pre-emption entry or objection in the land register (see Section 895 para. 1, ZPO). In addition, and, depending on the circumstances of the particular case, certain acts on the part of the liquidator or the approval of third parties are necessary in order to complete the change in the legal situation.

Where the defendant has, for example, been ordered by a judgment which has become final to produce the declarations of intent relating to the retransfer of immovable property, the liquidator accepts the defendant's declaration of consent (replaced by the judgment) before a German notary or, outside Germany, before a German consul empowered to take official note of agreements of parties regarding the transfer of ownership of immovable property (Section 925(1), para. 2, German Civil Code). The last phase of the transfer of ownership can then be effected by having an entry made, upon request, in the land register.

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For further information, this report contains in an annex examples of judgments showing how the operative part should be worded so that the change in the legal situation of the property can be effected in the Federal Republic of Germany without difficulty.

(3) and (4) Complaints and disputes concerning the capacity or powers of the liquidator

These points do not require any comment. The prerequisite for such complaints or disputes is the state of bankruptcy and they would not arise if the debtor were solvent. Disputes relating to the sale of immovable property are excluded, however, for reasons that will be explained later.

The express reference to Article 33(3) enables the provisional jurisdiction of the foreign local court to be preserved.

(5) Claims against the general body of creditors in respect of movable property

These include not only certain claims under bankruptcy law which may be lodged against the general body of creditors, but, by virtue of the general nature of the terms used, all claims relating to or for the recovery of movable property under ordinary law, including those of a civil nature such as claims for the recovery of movable property belonging to the bankrupt's spouse.

Even though such extension is questioned in countries which recognize the vis attractiva, this aspect has nevertheless been included on account of the substantive connection that may exist with bankruptcy law. For example, where a claim for recovery is based on a clause reserving title, the courts of the country in which the bankruptcy was opened will be required to give a ruling on whether such a clause can be invoked against the general body of creditors. The frequent application of the law governing the bankruptcy to such claims made it desirable that the courts of the country in which the bankruptcy was opened should have jurisdiction, subject to the provisions of Article 22(3) in the case of claims already lodged prior to the bankruptcy.

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In addition, the jurisdiction thus accorded to the State in which the bankruptcy was opened coincides with the customary rules conferring jurisdiction on the court of the defendant, in this case the liquidator representing the general body of creditors.

(6) Actions brought against the spouse

As indicated in the Convention, these consist solely of actions invoking a particular provision of bankruptcy law (see Article 35 of the Convention) and not other possible actions which the liquidator may bring against the bankrupt's spouse.

(7) Actions relating to the admission of debts

The principle of proving and admitting debts exists under all the national legal systems. These formalities must of necessity be completed and centralized before the authorities administering the bankruptcy. They differ only as to the nature of the debts which, of necessity, predate the bankruptcy and are subject to this requirement (especially as to whether or not a right secured by a charge in rem exists. The solution in this respect is, of course, determined by the law governing the bankruptcy.

The admission of debts frequently involves disputes relating to those debts and the same rules of jurisdiction must apply.

The only exceptions to the vis attractiva are actions relating to certain debts regarding which the courts of the country in which those debts (fiscal debts of the State or of other local authorities or public institutions, social security contributions and family allowance) are payable have jurisdiction according to its law or according to the law applicable to contracts of employment (7(a)). In view of the sensitive nature of such debts it did not seem feasible or appropriate to depart from the customary rules of jurisdiction of the country to which such claims relate, in the same way as under national law the jurisdiction of the court in which the

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bankruptcy was opened in frequently limited by the exclusive jurisdiction of another court or another type of court. It should be stressed that this exception concerns not only disputes relating to the existence and amount of a tax or social security debt or debt arising under a contract of employment, but also those concerning the existence and extent of any preferential right which may secure it.

An identical solution providing for an exception has been adopted for actions relating to preferential or secured rights over property subject to registration (7(b)).

Article 16 stipulates, with regard to jurisdiction, that judgments given by courts whose jurisdiction is reserved in this way and which will be recognized under the General Convention in accordance with Article 67 do not in any way preclude the final stage in the admission of debts in regard to which a dispute has been settled, where this is provided for under the law governing the bankruptcy.

(8) Disputes relating to the termination of current contracts

This point does not call for any special comment in so far as it is made clear that termination must be based on the law governing the bankruptcy. It is only to this extent that, for example, the rule of jurisdiction provided for in this paragraph replaces those contained in Articles13 to 15 of the General Convention relating to contracts concluded by consumers. The two exceptions laid down confirm, as in the previous point, the mandatory nature of exclusive jurisdiction in certain matters (see Article 16(1) of the General Convention referred to above).

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(9) Actions based on the liability of the liquidator

These include not only disputes relating to the submission of the liquidator's accounts but also civil liability actions against him for professional negligence.

It seemed most appropriate to include these in the common list since the country in which the bankruptcy was opened is best suited to dealing with matters that are frequently of a quasi-disciplinary nature. In any event, here again, the same comment applies that ordinary jurisdiction and that derived from the vis attractiva will, in most cases, coincide, save in the situation, provided for in Article 29(3), of joint liquidators who are nationals of States other than that in which the bankruptcy was opened.

It should be pointed out that in addition to these nine types of proceedings arising out of a bankruptcy, actions relating to the liability of managers of companies or of members are, under the terms of Article 11, matters for the courts of the State in which the bankruptcy of the company was opened, and constitute a tenth type of proceeding arising out of the bankruptcy within the meaning of the Convention.

All other actions which, according to the different national laws, are regarded as actions arising out of the bankruptcy but are not included in the exhaustive list in Article 15 of the Convention must fall within the scope of the General Convention.

The Bankruptcy Convention, on the other hand, governs not only conflicts of international jurisdiction relating to the actions listed in Article 15 (without consequently changing the national laws in any way) but subjects them to specific rules regarding their recognition and enforcement, as provided for in Sections I and IV of Title V, the commentary on which should be referred to.

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CHAPTER V - THE APPLICABLE LAW AND THE EFFECTS OF THE BANKRUPTCY

I. General remarks and examination of Title III of the Convention

The purpose of Titles III and IV of the Convention is to determine the law applicable to the procedure and to the extraterritorial effects of the bankruptcy.

Title III lays down general rules for determining the applicable law by reference to the rules of private international law of the Contracting State whose court has jurisdiction according to Title II. The law of the State in which the bankruptcy has been opened determines, in general, the procedural law and the lex fori. The law applicable depends on the court having jurisdiction.

Title IV elaborates on certain consequences of these general principles, especially in relation to the effectiveness of the bankruptcy as against third parties, and lays down derogations, as to the effects of the bankruptcy, from application of the principle of the law of the country in which the bankruptcy was opened.

Article 17 provides that the judgment opening the bankruptcy or one of the other procedures provided for in the Convention is delivered pursuant to "the internal law of the /_/ State in which the court having jurisdiction is situated". Since its wording has been determined by The Hague Conference on private international law this expression means the law of the State in question excluding its private international law.

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This will certainly be the position, firstly, for ascertaining the grounds for opening the bankruptcy[48]. It might at first appear that the differences between the legal systems regarding these requirements are profound but in fact they are more apparent than real (see the result in Article 62(2)(c)).

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48 See VAN DER GUCHT, op.cit. 1964, pp. 143 et seq. and GANSHOF, le droit de la faillite dans les Etats de la CEE, Bruxelles (1969) pp. 49 et seq.

The following is a summary of current national rules:

France: Cessation of payments is the prerequisite for "liquidation des biens" and "règlement judiciaire". The latter order is made only if the debtor is in a position to propose a cogent arrangement or composition. Cessation of payments exists where liabilities due cannot be met out of the available assets.

Belgium and Luxembourg: In addition to the cessation of payments, i.e;, the debtor's inability to meet his obligations, his credit must be shaky. The court must decide whether "the cessation of payments adversely affects the debtor's credit and solvency and jeopardizes his transactions as a whole".

Denmark: Cessation of payments means a situation halfway between insolvency and deficit.

The Netherlands: A bankruptcy is opened if facts and circumstances demonstrate that the debtor has ceased to pay his debts. It is neither necessary nor sufficient that the liabilities should exceed the assets.

Federal Republic of Germany: The only ground for the opening of a bankruptcy in respect of natural persons or partnerships is insolvency, i.e. the probable permanent inability of the debtor, owing to lack of resources, to settle the bulk of his debts which are immediately due for payment. Cessation of payments is not of itself a ground for opening a bankruptcy but simply an indication of insolvency (see BÖHLE-STAMSCHRÄDER, Konkursordnung, Binth edition, Section 102, notes 1-3).

In the case of companies and other legal persons insolvency is not the sole ground for opening a bankruptcy. A bankruptcy may also be opened where the liabilities exceed the assets (Uberschuldung). Special provisions apply, however, in this connection to producer and consumer cooperatives ("Erwerbs - und Wirtschaftsgenossenschaften").

Italy: Insolvency is the determining factor. A person is insolvent who is no longer able to fulfil his obligations properly and in good time. Cessation of payments may be an indication of insolvency.

United Kingdom and Ireland: Unlike the situation obtaining under the continental and Scots systems, a declaration of bankruptcy under English law is not based on cessation of payments or the debtors' insolvency but on the occurrence of an act of bankruptcy listed in the Bankruptcy Act. As for the various forms of winding up, we have seen above that some of these may be employed on grounds other than insolvency.

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Examination of case law shows that disputes relating to the requirements for opening a bankruptcy brought before the courts of the nine countries are resolved in much the same way, with the result that uniform provisions were not necessary in this area. There is no derogation consequently from national laws. Two points deriving directly from the universality of the bankruptcy must be mentioned however. Firstly, the law governing the bankruptcy will apply irrespective of the place where the events occurred on which the judgment is based. Secondly, where the ground for opening the bankruptcy is the shakiness of the debtor's credit or the fact that liabilities exceed assets, account must be taken of all the debtor's assets throughout the territory of the Contracting States. The extent to which effect must be given to the bankruptcy as regards property situated in non-contracting States will be determined by the lex fori.

Similarly, the possibility of declaring bankrupt a particular type of undertaking, a non-trader and the definition of trader or "piccolo imprenditore" (small businessman) will be governed by the national law governing the bankruptcy.

That same law will also determine by whom a bankruptcy may be initiated, whether this right is vested in the creditors only or if the bankruptcy may be opened ex officio, the forms in which judgment must be given and the remedies that are available against it.

The measure to be ordered from among those provided for in the Convention will also be determined by that law.

According to Article 18(1), the law governing the bankruptcy, as the national lex fori, will also determine the general procedure to be followed, the conditions for the appointment of the authorities administering the bankruptcy and their powers and the formation of creditors into a single group. It will also lay down the conditions under which debts must be proved, verified and admitted and the effects of admission. The appropriateness of this law for determining the conditions and effects of the different methods of terminating the procedure, particularly arrangements and compositions appears equally secure.

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It is this law too which should be applied in relation to the enforceability of debts for future settlement and the suspension of interest rates.

The unity and universality of the bankruptcy which already justify the unity of the jurisdiction of the court must therefore result, as far as possible, in the unity of the applicable law in favour of the lex fori.

Article 18(2) reintroduces the possibility of applying the rules of private international law of the forum concursus with general scope as regards the effects of the bankruptcy wis-à-vis the debtor, creditors or third parties. The expression "law governing the bankruptcy" or "law of the State in which the bankruptcy has been opened" in the Convention must therefore generally be understood in this sense, in contrast to the expression "internal law" which is referred to only in Articles 17 and 18(1). Accordingly, the law applicable to a particular effect of the bankruptcy will be that determined by the conflict rules of the court which opened the bankruptcy (which will refer frequently and directly to the national lex fori) unless this has been predetermined and unified by the special rules of Title IV which are already either in conformity or not in conformity with those of the forum.

It will be noted that in certain cases the law thus determined will differ depending on whether the property at issue is movable or immovable. The question of characterization of property thus arose and is dealt with in Article 19.

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II. Examination of the sections of Title IV of the Convention

Section I - Effects of the bankruptcy independently of advertisement

Article 20

While the purpose of depriving the debtor of power to deal with his property is the same under all the national legal systems, the techniques employed differ. Thus under the Latin based systems cessation of that power does not entail transfer of ownership. Only the right to administer and dispose of the bankrupt's property passes to the liquidator[49]. The Anglo-Saxon legal systems are more far-reaching in that bankruptcy entails the transfer of ownership of the debtor's property to the trustee who holds the property in trust only, however, and must turn the assets to account for the benefit of the general body of creditors. Under German law, cessation of the debtor's power to deal with his property entails a general prohibition on the right of disposal and the creation of a right *in rem* over the debtor's property vested in the general body of creditors.

Cessation of this power creates additional problems under international law.

The first is to ascertain when and subject to what formality cessation of the debtor's power to deal with his property applies in countries other than that in which the bankruptcy was opened. The national laws all recognize cessation as an effect of the judgment opening the bankruptcy which operates immediately[50] and independently of any advertisement.

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49 It goes without saying that the expression cessation of the debtor's power to deal with his property applies equally to similar concepts arising from measures other than bankruptcy in the strict sense such as, for example, règlement judiciaire, the compulsory assistance given to the debtor by the liquidator in respect of all acts relating to the administration and disposal of his property.

50 The French and Belgian practice is generally that the whole of the day on which the judgment opening the bankruptcy is given is included in the period during which the debtor's power to deal with his property ceases. Netherlands law (Article 23 FW) contains an express provision to this effect. Since 1975 Danish law has provided that the effects of the bankruptcy commence at the time at which it is opened and not when the petition is lodged (firstdag). The suspect period is still calculated, however, from the time of admission of the cessation of payments or from the date of the petition.

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Hence the solution adopted at Community level in Article 20. If cessation of the debtor's power to deal with his property takes effect in all Contracting States independently of provisions for advertisement, it is accordingly recognized automatically in those States without any formality as a direct and principal consequence of the bankruptcy judgment itself. In this way an end is put, in regard to relations between the Contracting States, to an uncertainty of case law as to whether or not the extraterritorial effect of cessation is subject to the need for an enforcement procedure and, if so, whether the time at which cessation takes effect could be the date of the foreign judgment. This solution in itself therefore represents considerable progress.

The second problem concerns the applicable law. Under private international law doubts as to the law applicable to the cessation of the debtor's power to deal with his property are permissible since the legal rules governing such cessation vary considerably from one legal system to another. French and, more recently, Belgian law no longer regard cessation as an incapacity governed by the national law of the debtor. It is therefore a question of an inability to dispose of property in the interests of the general body of creditors.

The Convention has implicity adopted the latter approach since Article 20, which makes no provision as to the law applicable, necessarily refers to the law governing the bankruptcy pursuant to Article 18(2). The law governing the bankruptcy consequently governs cessation, just as it governs the suspect period with which it is closely linked.

The question of cessation is dealt with again in Article 34 which will be commented on below.

Articles 21 to 23

The stay of proceedings brought by individual creditors, permitted under most of the national legal systems[51], affects creditors whose ultimate object is to prove their claims or obtain recognition of a right in the bankrupt's estate in the same way as cessation affects the debtor. Their point of departure is linked therefore since they simply represent two aspects of the same principle.

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51 See Article 452 - 54 Belgian Commercial Code, Sections 11 and 12 KO, Articles 35 and 36 of the French Law of 1967 and Article 55 of the Decree of 1967; Article 51 of the Italian Bankruptcy Law and Articles 27 to 29 of the Netherlands FW. See also as regards the applicable law, TROCHU, op. cit. pp. 143 et seq.

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Article 21 prohibits the institution of any new proceedings by individual creditors, who form part of the general body of creditors, whether these be actions for payment or enforcement measures.

Article 22 deals with actions and enforcement measures affecting the bankruptcy assets commenced before the opening of the bankruptcy. In most cases these will consist of actions for payment (paragraph 1) rather than actions for recovery which are specifically referred to in paragraph 3 and which do not result in inclusion in the liabilities but in the withdrawal of property from the assets. These two cases have a common feature, however, in that the proceedings may be instituted again abroad[52], notwithstanding the jurisdiction conferred on the courts of the country in which the bankruptcy was opened in respect of actions for the recovery of movable property (see Article 15(5) above) if judgment was about to be delivered in the matter. In view of the special features of the different legal systems the best criterion appeared to be to allow an order to be made upon a point in dispute evenif it concerned only a preparatory enquiry, but not to permit judgments regarding jurisdiction.

This provision, which is in line with certain legal systems but not with others whose rules on staying proceedings brought by individual creditors are stricter, was adopted to avoid unnecessary expenditure and delays.

Where a court which has been seised prior to the opening of the bankruptcy has given judgment in a dispute, it is a matter solely for the courts of the State in which the bankruptcy was opened to decide whether the claim arising from that judgment is a claim to be included with those of the general body of creditors, a claim against the general body of creditors or, if it is neither one nor the other, whether it must remain personal to the debtor. In other words, that court is unable to order payment but must confine itself to finding that a debt exists in principle.

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52 It must be borne in mind at all times that there is no derogation from national law as regards the staying of proceedings instituted before the courts of the country in which the bankruptcy was opened. Articles 21 to 23, which do not constitute a uniform law, apply only to proceedings in States other than that in which the bankruptcy was opened.

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Enforcement measures are among the proceedings brought by individual creditors which are stayed by the judgment opening the bankruptcy. In view of the multiplicity of cases to be considered, which are closely linked to the different national procedures, and the impossibility of defining precisely in the text of a convention the stage that each of these different procedures must have reached for the creditor instituting proceedings to be considered as having a "vested right" enabling him to escape the staying of enforcement measures already initiated, the Working Party decided, in Article 22(2), in favour of application, through its incorporation, of the local bankruptcy law.

Article 23 protects any preferential rights enjoyed by the tax authorities[53].

Article 24 concerns the interruption of periods of limitation. This provision refers, for example, to the situation in which, after the bankruptcy has been opened but before it has been advertised, a third party brings proceedings against the debtor. This will have the effect of interrupting any period of limitation which is running. Similarly, if, within the time limit laid down, the third party, after the opening of the bankruptcy but before its advertisement, takes up, for example, an option for sale granted to him, or places a reservation on a delivery of supplies, which must be effected within a very short period or will be invalid, it will not be possible to claim that his taking up of the option or his declaration are invalid on the ground that he should have notified the liquidator and not the debtor, whose powers to deal with the property have ceased.

The sole object of Article 25 is to lay down a uniform provision stipulating the minimum time allowed for opposition or third-party proceedings to set aside the judgment if those remedies are available under the law of the State in which the bankruptcy was opened[54].

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53 In France, for example, the Treasury, whilst subject to the stay of proceedings brought by individual creditors in a "règlement judiciaire", retains the right to institute proceedings in respect of preferential debts in a "liquidation des biens" (Articles 35 and 80 of the Law of 1967).

54 It should be noted that German law does not make provision for third-party proceedings to set aside a judgment. As for French law (cf. Article 105 of the Decree of 1967), the admissibility of opposition proceedings is reserved for the benefit of creditors and interested third parties (third-party opposition); the facility for parties to oppose bankruptcy judgments rendered by default against them (opposition in the strict sense) is barred; only an appeal is possible. See also Article 18 of the Italian bankruptcy law on the bringing of opposition proceedings.

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It seemed fair, when referring to the law of the country in which the bankruptcy was opened for the purpose of fixing the starting point of the period within which opposition proceedings must be brought, (giving of judgment, advertisement) to provide that at least 31 days be allowed for the exercise of that remedy when the applicant has no connection with the country in which the bankruptcy was opened. This provision applies, however, only to persons who have at least their residence in Community territory. It is possible that the Community time limit will have to be combined with the "délais de distance" (periods based on distance) for which provision is made under certain legal systems[55].

The starting point of the period is consequently that prescribed by the law governing the bankruptcy. Generally, the day on which the period commences (dies a quo) is not counted. On the other hand, the method of calculation adopted "31 days following the day which initiated the period" obviates the problem of whether the day on which the period expires (dies ad quem) must be included in a 30-day time limit. The solution would have varied from country to country, the majority of them having abandoned the system of clear days.

The second paragraph of Article 25 likewise refers to the lex fori regarding possible extension of this period to the first working day. We would point out that the European Convention on the Calculation of Time Limits signed in Basle on 27 May 1972, whose rules are identical with those of Article 25, should make it possible to arrive at a uniform set of rules on all these points.

Section II - Advertisement and its effects

Articles 26 and 27

The arrangements for the advertisement of bankruptcy judgments are not entirely the same in the Community Member States, some of which publish the judgment opening a bankruptcy in an official journal or a journal

55 See, for example, the increased time limits provided for in Articles 643 and 644 of the new French Code of Civil Procedure, referred to by, among others, Article 111 of the Decree of 1967.

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of legal notices, while others require also that it be posted up[56].

The different means employed can have only territorial effect however. Furthermore, there are no arrangements for advertising foreign bankruptcies; conventions alone provide for some extension of the advertisement provisions of the law under which the bankruptcy was opened by combining with them the advertisement provisions of the law of the other State as if the bankruptcy had been opened there.

Once the need to advertise internationally was recognized, three solutions were possible:

- to adopt a system modelled on the German procedure whereby an individual notice is sent to known creditors;
- to employ the various national methods of advertisement simultaneously;
- to create an official European Bulletin.

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56 The principal forms of advertisement are as follows:

- Belgium: insertion of an except from the judgment in the local newspapers and in the 'Moniteur belge" (Article 472 rev. of the Commercial Code); entry in the Commercial Register (Article 25 of the Royal Decree of 20.7.1964).
- Federal Republic of Germany: insertion in the journal which publishes official information emanating from the Bankruptcy Court (Section 76 KO). Publication in the Bundesanzeiger (Section 111 KO); entry in various registers, including the Land Register (Sections 112 and 113 KO).
- France: entry in the Commercial and Companies Register or in the register which takes its place for this purpose in respect of non-trading legal persons; insertion in a journal of legal notices and in the Official Bulletin of Commercial Notices (Articles 13 and 14 of the 1967 Decree).
- Italy: the judgment is notified to various authorities, such as the office of the Register of undertakings pending the establishment of a commercial register. It is also posted up and is published in the journal of legal notices in the province concerned (Article 17 of the Bankruptcy Law).
- Netherlands: publication in the Nederlandsche Staatscourant and in one or more newspapers (Article 14 FW); entry in the Commercial Register (Article 18 of the Law of 26 July 1918).

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The first solution was regarded as inadequate at international level and will apply only if the law governing the bankruptcy provides for such notification (see Article 31(1)). The last two procedures were adopted and combined in such a way that the arrangements under Articles 26 and 27 operate relatively flexibly, any automatic operation being excluded.

Experience shows that many bankruptcies have local effect only and do not involve foreign creditors or debtors. Consequently, it did not appear desirable to make provision, in respect of all bankruptcies opened in a country, for advertisement arrangements having effects in the other Community countries. The fairly considerable expense that such advertisement would involve for the estate would not be justified.

(1) Advertisement arrangements at European level: It is only when a bankruptcy opened in a State has sufficiently important international implications - which are left to the assessment of the court or liquidator (Article 26(1)) or are presumed by virtue of the existence of an establishment in another Community country - that an extract of the judgment containing the particulars specified in Articles III (judgments opening the procedure), or IV and VI (in the case of other judgments given in the course of the procedure) will be published by the liquidator, the clerk of the court or any other person empowered to do so (Article 26(5) in the Official Journal of the European Communities.

This advertisement alone, which concerns third parties to the exclusion of the debtor (cf. Article 20), will have legal effect in countries other than that in which the bankruptcy has been opened. This advertisement is necessary first of all in that it notifies foreign creditors that they must prove their claims (see also Article 31(1) providing for the individual notification of known creditors). But, above all, it alone will determine the conditions under which debtors of the bankrupt can validly obtain discharge, without any possibility of the reference date varying from one country to another.

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Any act done from the eighth day following publication in the Official Journal of the European Communities will be void as against the general body of creditors without any opportunity for bona fide third parties to prove to the contrary[57]. The wording "from the eighth day" was preferred to "after a period of 7 days" so as to avoid, here again, any uncertainty as to the question whether the period involved was or was not a clear one (Article 27(1)).

The outcome in regard to acts done during the transitional period between the opening of the bankruptcy and the time when the latter is effective erga omnes will, according to a provision derived from the Benelux Treaty[58], depend on the debtor's actual knowledge of the bankruptcy. The burden of proof of such knowledge lies on the liquidator (Article 27(2)). He may also avail himself, however, of the relatively stringent provisions of Article 27(3), according to which such such acts may be challenged by an action to set aside fraud on creditors or by the transposed operation of the rules governing the suspect period. Depending on the circumstances, the liquidator will therefore have a number of options open to him.

Where any question arises of the effectiveness of the bankruptcy against third parties in relation to property or rights subject to registration, all of the provisions of Article 27 are to be combined with those of Article 28 (Article 27(4)).

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57 This solution is stricter than that adopted in the Benelux Treaty (Article 24(3) in fine) and under German (Section 8(3) KO) and Netherlands law (Article 52(2) FW) but less stringent than under French law where the bankruptcy also takes effect against third parties as soon as it has been opened. Article 26 applies only to third parties in EEC countries other than that in which the bankruptcy is opened.

58 Article 24(3), first sentence of the Treaty. In order to simplify matters and in view of the advertising measures adopted, the Working Party departed from the Benelux Treaty by not including a requirement that the bankrupt have an establishment abroad, nor a further one, cumulative or otherwise, that the third party have his domicile in a country other than that in which the bankruptcy has been opened and where it has not yet been advertised, and that payment has been made in a country where the bankruptcy has not yet been advertised.

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(2) Supplementary advertising arrangements: The liquidator is also empowered to advertise in the various official gazettes of the States other than that in which the bankruptcy has been opened and which are referred to in Article VII of the Protocol, without prejudice to any further advertisement which appears to be expedient (Art. 26(3)). This advertisement, the advisability of which is left to the discretion of the liquidator, will not, however, produce any of the effects provided under national laws, since the only advertisement of significance is that in the OJEC, even if this is subsequent to the local advertisement. Payment of advertisement expenses abroad will be governed by the law of the country in which the bankruptcy has been opened, in that the Public Treasury of that State may advance those expenses, where appropriate, (see Art. 94 of the French law) but the Public Treasury of the foreign State where advertisement is effected cannot be asked to cover them.

Similarly, entry of the bankruptcy in the various trade or company registers in which the debtor may be registered, which is the only compulsory formality for the liquidator (Article 26(2)), is effected solely for the purpose of providing further information.

Article 26(4) provides, finally, that all these additional advertisement measures are to apply equally to supplementary or amending decisions which occur later during the proceedings (closure of proceedings, alteration of the date of cessation of payments, cancellation or annulment of a composition, etc.) whose opening has already been advertised pursuant to paragraph 1. The latter are listed by category of proceedings in Article IV of the Protocol. Article VI of the Protocol refers back to Article III as regards the various particulars to be included in the advertisement.

Reasonable application of Article 26(4) will entail the publication in registers and gazettes solely of particulars of decisions which would be advertised if the bankruptcy had been opened in the country concerned ("... as necessary ...").

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Article 28

Considerable differences exist between the laws of the Contracting States as regards both recording the bankruptcy or the general prohibition on disposals of property in public registers in which certain assets or rights relating thereto are entered (immovable property, vessels, aircraft, cinematographic films, industrial property rights, etc.) and the effects of such entry. Sometimes, as under German Law (Sections 7 and 15 KO, 62 VglO and 892 s. Civil Code), entry in the Land Register transfers ownership of immovable property, and entry in that register of the bankruptcy or of the general prohibition of transfer is the only factor to be taken into consideration when determining whether a purchaser who has concluded a contract after the opening of the bankruptcy was acting in good faith. Sometimes it is merely a question, as under French or Belgian law, of registering the statutory lien of the general body of creditors over the debtor's property. In the Netherlands, although in the case of property subject to registration, the act must be recorded in the register provided for this purpose in order to effect transfer of ownership, Netherlands law does not provide for entry of the bankruptcy in those registers. Article 35 FW merely lays down that, after the bankruptcy has been opened acts effected previously can no longer be validly entered or recorded in the register.

Since it is impossible to amend national laws in this area, which is closely connected with the law of the property, the only reasonable solution was to refer, not to the law of the State in which the bankruptcy was opened, but to the special provisions governing bankruptcy of the law of the State in which the public registers are kept. It is consequently by reference to those provisions that the entries to be made when a bankruptcy is opened are to be determined and the legal effects of such entry or the absence of it on property and rights in rem subject to registration are to be assessed.

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As regards those effects in relation to third parties, the provisions of Article 28 are to be combined with those of Article 27, particularly Article 27(2). Either one or the other will apply, depending on how the bankruptcy has first been advertised (in the OJEC or by entry in a register). Thus, recording the bankruptcy in the register (Article 28) will mean that the third party ought reasonably to have known of it (Article 27(2)). All will depend, however, on the requirements of the law of the country in which the register is kept; for example, in the Federal Republic of Germany where the only entry that counts is that in the Grundbuch, advertisement in the OJEC will be inadequate and the liquidator will always be required to provide evidence of the third party's specific knowledge of the bankruptcy of the person with whom he has concluded a contract.

Section III - Powers and functions of authorities administering the bankruptcy

Articles 29 to 33 of the Convention deal more particularly with the authorities administering the bankruptcy and apply the principles of the unity and universality of the bankruptcy, particularly as regards the powers of the liquidator.

The allocation of powers among the various authorities administering the bankruptcy varies from one legal system to another[59].

While the legal systems under consideration have recourse to a liquidator or trustee (syndic or curateur) (Belgium, Italy, Netherlands), administrator (Verwalter) (Germany), trustee in bankruptcy or liquidator (United Kingdom) and provide for a creditors' meeting, France, Belgium, the Netherlands, Luxembourg and Italy, but not Germany, make provision for a "juge-commissaire" (judge sitting in bankruptcy cases) while France, Denmark and the United Kingdom have "contrôleurs" (inspectors). In the latter there is also provision for appointment of an official receiver for the stage between the receiving order and the order of adjudication.

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59 On all the points touched on below see the thorough comparative examination of the different legal systems inVAN DER GUCHT, op. cit. 1964, pp. 151 et seq. and GANSHOF, le droit ..., op. cit. pp. 53 et seq.

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In some EEc countries there exists, side by side with the creditors' meeting, a more limited committee comprising only some of the creditors. In Germany this is called the "Gläubigerausschuss", in Italy the "Comitato dei Creditori" and in the Netherlands the "Commissie uit de schuldeisers". The functions of these various committees do not correspond on all points and these disparities necessarily affect the powers and functions of the authorities administering the bankruptcy.

In addition, quite considerable disparities exist between the countries, in particular regarding:

- the appointment and status of the liquidator[60];
- the role and capacity in which the liquidator acts.

In certain countries (France, Belgium, Luxembourg) the "syndic" (liquidator) or "curateur" (trustee) represents the bankrupt and the general body of creditors simultaneously. In the others, academic opinion and case law are divided on this point. In Germany, the legal status of the Verwalter has not been expressly defined by law and basically there are two opposing theories: that of representation (Vertretungstheorie) and that of the official institution (Amststheorie), which has prevailed in case law. In Italy the "curatore" discharges a public office; he is responsible for securing attainment of the objectives of the bankruptcy.

The Working Party did not regard these differences, which concern practicalities rather than fundamental principles, as major obstacles to the implementation of a multilateral convention based on arrangements for resolving conflicts of laws. The essential point is that there should be provision in the six countries for action by a professionally qualified person, subject to effective control, who will be responsible for administering the assets, the continuation, where possible, of the business, realization of the assets and distribution of the proceeds.

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60 It should be noted that France is the only country which has an independent professional organization for liquidators (Decrees of 20.5.1955, 18.6.1956 and 29.5.1959). In the other EEC countries liquidators are selected from among persons who appear to be qualified (lawyers, accountants, etc.) or in the case of official receivers or trustees, from among officials of the Department of Trade who are, in addition, attached to the court. In Denmark the court itself acts as liquidator in certain situations if the creditors decide not to appoint one. In Ireland the official assignee, a court official, acts jointly with a liquidator appointed by the creditors.

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The Working Party did not, therefore, consider it essential, at the present time to bring about a unification or approximation of the laws relating to the authorities administering the bankruptcy. Such harmonization, in an area closely associated with diverse judicial arrangements and national procedures, is regarded as along-time undertaking which does not have to be tackled in the immediate future.

This is all more so as the differences noted between the national laws or, more precisely, between some of them should not, in practice, give rise particular difficulties since the law applicable to the bankruptcy procedure can only be the national law of the court which opened it.

Thus, according to Article 18 of the Convention, that law will govern not only the organization and conduct of the procedure (appointment and removal of liquidators, consultation of creditors, powers of the "juge-commissaire" if there is one, etc.) but will also resolve the following points:

- whether creditors who have an interest distinct from that of the general body may intervene on their own individual behalf in a dispute in which the liquidator is the defendant or plaintiff;
- whether the bankrupt may intervene in a dispute concerning the general body of creditors;
- whether and according to what rules the liquidator or the bankrupt may bring a civil action in criminal proceedings, or whether an order for payment damages by the bankrupt delivered by a criminal court, if the liquidator is absent from the proceedings, is effective as against the general body of creditors[61], subject in the first case to an assessment of the admissibility of the civil action under the law of State concerned;

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61 It should be pointed out that the principle of the unity of the bankruptcy will not operate without posing certain criminal law problems as regards the prosecution of fraudulent bankruptcy and infrigements treated on the same footing in countries other than the one in which the bankruptcy was initiated where the law of those States considers the opening of the bankruptcy to be a constituent factor of the infringement, which must take place in national territory. The solution of these questions was however, outside the Working Party's terms of reference (Cf; above p. 16).

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- whether the creditors or the bankrupt can be heard as witnesses in the proceedings;
- whether the defences which can be invoked against the bankrupt can be invoked against the liquidator. This question is linked to that of ascertaining in what cases the liquidator can claim to have more rights than the bankrupt himself[62];
- in the case of countries which draw a distinction in this connection between civil and commercial cases, what forms of evidence may be adduced against the liquidator in disputes where the latter acts either as the representative of a bankrupt trader or as the representation of the general body of creditors.

Having restated the general principle in Article 18 of the convention, the provisions of Articles 29 to 33, which specify application of the law of the State in which the bankruptcy has been opened and the law of the other States where the bankruptcy is enforced, respectively, appear sufficiently clear to make any detailed commentary unnecessary. We will therefore confine ourselves to providing some explanations regarding each of these articles.

Article 29

The first paragraph of this article merely elaborates, in relation to the liquidator, on the rule mentioned above, which makes reference to the law governing the bankruptcy to define the extent of his powers in States other than that which the bankruptcy was opened. As the second sentence of para. 1 states, these powers will, of course, have to be exercised in accordance with the rules laid down by each local law regarding implementation of the procedures which the liquidator will follow (the same provision is also contained in Article 33). The scope of this article is made clear by the provisions of Article 33 on realization of the assets and by the system of automatic recognition and enforcement of bankruptcy judgments (Articles 50 et seq.).

62 Often, under current case law, the fact that the debtor or the majority of the general body of creditors are aliens limits the powers of the national liquidator: Cf. particularly in reference to the "caution judicatum solvi".

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Thus, all uncertainty as to the powers of a foreign liquidator before any exequatur decision is dispelled. Under French law, for example, even though the question is still disputed, it is widely acknowledged that foreign bankruptcy judgments in themselves constitue an authentic form of evidence conferring on the liquidator the power to be party to legal proceedings on behalf of the general body of creditors, to take certain protective measures, to claim in a concurrent bankruptcy opened in France, etc.

To help the liquidator to fulfil his task abroad the document provided for in Article 29(2) will enable him to establish his status. However, this certificate which calls to mind the model document annexed to the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, is no more than an identity document. Legally, the bankruptcy judgment, automatically recognized and enforceable, is the sole document authorizing the liquidator to act.

With the same concern for effectiveness, Article 29(3) allows the liquidator to be assisted, in regard to acts to be carried out abroad, by one or more co-liquidators chosen from among persons who carry on this activity in the country concerned, or to delegate certain of his powers, where the law governing the bankruptcy authorizes such a procedure at national level[63]. This provision which is merely a "facility" to enable the "principal" liquidator to overcome difficulties arising from his possibility limited knowledge of the laws of the other countries in which he has to carry out his duties is drafted in such a way that it neither prejudices nor effects, even indirectly, application to "legal activities" to the provisions of the EEC Treaty on the right of establishment and freedom to provide services.

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63 Belgian, French and Dutch law permit the appointment of several liquidators. Italian law does not recognize such a possibility, but authorizes the liquidator, to a certain extent, to delegate his powers to carry out certain acts on condition that this is authorized by the bankruptcy court (Art. 32 i.f.). German law provides for the appointment of several Verwalter only where the undertaking engages in separate business activities.

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In practice such assistance will be justified by the extent of the assets to be realized abroad, the foreseeable difficulties of enforcement or those pertaining to fulfilment of the obligations incumbent on any liquidator, under the laws of the other Contracting States, for example in fiscal, customs, social security or redundancy matters[64].

It will be for the law governing the bankruptcy to determine whether the liquidators must act collectively or whether each of them may act separately. Similarly, the fees of the co-liquidator(s) will be fixed in accordance with the law of the country in which the bankruptcy was opened. Finally, it should be borne in mind that, in accordance with the provisions of Article 15-7, any possible liability of these co-liquidators will be a matter for the courts of the State in which the bankruptcy was opened.

Article 30

Which relates to a particular aspect of the debtor's being deprived of the power to deal with his property, provides for the redirection of his mail to the liquidator by the postal authorities. The latter, when consulted by the Working Party, requested that, for the sake of convenience, redirection of mail to the liquidator should always be the subject of a special order of the court, as is the case in Germany (Sec. 121 KO) and that it should be for a limited period (six months with the possibility of renewal).

Under the terms of Article IX of the Protocol, the postal authorities will be informed by the liquidator of the need to redirect mail and of the termination of this measure. As has already been pointed out, the liquidator has the powers conferred on him by the law governing the bankruptcy; nevertheless, under that law, redirection of mail has not been expressly ordered by the court, the liquidator will have to obtain an express decision from the authority specified in Article 30.

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64 Cf. Sections 103 and 104 of the Reichsabgobenordnung and Article 41 of the French Decree of 1967.

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Article 31

modifies to some extent national laws in favour of creditors residing abroad, albeit only within the EEC, in that firstly it introduces the requirement of individual notification of known creditors and secondly it considerably simplifies the rules governing the lodging of claims. The opportunity for such creditors to lodge their claims by writing informally to the authorities referred to in Article X of the Protocol is intended to limit possible difficulties they might face where, for example, the law governing the bankruptcy requires the presence of creditors lodging claims or special formalities for the lodging of claims. There are, however, no changes to the arrangements regarding the evidence required for the verification of claims, nor to the procedures for contesting claims.

Although it is stipulated that creditors will be free to draft their claims in their own language, for example, the translation being a matter for the bankruptcy authorities, it is not, however, laid down that any correspondence sent to foreign creditors by the bankruptcy authorities must be translated by the latter. These are, however, minor points. The problems of substance relating to the lodging, verification and admission of claims[65] (time limits, notification of creditors as to the position regarding claims, whether or not creditors are subject to the procedures for lodging and verification, the legal nature of the verification of a claim, the problem of claims maturing at a future date, joint and several debtors, debenture holders, provisional admission of a claim, etc...) in respect of which the Convention makes no special arrangements, form part of the conduct of the bankruptcy procedure itself which under Article 18 is governed by the law of the country in which the bankruptcy was opened.

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65 Cf. the comparative law study carried out by Mr. VAN DER GUCHT, op. cit. 1964, p. 193 et seq.

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Because of the differences between the various national laws regarding these matters, it will be desirable to keep interested parties well informed as to the steps they will have to take to safeguard their rights in proceedings opened in another State and as to the legal officers to whom they may apply in this connection.

Article 32

Lays down a rule which in practice will have to be tempered in accordance with the binding rules laid down by the law of each State. Although it is legally certain that the bankruptcy authorities have the power to refuse, for example, to authorize the continuance of a business, the liquidator will have to respect local administrative procedures or obtain the necessary authorization to dismiss workers[66].

Article 33

The first paragraph of Article 33 reiterates the principle already embodied in Article 29 in regard to the measures for protecting and realizing assets that are to be implemented by the liquidator.

The protective measures referred to in Article 33(1) may include making the inventory, registration of mortgages, recovery of certain items and, more particularly, the affixing of seals and the sale of movables which are perishable or costly to preserve (merchandise, business assets where appropriate). The last two points demonstrate the marked differences between the national laws regarding the authority from which the necessary authorization must come[67].

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66 Directive 75/129/EEC of 17.2.1975 on the approximation of the laws of the Member States relating to collective redundancies does not apply to workers affected by a cessation of business resulting from a court judgment. However, Directive 77/187/EEC of 14.2.1977 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses applies in the case of collective proceedings.

67 Cf. in particular VAN DER GUCHET, op. cit. 1964, p. 164 et seq.

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In this connection, conflicts are to be expected between the lex concursus and the lex rei sitae. In accordance with the general principles already referred to above, the former will aly down the extent of the liquidator's powers and will stipulate by whom and how he is to be authorized to act (enabling formalities).

The lex situs will determine the local procedure which it may be necessary to employ, for example to affix seals (purely implementing formalities).

The sale by the liquidator of movables and, above all, of immovable property situated abroad highlights this conflict of laws. Two systems are equally conceivable:

- the form of sale is determined by the law governing the bankruptcy. As these forms are not identical in bankruptcy matters in the Member countries, however, it will be necessary to choose the procedure in the country in which the property is situated which is closest to that which may be laid down by the law governing the bankruptcy;
- the form of the sale is determined by the bankruptcy law in force in the country where the property is situated.

The Working Party decided in favour of the first system, since only the law under which the bankruptcy was opened should govern its conduct. Article 33(2) therefore makes a distinction between, on the one hand, the possibility of realizing assets and the forms in which this is done - both being determined by the law governinf the bankruptcy - and, on the other, the procedural rules governing realization, which will be those of the law obtaining where the property is situated. Thus, if a debtor whose bankruptcy has been opened in Belgium possesses immovable property in Germany and if, under Belgian bankruptcy law, immovable property can be sold only by auction, the property situated in Germany will have to be sold by auction even if German law provides that in bankruptcy matters property may equally well be sold by private treaty as by auction. However, the sale by auction in Germany will be conducted in accordance with the procedure laid down by German law for this purpose. Conversely, if the law of the country where the immovable property is situated lays down

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that the sale must be by auction, the property may nevertheless be sold by private treaty or by some other means where under the law governing the bankruptcy, the liquidator has the right to decide. Obviously, the law of the country in which the immovable property is situated will determine whether or not a mortgage to which the property is bubject is cancelled by the sale etc... More precisely, and to take account of certain national rules on the respective powers of disposal of the liquidator and of a mortgagee or secured creditor (Art. 57 FW; Arts. 83 and 84 of the French law), paragraph 1 in fine lays down that the liquidator may himself dispose of property subject to a charge only insofar as this is permitted by the law of the State in which the property is situated or from the time laid down by that law.

Whether in regard to protective measures or measures to realize assets, it was considered essential to make express provision in the Convention (Article 33, last paragraph) for the possibility, in order to safeguard legitimate interests, of recourse to the local procedures available in regard to urgent matters. Thus, where the liquidator wished to sell an item of movable property which he considers perishable, although in fact it is not, any interested person, for example the owner who has hired out the property or the debtor himself, may apply to the courts of the country in which the bankruptcy was opened which will have sole jurisdiction to rule on whether such an application is admissible and well founded. However, if it proves necessary to stay execution as a matter of urgency, the opposing party will be able to bring the matter before the court of the place of enforcement to obtain, possibly, a stay of execution until the dispute has been decided by the court having jurisdiction in the country in which the bankruptcy was opened.

Section IV - Effects of the bankruptcy on the estate of the debtor

Article 34

The first paragraph of this article affirms in the clearest fashion the principle of universality of the bankruptcy. Article 20 already provides that cessation of the debtor's power to deal with his property applies automatically in all the Contracting States independently of any formality as to recognition or advertisement of the judgment. Article 34 develops this principle in relation to assets thus affected by cessation of the

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debtor's power to deal with his property in terms of both space and time. Naturally, property of which the bankrupt is not the owner or which can be claimed by others (property held as security, in trust) does not form part of the assets.

Contrary to the situation under certain national laws of Section 238 KO) the movable and immovable property of the bankrupt situated in the other Contracting States will form part of the assets which the liquidator is required to seize and realize. The same will aplly to property situated in third States (always providing that the liquidator is able to actually seize it) only to the extent laid down by the law governing the bankruptcy (of Art. 19(2) and 43(2)[68]. The Convention admits only the two exceptions to this principle examined under Articles 10(2) and 66. (The case where, because of the special status of the debtor, the bankruptcy cannot take effect in all the Contracting States; a bankruptcy which is purely territorial in the event of a successful challenge in one country).

The principle of universality is, however, tempered somewhat by Article 34 (2) and 3) relating respectively to future assets and assets which cannot be seized.

In eight of the nine Member States, cessation of the debtor's power to deal with his property affects not only the bankrupt's existing assets but also those to which he may become entitled while he is in the state of bankruptcy (inherited property, assets acquired as a result of a new business activity,[68a] but this is not the case in German law (Section 1(I) KO). It was important therefore to specify which law was to stipulate whether or not future property forms part of the assets when a debtor declared bankrupt in Belgium, for example, possesses property in Germany. This required a choice between Belgian law, the law governing the bankruptcy, and German law, the lex rei sitae. At the suggestion of the German delegation itself, the Working Party decided in favour of the law governing the bankruptcy; it appeared logical to the Working Party that the law, which governs cessation of the debtor's power to deal with his property, should also govern its extent. Thus, when the bankruptcy is opened in the Federal Republic, cessation of the debtor's power to deal with his property will not affect future property no matter where it is situated.

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68 Cf. NADELMANN, Preliminary Draft EEC Bankruptcy Convention: assets situated abroad and the problems they pose. Riv. di diritto internazionale privato e processuale, 1970, p. 501 et seq.

69 Cf. Art. 444, Belgian Commercial Code, Art. 15 of the 1967 French law, Art. 2740 of the Civil Code and 42(2) of the Italian bankruptcy law; Art. 20 of the Dutch FW.

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The conflict between the provisions of the law governing the bankruptcy and those of the lex situs does not concern future property alone; under the majority of the national legal systems, certain assets, the list of which may vary from one country to another, are not affected by the cessation of the debtor's power to deal with his property by virtue of the fact that they cannot be seized. In most cases, this is on social grounds peculiar to each State. Article 34(3) therefore refers only to the law of the State in which the property is situated.

There is little danger of this solution leading to the aggregation of nine estates of unseizable assets, because most of them - those which are indispensable to the debtor and his family - are small in number. Other assets, such as salaries and pensions are, in practice, very rarely paid to the bankrupt in more than one State.

Finally, it should be pointed out that Article 34 (3) does not employ the term "property which may not be seized" but deliberately adopts the wider expression of property "excluded from the bankruptcy".

Article 35

Legislative authorities have generally been severe with regard to the bankrupt's spouse, in particular with regard to the wife. This severity usually takes the form of certain restrictions on the rights and benefits which the spouse may claim in order to avoid any attemted fraud to the detriment of the creditors.

First of all, the bankruptcy of a debtor considerably curtails any opportunity for the spouse to regain possession of personal property. Thus the laws of the Contracting States, with the exception of France and Germany[69], recognize in principle the "Mucian presumption" according to which property acquired for valuable consideration by the bankrupt's spouse since the marriage is presumed to have been acquired with his funds and, consequently, is included in the bankruptcy assets. In the United Kingdom there is no general presumption,

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69 Cf. Art. 56 of the 1967 French law; Section 45 KO was annulled by the Federal Constitutional Court on 24.7.1968 (BGBl. I, p. 994).

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but the law lays down that funds advanced by a married person to his or her spouse in respect of professional activities form part of the bankruptcy assets of the latter and may be recovered only after all the creditors have been paid[70].

This presumption, which is a provision of bankruptcy law and not a rule of law governing matrimonial property rights is considered to be one of public policy and applies whatever the matrimonial property rights and the law governing the same.

Those national laws which recognize such a presumption differ, however, with regard to its application. Some apply it only with regard to the wife[71] whereas the others apply it to both the husband and the wife[72]. However, it is above all the nature of the proof intended to rebut the presumption that has given rise to a difficulty, with the solution under Belgian law which requires, as a general rule, an inventory or authentic document listing the property claimed separately according to its nature, and the time and manner of its acquisition.

Such differences constitute serious obstacles to straightforward application of the law governing the bankruptcy, recommended unanimously in legal works and generally adopted in case law[73].

Thus the Working Party ruled out operation of the "Mucian presumption" that might apply under the law governing the bankruptcy to property situated in Contracting States whose law does not admit such a presumption, unless the law governing matrimonial property rights reintroduced such a presumption[74].

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70 Bankruptcy Act 1914, page 36.

71 Belgium (Article 553 et seq. Commercial Code) and Luxembourg.

72 Italy (Article 70 of the bankruptcy law) and Netherlands (Article 61, FW and 205 BW).

73 Cf. TROCHU op. cit. page 215; see also Orléans 17.7.1895 CLUNET 1895, page 1038 and Brussels 2.7.1902, CLUNET 1904 p. 202.

74 There is therefore cumulative application of the lex concursus and the lex rei sitae possibly adjusted by the lex matrimonii. Application of the latter law is surprising since the Mucian presumption is, as we have seen, an institution peculiar to bankruptcy.

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Moreover, the Working Party drew up a uniform law according to which all modes of proof to the contrary are now admissible (Article 1 of Annex I). The scope of this law should be made clear: it constitutes only a rule of evidence intended to rebut the Mucian presumption where the latter would have had to apply under the system referred to above.

The question of "les avantages matrimoniaux" and disposals of property to a spouse without valuable consideration which is dealt with in Article 35(2) also shows up legislative differences which do not concern only bankruptcy law:

- Under Belgian law (Article 557 of the Commercial Code) and French law (Article 58 of the law of 1967), "les avantages matrimoniaux" are, under certain conditions, void as against the general body of creditors who, by way of compensation, cannot avail themselves of those granted to the bankrupt;
- Under United Kingdom law, gifts and certain life assurances are void as against the liquidator if the donor becomes bankrupt within two or ten years according to the case in point (Bankruptcy Act, Section 42). Moreover, where property is purchased by a married person and transferred to his or her spouse, it is presumed, in the absence of proof to the contrary, that the property has been donated or settled under a trust;
- Under Netherlands law, only promises of matrimonial benefits are void as against the general body of creditors (Article 62 FW);
- Under German law this question is covered by the provisions governing the suspect period: under Section 32(2) KO, transactions carried out without valuable consideration by the bankrupt in favour of his or her spouse during the two years preceding the bankruptcy may be annulled;

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- Disposals of property effected without valuable consideration during the two years preceding the bankruptcy are declared invalid as against the creditors under Article 64 of the Italian law on bankruptcy, which makes no distinction between the spouse and other beneficiaries. This provision is, however, reinforced to a considerable extent by the prohibition of gifts between spouses laid down in Article 781 of the Civil Code which may be invoked by the liquidator[75].

The drawing-up of a common law limited to bankruptcy law could have given rise to excessive difficulties. Thus, the Working Party considered it preferable to simply come down in favour of the specific provisions of the law governing the bankruptcy in accordance with the solution most often accepted.

Finally, those national laws which make provision for a statutory charge in favour of the married woman generally impose restrictions, in the event of the bankruptcy of the husband, as regards its subject matter and the claims secured where the husband was a trader at the time of the marriage or became one within a certain period thereafter[76]. The Convention contains no express provisions on this point.

Firstly, there is no doubt that the solution based on application of the law governing the material interests of the spouses should be rejected as in the preceding case, since this problem does not come within the normal framework of situations governed by the law governing matrimonial property rights which at the most has a creative power insofar as the spouse may claim certain advantages or secured rights only where these are permitted under the law governing the pecuniary interests of the spouses. The legislators are divided between application of the law governing the bankruptcy and that of the State in which the encumbered property is situated[77].

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75 For the combination of these two provisions, cf.Provinciali, Manuale di Fall., Milan 1953 ,page 358 and for that between Article 781 of the Civil Code and the Mucian presemption. Cass. Ital. 20.3.1959, Gir. it. 1960, I, I. col. 49.

76 This is the case under Belgian law (Article 64 of the Mortgage Law of 16.12.1851 and 559 of the Commercial Code) and Italian law solely in respect of the dowery of the wife (Article 2817 of the Civil Code and 69 of the law on bankruptcy). Since the reform of matrimonial property rights, effected by the Law of 13.7.1965, French law now provides for a statutory charge on the part of spouses, but the law of 1967 repealed Article 544 of the Commercial Code which contained provisions almost identical to those of Article 559 of the Belgian Commercial Code.

77 Cf. TROCHU, op. cit. pages 211-213.

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For the reasons already stated in the introduction, to which we will return in connection with Section VI, the subject matter and scope of secured rights, whether general or special, are, under the Convention, determined by the lex rei sitae. It will therefore be the provisions of the lex rei sitae specific to bankruptcy which will define any restrictions placed on the wife's statutory charge over the immovable property of her husband, subject of course to the rule relating to the suspect period with regard to the validity as against the general body of creditors of the registration of such a charge.

Section V - Effects of the bankruptcy on past acts and on current contracts

Articles 36 to 41 of the Convention contain the essence of the provisions of Title IV which are the subject of the reservation contained in Article 18(2) insofar as the object of the latter is to derogate from application of the lex concursus to the effects of the bankruptcy.

In fact, only certain provisions of Section V lay down rules for resolving conflicts which make reference to a law other than that governing the bankruptcy: this is so for the law applicable to recovery actions (Article 37), contracts of employment (Article 38), leasing and hiring (Article 39) and sale (Article 40). These cases are derogations from the principle embodied in Article 18(2) dictated either by the normal operation of the rules of private international law or by special considerations concerning social policy or the security of transactions.

The uniform laws provided for in Articles 36 (and 41) have a different purpose, however, which is to resolve the present uncertainties with to determining the law applicable to certain matters, such as set-off and clauses containing a reservation of title, where several laws conflict the law governing the bankruptcy, laws governing claims, the law of the State in which the property is situated, and, moreover application of one or the other, or even a combination of them, would not have produced a satisfactory result.

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The technique of the unification of the national bankruptcy laws has therefore been adopted in matters where such laws provided very different solutions, because of the serious economic consequence that any other solution would have allowed to persist or would have created[78].

Article 36 deals with the position regarding set-off in cases of bankruptcy.

Set-off in bankruptcy proceedings, between two reciprocal obligations which have arisen under two different systems of law, gives rise to a problem which is particularly difficult to resolve merely by the operation of the rules of private international law. Determination of the applicable law is all the more difficult as there is already disagreement in case law and legal works on this point even where is no bankruptcy[79]. Moreover, since the substance of the national laws differs, adoption of a simple conflict rule would inevitably create unacceptable inequalities between creditors[80].

Under all the legal systems that fall to be considered, however, set-off is always shown as having a dual role; it is a simplified method of settlement and a guarantee of payment. However, whereas in France, Belgium and Luxembourg no implication is denied from the guarantee function, the authors of German, Italian and Dutch legislation have, in contrast, emphasized the idea of security which set-off affords to creditors and debtors, without neglecting the simplifying effect or accountancy aspects of set-off. The two tendencies give rise to a complete contrast in the event of bankruptcy; when viewed as a guarantee, set-off becomes firmly anchored, or is even developed[81], whereas viewed as a means of payment, it is frustrated by cessation of the debtor's power to deal with his property and the rule of equality of creditors.

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78 VAN DER GUCHT, Draft EEC Bankruptcy Convention, J. Comm. Belgique 1968, III, 361 et seq.

79 Cf. the analysis of legal works made by TROCHU, op. cit. p. 181, which are divided on the respective applicability of the law governing each of the claims and of bankruptcy law.

80 Cf. VAN DER GUCHT, op. cit. 1964, p. 274; and COPPENS, for set-off after bankruptcy, in Idées nouvelles dans le droit de la faillite,p. 201 et seq. and Jur. com. belge 1968, II 205.

81 Cf. Sections 54 et seq. KO and Article 53 et seq. FW; Italian law allowed set-off in 1942, cf. Article 56 l.f. and FOSCHINI, La compensazione nel fallimento, MORANO, 1965. As regards United Kingdom law, cf. Bankruptcy Act 1914 p. 31 and Companies Act 1948, p. 317.

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Thus, in the latter case, no set-off, whether statutory, judicial or contractual, is admissible for the benefit of a person who is both a creditor and debtor of the bankrupt from the time of the judgment opening the bankruptcy. As a debtor, he has to pay everything he owes; as a creditor he is subject to the law on dividends. By way of an exception, however, Belgian and, above all, French case law recognize that set-off may operate after the opening of the bankruptcy, i.e. even though the conditions concerning liquidity and liability for payment of the two debts are met only after the bankruptcy, where the claims and debts are in the same account or if the two debts arise from the same contract.

The need for a minimum degree of uniform law was evident. However, the drawing-up of common laws, even when restricted in scope, presupposes reciprocal concessions, each country showing some hesitation in giving up traditional solutions which have their own raison d'être. A choice had to be made.

The minimum uniform law contained in Article 2 of Annex I represents a compromise between German, Dutch and Italian law.

Under Article 2(1) - and this is the only real objective of the uniform law - set-off is possible where the conditions concerning liability for payment or liquidity of the claims to be set off or one of them are met only after the opening of the bankruptcy. The uniform law confines itself to removing the prohibitive effect of the bankruptcy. Set-off established at the time of declaration of the bankruptcy, in particular statutory set-off which generally comes into operation automatically, is not the subject of the text. For set-off to be possible under the uniform law, the claim and debt must at least exist in the same estate at the latest at the date when the bankruptcy was opened. Consequently, the uniform law does not cover set-off in the event of the acquisition of a claim or debt subsequent to the bankruptcy, for example by inheritance; or again, in the event of a claim arising after the opening of the bankruptcy (claim in respect of a debt incurred on behalf of the general body of creditors).

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Although the uniform law no longer contains a stipulation to this effect as contained in a previous version, it is reasonable to assume that set-off will also apply in the case of debts where one is not stipulated in the contract but arises from the non-performance of the latter subsequent to the bankruptcy.

The uniform law then deals with cases in which the conditions regarding liability for payment or liquidity are not met at the time of bankruptcy.

First of all there are those claims that will mature at a future date. Following in this respect those legal systems which allow set-off in the event of bankruptcy, paragraph 2 of Article 2 in a way effects an acceleration of payment with regard to the creditor whereas as a general rule acceleration of payment applies only in respect of the debts of the bankrupt. The claim on the bankrupt will be evaluated on the date of the opening of the bankruptcy in accordance with special rules to this effect provided for under the law governing the bankruptcy if they exist (cf. Section 65 KO; Articles 130 and 131 FW) and in the absence of such rules, by the transposition of those relating to the liability for payment of debts of the bankrupt which are not due (cf. Article 450 of the Belgian Commercial Code).

Set-off will also apply in the case of claims expressed in foreign currencies[82]. Stipulation of a foreign currency constitutes in most cases simply the selection of a money of account that results in payment in the currency of the forum, the mechanics of which are similar to those of an index-linking clause. It was logical that the same solution should apply where the debt of the bankrupt is a debt in kind, which is not evaluated in money (Cf. Sections 54-4, 69 and 70 KO).

By contrast, the uniform law does not refer to set-off for claims to which a suspensory condition attaches. The problem here is different from that of claims payable at a future date. A claim subject to a suspensory condition does not exist until the condition has been satisfied, and the opening of the bankruptcy does not change this in any way. The Working

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82 Cf. European Convention on foreign money liabilities concluded in 1967 under the auspices of the Council of Europe. See also with regard to conversion, Article 37(2) of the French law of 1967.

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party decided not to go as far as German and Dutch law which facilitate set-off in the event of bankruptcy often beyond even the provisions of civil law. This point, like all those not dealt with in Article 2 of the Annex, is a matter for the national law, and will be resolved in accordance with the conflict rules of the court adjudicating the bankruptcy (Article 18(2)).

Article 37

The laws of all Community countries make provision for the invalidity (Federal Republic of Germany and France), nullity (Belgium, Luxembourg, Netherlands) or ineffectiveness (Italy) of certain acts performed by the debtor before the opening of the bankruptcy[83].

The national systems differ, however, on the balance to be achieved between equal treatment for creditors and the credit requirements and consequently the technique to be applied. Whereas the Belgian, French and Luxembourg legal systems, which link invalidity to the cessation of payments, are intended primarily to re-establish equality between the creditors, by stipulating that transactions likely to benefit one of them, even if he acts in good faith, to the detriment of the general body of creditors are invalid, Dutch and, to a lesser extent, German, Italian and United Kingdom law, which incline more to the concept of the action to set aside frauds on creditors, attach greater importance to the security of transactions, which normally may be challenged only in so far as the other contracting party was aware of the precarious situation of the debtor[84].

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83 In the case of Belgium and Luxembourg, Article 445-49 of the Commercial Code; France, Articles 29 to 34 of the law of 1967; Italy, Article 64 et seq. of the Bankruptcy Law; Netherlands, Articles 42 to 48 FW; Federal Republic of Germany, Sections 29 to 42 KO 222 KO, Section 342 HGB.

84 HEENEN, Les nullités de la période suspecte dans les pays de la CEE Liber amicorum Baron FREDERICQ, 1965, page 557 et seq.; VAN DER GUCHT, J. Comm. Brussels, 1964, page 219 et seq. and GANSHOF, Le droit ... op. cit. page 67.

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Moreover, very great differences exist with regard to the definition and duration of the "suspect period" preceding the opening of the bankruptcy and during which acts which may be legally set aside have to have been executed. The concept or date of cessation of payments are not recognized everywhere. Above all, however, the periods vary from 40 days in the Netherlands to two years in Italy; Belgium, Luxembourg and German law generally adopt a period of six months whereas French law, until 1967, provided for a period that was theoretically limited to that of the period of limitation[85]. Under Danish and United Kingdom law, the period is calculated not from the bankruptcy, but from the petition.

Encouraged nevertheless by the finding that all the national laws recognized to a greater or lesser degree a system of de jure invalidity (for transactions executed without consideration, abnormal payments ...) and optional invalidity, the Working Party initially drew up uniform substantive rules, one of the merits of which was to tighter up, relevant periods. The initial agreement did not, however, survive the negotiations that followed enlargement of the EEC and faced with the excessive number of reservations which destroyed the uniform nature of the substantive laws, the Working Party preferred the leave the matter to be resolved in accordance with the conflict rules provided for in Article 18 which will probably result in direct application of the national law governing the bankruptcy having regard to the aim pursued.

It is highly desirable that an approximation of laws should be carried out on this point at a later date to avoid the continuation of excessive disparities, which give rise to serious difficulties in trade within the Community.

Actions brought in regard to the suspect period are particularly severe in nature in that they can affect even payments which under ordinary law are not covered by Paulian actions that penalize the proven fraud of the debtor.

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85 Since the Law of 1967 (Article 20), based on the work of the Working Party, the date of cessation of payments cannot precede the opening of the bankruptcy by more than 18 months.

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Under no national law do the provisions specific to bankruptcy preclude the bringing, in the course of the bankruptcy, of a Paulian action under ordinary law[86]. In fact, this latter remedy is the only one which allows acts prior to the suspect period and those executed between ratification and termination of a composition to be set aside. It may also be brought in the case of acts carried out during the suspect period, and although the conditions which have to be met for it to be brought are generally stricter, it will be possible for the two remedies to be employed simultaneously.

Article 37 complements the rule of exclusive jurisdiction laid down in Article 15(1) of the Convention with a stipulation as to the applicable law, which, in the first place, can only be the law governing the bankruptcy. If that law contains no specific provisions in the event of bankruptcy for the recovery action in question brought in the interests o fall the creditors, reference in made to the provisions of the law governing the disputed act which are, however, applicable in the event of bankruptcy. Thus a "suspect period" system can be reintroduced by this means. Finally, it should be stated that the law to which Article 37 refers may be that of a non-Member State.

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86 Cf. in particular Articles 1167 of the French, Belgian and Luxembourg Civil Codes, 2901 of the Italian Code and 1377 of the Netherlands Civil Code. Where they are brought in connection with a bankruptcy (cf. Article 448 of the Belgian Commercial Code, 66 of the Italian bankruptcy law, 42 of the Netherlands FW and 31 KO) such actions are often subject to procedural changes which make them similar to actions in respect of the suspect period; thus, under French law (Com. 7.6.1967, Bull. III, page 224), as under other laws, the Paulian action becomes an action arising from the bankruptcy and an action on behalf of the general body of creditors which can be brought only by the liquidator and before the court adjudicating the bankruptcy.

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Articles 38 to 41

A. General considerations

Apart from possible application of the suspect period rules, bankruptcy may have two types of effect on contracts and acts executed by the debtor before it is opened. It may either lead to their termination or modify their effects.

In principle, only contracts entered into intuitu personae (agencies, partnerships ...) are automatically terminated by the opening of the bankruptcy. As regards other bilateral contracts, the liquidator has in most cases the right to choose whether they are to be maintained in force or cancelled. If he is in favour of the contracts being performed the other contracting parties are included, in regard to the consideration they are to received, in the general body of creditors, whereas if the contract is cancelled, the damages which may be accorded constitute a claim in the estate[87].

As it is a question of establishing whether, by whom and under what conditions current contracts may be cancelled or maintained in force, or again whether clauses providing for cancellation in the event of bankruptcy have to be implemented, it would be natural to resort exclusively to the law of the State in which the bankruptcy was opened. Since these points call into question the powers of the authorities administering the bankruptcy, in particular the liquidator, it will be that law which will determine, in principle, the consequences of cancelling contracts or maintaining them in force (Article 18(2)[88];

87 Cf. the very general provisions of Article 38 of the French law of 1967 Compare with Sections 17 et seq. KO and 50 VgO; Articles 72 to 83 of the Italian bankruptcy law and 37 et seq of the FW which also contain provisions specific to certain contracts.

88 The law governing the bankruptcy, which as has been stated is understood to be the law of the State in which the bankruptcy was opened including possibly its rules of private international law, may refer to a law other than the national law of that State, for example, the law which governs the company's instrument of incorporation since it is for that law only to determine whether the bankruptcy of the company or that of a member gives rise to its dissolution. In general, these two laws are the same for companies whose registered office is within the EEC, given the criterion for determining juridiction employed.

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Here the question at issue is that of ensuring the equality of creditors, in accordance with the very objectives of bankruptcy. If the principles are strictly adhered to the nationality and domicile of the parties, the place where the transaction was concluded or executed and the location of property should not be of any significance, just as one should not have to refer to the law governing the contract since the charges made to the rights of the other contracting parties do not result from the intrinsic terms of the contract but from an external factor, the occurrence of the bankruptcy of the debtor.

For the reasons already set out, however, the Working Party was unable to apply these principles strictly and had to derogate from them in the case of certain contracts which, moreover, had the advantage of providing objective connecting criteria that generally enable the competent court and the applicable law to coincide (cf. for the exceptions referred to, for the vis attractiva concursus, Article 15(8)).

It should be pointed out that Articles 38 to 41 do not apply to secured and preferential claims which are dealt with in Sections VI (Article 42).

B. Article 38

Application of the law governing the bankruptcy as regards the effects of the bankruptcy on contracts of employment has in principle been ruled out subject to a reservation which will be examined below since the legal position of employees[89] and their rights in the event of the bankruptcy of the employer (cf. Section 22 KO: Article 2119(3) and 2778(1) of the Italian Civil Code; Article 40 FW) differ greatly from one national legal system to another. For example, and to anticipate Section VI, under French law, wage-earners have a "super-preferential claim" which applies in the event of a "liquidation des biens" ou "règlement judiciaire" and which enables them, notwithstanding the existence of any other preferential claim,

89 The contract of employment referred to in Article 38 is a generic term which must be understood to mean both contracts for the hire of services and contracts of employment or apprentieship, i.e. any legal rationship of subordination of an employee to an employer, whatever the nature of the remuneration and the intervals at which it is paid.

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to receive out of the initial receipts of funds the unattachable portion of the sums due (Articles 50, 51 and 155 of the Law of 1967); the liquidator must also pay them immediately, as a temporary measure, and before the amount of the super-preferential claims is established, a sum equal to the unattachable portion of one month's unpaid wages (Article 51); in the Federal Republic of Germany, since a reform in 1974 (Section 59(1) nº 3-4 KO), part of the unpaid wages is considered to be a debt incurred on behalf of the general body of creditors (Masseschulden) in addition to the general right of preference.

One should however note the recent assumption of responsibility in almost all countries for part of the wages and allowances due in the event of the insolvency of an employer by guarantee funds which are then subrogated to the rights of the employees; a directive is being drawn up on this subject.

Moreover, the laws on employment are too closely connected with the social policy of each State for them to be changed even in the event of bankruptcy.

It is therefore the bankruptcy provisions (if they exist, and failing this the general provisions) of the law applicable to the contract of employment which will determine the effects of the bankruptcy on the contract of employment if it is the law of the Contracting State.

Otherwise, it will be the private international law of the Court having jurisdiction which will determine the law governing the contract of employment. Pending Community harmonization (in progress) of the substantive rules or conflict rules consequent upon the free movement of workers in the EEC[90], we shall merely state here that in general one finds more or less, limited recourse to the principle of autonomy and failing this, a fairly definite preference for the law of the place where the work is carried out rather than that of the place where the contract was entered

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90 As regards conflict rules, the measures in question are the draft Convention on the law applicable to contractual obligations (Article 6) and more especially for workers employed within the EEC, a draft regulation on the basis of Articles 38 and 235 of the EEC Treaty; study of the harmonization of the substantive rules does not appear to have been continued by the Commission apart from the directives of 1975 and 1977 referred to above in footnote 66.

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into, e.e. that of the place of engagement which again becomes applicable only if the work has to be carried out in an unspecified location or if it is not possible to determine a principal location for the execution of .

However, the free movement of workers and freedom of establishment and freedom to provide services already have repercussions on the contract of employment, both on probable developments of national law in the Member States of the EEC and on the outlook for the private international law of those States. For workers who obtain employment with an employer in another EEC State and also for those who work for an employer who, while having his principal place of business in one country has an establishment in another, Article 7 of Council Regulation (EEC) n° 1612/68 of 15.10.1968 lays down a presumption in favour of the application of the law of the country in which the work is carried out; these workers enjoy the same protection and treatment as nationals as regards all conditions of employment both intellectual and manual.

C. Article 39

By way of derogation from the law governing the bankruptcy, the Working Party made the effects of the bankruptcy of the lessee or lessor on leases or tenancies of immovable property and farm leases subject to the lex rei sitae and more precisely to the provisions of that law specific to bankruptcy (cf. the detailed provisions of Sections 19 to 21 KO and Article 39 FW). Rural leases or tenancies and leases of immovable property for commercial or professional use or use as dwellings are, in some countries, too closely connected with land law for it to be advisable to apply a law other than that governing real estate. The policy of the legislators in this respect, as with that of the contract of employment, was to give special protection to lessees and tenants by means of public policy provisions, which are often very complex, any disputes being for specialized courts to settle (cf. Article 15(8)).

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The rule is expressly extended the cases in which the contract relates to a collection of items of movable and immovable property which is often the case with agricultural or commercial undertakings.

It should finally be pointed out that the prior question of the characterization of property is dealt with in Article 19.

According to the majority of national laws, it is now scarcely disputed, since the work of Kahn and Bartin, that conflicts of characterization are in principle resolved by reference to the lex fori where such characterization requires designation of the applicable law. Thus at first sight, the characterization lege rei sitae adopted in Article 19 is surprising even if it can be based on certain precedents such as the Benelux Treaty of 1969 (Article 12). In fact, the solution adopted is not really an exception to the general principle described above if it is borne in mind that disputes concerning immovable property (Article 16(1) of the General Convention and Article 15(8) of this Convention) come within the exclusive jurisdiction of the courts of the Contracting State in which the immovable property is situated. The rule therefore had to be extended to movable property also in order to avoid conflicts of characterization.

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D. Article 40

Article 40, like Articles 38 and 39, deals only with the right to choose enjoyed by the liquidator, subject to reservation of title clauses (Article 42) and preferential rights (Section VI). Some additional comments on this point will not, however, be amiss.

The guarantees afforded to an unpaid vendor are, of necessity, different where the transfer of title between the vendor and the purchaser is subject to different rules in the countries of the common market and some of those guarantees follow the rules relating to transfer to title or are based on them[91].

Under Belgian, French, Italian and Luxembourg law, which are consensual laws, the purchaser in principle becomes the owner solo consensu even before he has actually taken possession of the object sold, whereas in Germany, whose law has remained closer to Roman concepts in this respect, it is necessary, under Section 929, sentence 1 of the BGB, for the purchaser of movable property to have taken possession of the thing sold, and for the two parties to have agreed to the transfer of title. Under certain conditions, there may not be a handing over of the property, or an agreement may replace it. As regards the transfer of title to immovable property, Section 873(1) and Section 925(1) of the BGB lay down that the vendor and the purchaser must have agreed to the transfer of ownership and the change in the legal status of the property must have been recorded in the land register. The contract of sale in itself gives rise only to a right having the character of an obligation. Actual handing over is also necessary under Dutch law (Article 639, 667 et seq BW).

The effects of the bankruptcy of one of the parties to the contract of sale can therefore only be governed differently under the laws of those countries.

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91 Cf. the comparative study by Mr VAN DER GUCHT, Rights of the purchaser or vendor in the event of the bankruptcy of either of them, as opposed to the rights of the creditors of the bankrupt. J. Com. Brussels 1965 page 213 et seq.

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These systems are still opposed as far as their general approach is concerned, since the laws of the former clearly limit the unpaid vendor's prerogatives in the event of the purchaser's bankruptcy, whereas German law and Dutch law place him in a much more favourable position. These differences are mainly apparent in relation to:

- the conditions for exercising a right of recovery (Verfolgungsrecht and reclamerecht)[92];
- the validity as against the general body of creditors of clauses containing a reservation of title, which is dealt with in Article 41;
- the preferential right of a seller of movables that have not been p paid for, which is non-existent under German and Italian law (except in the case of a seller of machinery costing more than 30 000 lire), and which, in the event of the purchaser's bankruptcy, continues to exist under Dutch law if the object is still in the purchaser's possession, but not under French (Art. 60, bankruptcy law), Belgian or Luxembourg law (Article 546 of the Commercial Code, save for an exception laid down in favour of suppliers of professional equipment).

From this brief survey it can be seen that the difficulties mentioned above will continue to exist as long as the unification or harmonization of the law relating to sales has not been achieved. The Hague Convention of 1 July 1964 (LUVI) and the convention concluded in Vienna in April 1980 under the auspices of the UN (CVIM) have no significant effect on the matter we are considering. They are limited to the international sale of tangible movables. What is more, they do not govern transfers of ownership. It is certain that unification of the law will one day have to be achieved between countries which have endeavoured to set up an economic union, in an area in which security of the main commercial transactions - sales - is at stake. Unification was conceivable in a bankruptcy Convention only in regard to the effects of the bankruptcy alone on the contract.

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92 Cf. Section 44 German Bankruptcy code Arts. 546, 566 et seq. Belgian Commercial Code, 59 et seq. of the 1967 French law, 75 of the Italian bankruptcy law and 230-32 of the Dutch Commercial Code, See also TROCHU, op. cit. pp. 176 et seq.

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The choice of the law applicable therefore had to satisfy two essential requirements: to maintain as far as possible the equality of creditors and to ensure the security of commercial relations.

After much discussion and in view of the limited scope of the provisions to be incorporated in Section V, the Working Party finally decided to make as few derogations as possible from application of the law of the state in which the bankruptcy was opened. For reasons similar to those on which Articles 39 and 15(8) were based, the effects of bankruptcy on sales of immovable property will be determined by the lex rei sitae.

Article 40 expressly treats in the same way as sales similar contracts, which are in an intermediate position between leases and sales, such as lease/sale, "crédit bail" and leasing. The same will apply to mixed sales concerning both immovable property. Whatever the name given either to the contract or to the property to which it relates, only one system will therefore apply under the lex situs rule.

E. Article 41

The national bankruptcy laws are in radical opposition to each other with regard to the efficacy of clauses subordinating the transfer of ownership to payment in full of the price, included in contracts for the sale of goods. In Belgium and Luxembourg, such clauses, which are lawful in themselves, are, according to present case law, invalid as against the general body of creditors of the purchaser by reason of the principle of apparent solvency evidenced by the possession of objects purchased. Italy requires writing bearing a definite date. In Germany, Denmark and the Netherlands, and in France since the law of 12 May 1980 was adopted, reservation of title may be invoked against the bankruptcy. In England, the validity of the clause depends on the Court's decision as to whether the property acquired subject to reservation of title was, in fact, acquired in circumstances which would indicate that the purchaser is the owner[93];

93 See on this subject the reports presented at the IVth Jean DABIN legal seminar "Idées nouvelles dans le droit de la faillite" Brussels, 1969. See also WAELBROECK, "Le transfert de propriété dans la vente d'objets mobiliers corporels en droit comparé; Unidroit study on hire purchase sales and credit sales of tangible movables in the member countries of the Council of Europe, 1968, pp. 51 et seq; particularly pp. 86 et seq. As regards English law, see also Aluminium Ind. VAASSEN v Romalpa Aluminium (1976) CA, WLR July 2, 1976, and as regards Irish law, High Court 7.3.1975, in re Interview Ltd and 12.12.1978, in re Stokes & McKierman Ltd.

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The considerable development of sales of movable property on hire purchase or credit, in regard to which these clause are most frequently encountered, as well as the economic advantages which certain laws attach to the full effectiveness of reservation of title in the event of bankruptcy[94], militate in favour of a unification of bankruptcy rules on this point since the conflict of laws solutions are uncertain and far too divergent on matters of substance.

The Working Party was unable to reach agreement in the end, however with the result that it is submitting to the Council three possible solutions from which a choice will have to be made. Two of them are pure conflict of laws solutions, while the third is the solution of uniform substantive law, which was favoured by the Working Party until 1975.

1. The first variant consists of the uniform substantive law solution, which appears in Article 3 of Annex I, has minimum scope as in the case of set-off and is based on Italian law.

The Working Party did not intend a unification of the provisions of national laws concerning the conditions necessary for a clause containing a reservation of title to be valid, but only a unification of bankruptcy laws so that a reservation of title which is valid under the law governing the contract of sale might be invoked in bankruptcy matters. Two conditions therefore have to be met in turn:

- The contract of sale must be valid and fulfil the requirements of the law governing its conclusion[95]. Thus the mandatory provisions of certain laws on consumer protection, which may go so far as to prohibit clauses containing a reservation of title, are fully safeguarded.

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94 Cf. J. BASTIN, "Les conséquences économiques de la réserve de propriété" in "Idées nouvelles dans le droit de la faillite", pp. 333 et seq.

95 However, matters could be different if German law is applicable, for the "Einigung" which constitutes the agreement for the transfer of ownership is a contract independent of sale (Kaufvertrag) and, this being so, it is possible that the "Einigung' may be valid despite the irregularity of the casual document.

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- The conditions as to form set out in Article 41(1) will have to have been met if the clauses containing a reservation of title referred to in the text are to be effective. In the case of certain national laws, these conditions may be more rigourous than those laid down under the law governing the contract.

The authors of the Convention nevertheless sought to exercise caution. The uniform law relates only to "simple" reservations (einfache Eigentumsvorbehalte), that is to say those which concern the object sold and which guarantee only payment of the price, to the exclusion of other types of clause found particularly in German law such as clauses providing for "prolonged" (verlängerte Eigentumsvorbehalte) or "transferred" reservation (weitergeleitete Eigentumsvorbehalte), which can apply in the case of a transformation of the object or its resale or which guarantee claims other than the price[96]. The validity of such clauses as against the general body of creditors will depend on the law governing the bankruptcy.

Article 3(1) of Annex I deals with the bankruptcy of the purchaser. National laws on bankruptcy will henceforth have a minimum content. Reservations of title evidenced in writing before delivery of the object will have to be recognized as valid as against the general body of creditors. They will therefore most frequently be contained in the contract of sale itself, writing being understood to be not only the contract document but also any exchange of correspondence, such as an order form or confirmation and acceptance of the order, which can be either verbal or take the form of a pro forma invoice, telegram or telex. This clause must therefore be clearly specified or accepted by the purchaser and cannot be stipulated at the time of delivery of the object.

The text does not, however, contain the condition required under Italian law of writing bearing a definite date prior to the opening of the bankruptcy (Articles 1542 and 2074 of the Civil Code), as this condition does not fit in well with commercial practice. It is simply recalled that the liquidator may prove by any means the inaccurate or fraudulent character of the writing or its date.

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96 Cf. Sections 946 et seq. BGB; Stump "L'expérience allemande de la réserve de propriété" in "Idées nouvelles dans le droit de la faillite" pp. 287 et seq.

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Nor did the Committee believe that it should take up the idea - attractive in principle - of making the validity as against the general body of creditors of clauses containing a reservation of title dependent on their advertisement. Providing for effective advertisement would have been no easy matter; where would it have had to be done? Where the centre of administration is situated no doubt, but what if only establishments exist within the EEC? And as advertisement would have to have been effected prior to delivery to play its part fully, the result would have been not only the incurring of expense, but delays that are difficult to accept in the world of business. Once reservations of title are fully accepted and become common practive, it will be necessary to presume that possession of goods and equipment can in itself no longer be considered by anybody as an assurance of solvency. Contracting States which already recognize reservations of title in bankruptcies have not experienced the disadvantages feared in certain circles and are opposed to the creation of new formalities.

Article 3(2) of Annex 1 reproduces the basic provisions of Article 73(2) of the Italian bankruptcy law. In the case of a sale with reservation of title, the bankruptcy of the seller subsequent to delivery does not entitle the liquidator to elect to rescind the contract as in the case of the bankruptcy of the purchaser. The purchaser will therefore be able to continue his payments and acquire ownership of the article at the end of the agreed period. This solution also results from the second variant.

2. It is, on the other hand, the private international law solution which appears to be the most widely accepted, that is adopted in the second variant.

As in the case of the first variant, the second variant makes a distinction between the law applicable to the validity of the contract and that applicable to its effectiveness as against the general body of creditors. The former will be determined by the conflict rules of the court hearing the bankruptcy (which has exclusive jurisdiction under Article 15(5), and these will determine which law governs the contract of sale. Since the latter law is not otherwise defined, as this is a general question the two sub-variants for the first

paragraph of Article 41 must be considered not to be variants of substance, and constitute, in reality, only two drafting variants on the inescapable jurisdiction of the private international law system of the court hearing the bankruptcy.

The law applicable to the validity of the clause as against the creditors of the purchaser will be the law of the State in which the object sold is situated at the time of the abnkruptcy[97].

3. The third variant consists in inserting no special provision in the Convention, with the result that the whole question will be governed by the private international law of the State in which the bankruptcy has been opened (Article 18(2), which may either narrow down the choice to the solution proposed in the second variant or render the law of the bankruptcy applicable[98].

On this subject, where divergent solutions are unacceptable as they would seriously affect the trustworthiness and security of transactions, it is essential that, if one of the two latter variants is finally adopted, an attempt to approximate laws should be made by means other than the present convention. Both the Commission of the European Communities and the Council of Europe seem to wish to give this matter their attention.

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(97) Cf., in this connection, Civ. 8. 7. 1969, Clunet, 1970 p. 917, note by Deruppe and OLG Hamburg, 2. 6. 1965, Rabels Zeitschrift für ausländ. und internat. Privatrecht 1968, p. 536. The Hague Convention of 15 April 1958 on the law applicable to the transfer of ownership contains a similar provision.

(98) Cf. with regard to the application of the internal law of the bankruptcy, Trib. Com. Bruxelles 27. 10. 1958, Jurisp. Com. 1959, p. 81 and Trib. Com. Seine 9. 11. 1964, Journ. Agrées, 1965, p.15.

Section VI - Preferential claims and secured claims

Articles 43 to 52 relate to the formidable problem of secured claims and preferential claims from the point of view of a single bankruptcy at European level. As already pointed out in the introduction, the basic principle which the Working Party has adhered to in this regard is that of territoriality. It is undeniably an impairment of the guiding principle of the Convention, namely the unity of the bankruptcy.

This being so, before explaining the machinery designed to avoid as far as possible in this respect the partitioning-off of the different estates thus constituted for accounting purposes, we must first consider the reasons for the choice made.

I. Determination of the law applicable: the law of the State in which the assets are situated

In theory, the statutory or contractual secured claims asserted by certain creditors can be governed, in the event of bankruptcy, not by one, but by three laws: the law which govern the obligation, the law of the State in which the encumbered asset is situated and, finally, the law of the country in which the bankruptcy was opened.

Legal writers are, however, divided on the primacy to be accorded to one or other of these laws[99]. Case law on the question of general preferential claims is almost non-existent. The systems proposed by authors or contained in international conventions apply:

- the principle of territoriality (lex rei sitae)[100];
- simultaneously, the law governing the bankruptcy and the law of the State where the assets are situated,[101], but the latter law would not have to be intended either to engender or not to engender preferential claims;

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(99) Cf. De Boeck, "Les conflits de lois en matière de droits réels dans le cas de faillite", Rev. DIP 1913, p. 301; Travers, op. cit. No 11.425; Trochu, op. cit. pp. 084 et seq.

(100) Despagnet, Précis DIP 5th ed. No 434, Code Bustamente, Art. 420, and Ph. Kleintjes, "Het Faillissement in het international privatrecht", Leyden 1890.

(101) Rolin, op. cit. p. 100 et seq; Travers, op. cit. No 11 434.

- the law governing the bankruptcy to preferential claims relating to movables and the law of the situs in respect of those relating to immovables[102];

- the law governing the claim in the case of general preferential claims and the law of the country in which the assets subject to the charge are situated in the case of special preferential claims[103]. This system is conceivable only between countries whose laws on general preferential claims tally to a large extent, which is not the case at present with the nine common market countries;

- the law governing the bankruptcy in the case of general preferential claims and the law of the country in which the assets subject to the charge are situated in the case of special preferential claims, this distinction being the one most generally applied or advocated[104].

In view of the multiplicity of solutions and the complexity of the subject, the Commission asked Mr. Sauveplanne, Professor at the University of Utrecht, to carry out a study. After a very detailed analysis of the laws of the member countries of the common market, Mr. Sauveplanne came down in favour of distinguishing as a principle, between special preferential claims and general preferential claims[105]. With regard to the latter - including preferential claims of the tax authorities and employees - he proposed the law of the country in which the bankruptcy had been opened. Those same laws should govern distribution between creditors according to the nature of their preferential claim. Finally, the ranking as between general preferential claims and special preferential claims in respect of a particular asset should be governed by the law of the country in which the asset is situated, or by the law governing the claim where the subject matter of the preferential claim is an intangible asset.

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(102) De Boeck, op. cit, p. 303, Benelux Treaty of 24 November 1961, Art. 25.

(103) Draft Austro-German Convention of 27 January 1938, Arts. 14 and 15.

(104) Draft Hague Convention of 1925-1928, Art. 10; Frankenstein Code Art. 783 et seq; Jitta, "Codification of international bankruptcy law", The Hague 1893; Meili, Manual of international bankruptcy law, Zurich 1909; Diena, quoted by Rolin, op. cit. p. 101; P.L. de Vries, "The extra-territoriality of bankruptcy in private international law, Amsterdam 1926; Franco-Austrian Convention of 27 February 1979, Art. 15.

(105) EEC Commission document No 8838/IV/63

Even though all the delegations immediately expressed reservations regarding the solution put forward by Professor Sauveplanne in respect of general preferential claims and unanimously considered that preferential claims of the tax authorities should remain territorial and that it was inadvisable, given the disparities between the national laws, to make the preferential claims of employees who are covered by different rules, subject to the law govering the bankruptcy, the Working Party nevertheless decided to study the matter in detail. The examination showed that if the law governing the bankruptcy were to be applied to general preferential claims and to distributions between the creditors having such claims, the Convention would have to contain a set of extremely complex provisions involving difficult options, bearing in mind all the possible combinations, if the following problems were to be resolved:

- the case of a preferential claim in respect of immovables according to the law governing the bankruptcy, while the law of the situs treats it as pertaining only to movables, or vice versa;
- problem of classifying general preferential claims where some are governed by the local law (preferential claims of the tax authorities) and others by the law governing the bankruptcy (other general preferential claims);
- the problem of classifying general preferential claims (governed by the law of the country in which the bankruptcy was opened) and special preferential claims (governed by the law of the situs).

The Working Party rapidly came to the conclusion that as far as this problem was concerned no conflict of laws solution was fully satisfactory and that the only way to really settle the problem would be through unification of the law governing secured rights. However, the framing of a uniform law of this nature, quite apart from that fact that it went well beyond the Working Party's terms of reference, would have involved quite unacceptable delays.

The Working Party therefore concentrated on finding the least imperfect and least complex solutions possible, and thus gave de facto sanction to the status quo of the national systems of law by deciding to make all secured rights subject to the law of the country in which the assets are situated[106]. To do this, the principle of the unity of the bankruptcy has to some extent been impaired by the formation of as many sub-estates of assets and liabilities as there are Contracting States in whose territory there are assets to be realized. It should be noted that it is only after the assets are realized that the liquidator, acting under the supervision of the court adjudicating the bankruptcy, will proceed to form these sub-estates purely for accounting purposes (Article 43). Fairly detailed rules govering distribution then became indispensable to take into account the fact that a claim could be secured in several countries for unequal amounts or by charges differing in nature and rank.

II. Implementation of the law of the country in which the assets are situated

A. General rights of preference and claims of debts incurred on behalf of the general body of creditors: Articles 44, 45 and 50

These articles govern "Community recognition" of debts incurred by the general body of creditors and of general rights of preference[107] which do not relate to any definite object but encumber a general category of (all the movables or all the immovables or both together) assets which may be situated in the territory of several States and which make up all or part of the debtor's estate considered as a whole and constituting the common

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(106) Economic and professional circles have usually taken the same view in their opinions (Paris Chamber of Commerce and Industry, Association of Registrars of the French Commercial Courts) or have advocated, as an exception to the law governing the bankruptcy, application of the law governing the branch office dealt with (European Insurance Committee, Banking Federation of the EEC). Others, such as the Permanent Conference of Chambers of Commerce and Industry of the EEC, propose applying the solutions contained in Article 25 of the Benelux Convention. The Sanders draft of the European Company statute also provides for exclusive application of the law of the situs (Article IX-B-5).

(107) General preferential claims do not exist in the Federal Republic of Germany. The Bankruptcy Code provides for a certain hierarchy of claims.

surety for the creditors[108]. Basing itself simultaneously on the unity of the debtor's estate, the universality of the bankruptcy and the anlysis of the very concept of general right of preference, Article 44 confers on foreign claims in respect of assets situated in each Contracting State, whether they arose before or after the bankruptcy, the same rights of preference as those attached by the law of each of those States to anlogous claims[109].

But this principle could not be general, as everything depends on the purpose and social function of the general right of preference. Article 44 therefore chooses it only for civil and commercial claims (paragraphs 1 and 2), to the exclusion of public claims, which are mentioned in paragraph 3. Belgian workers can therefore, for example, invoke in respect of assets situated in France the general rights of preference of French employees according to the various rankings laid down by French law (extended rights of preference and general rights of preference), in Germany treatment as if debts due to them had been incurred the general body of creditors, and general rights of preference under German law, etc...[110]. Conversely, German employees will be paid out of assets situated in France like French employees, in Belgium like Belgian employees, etc...

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108 General rights of preference within the meaning of the convention include:
- "floating charges" under common law, which are secured rights granted by companies over a collection of assets, both present and future,in such a way that they "crystallize" when the secured right becomes operative.
- "Massenschulden" pursuant to Sec. 59(1) Nos 3 and 4 of the German Bankruptcy Code represented by certain debts owed to employees (for six months) and social security or pension organizations which arose before the bankruptcy and which, before a reform carried out in 1974, enjoyed only general preferential rights. Such debts will hereinafter be called "quasi debts incurred by the general body of creditors". Bodies which can invoke subrogation exercise only the earlier general right of preference.

109 Cf. Patarian, Rég. Dalloz de Droit International, V° Preferential rights, No 31 and Hoge Raad 15. 6. 1917, N.J. 1917, p. 812, where it was held that, in a Dutch bankruptcy, a foreign creditor could exercise a preferential right under Dutch law, even though it had not been provided for in the foreign law governing the claim. This case involved a special preferential right and the Hoge Raad applied the law governing the bankruptcy and that of the place where the property was situated.

110 Cf. for Belgium, Art. 20, (4) of the 1851 mortgage law; for France, Arts. L. 143-10 and 143-11 of the Labour Code and Arts. 2101, (4) and 2104,(2) of the Civil Code; for the Federal Republic of germany, Art. 61, (1) of the Bankruptcy Code; for Italy Art. 2778, (14) of the Civil Code; for the Netherlands, Art. 1195, (4) BW. Cf. also 1979 Franco-Austrian Convention, Art. 16

The Committee has neither specified what must be understood by "civil and commercial matters", nor settled the problem of qualification by determining the law according to which the meaning of this expression must be assessed. In this respect it conforms to the method adopted in existing conventions, and especially in the general convention of 27 September 1968. The opposition between paragraphs 1 and 2 of Article 44 nevertheless permits the inference that it is not the category of the creditor that must be taken into consideration but the nature of the claim invoked. Claims in private law come under paragraph 2, whereas those in public law, as well as fiscal and social security claims, even where they arise from a professional activity, are covered by paragraph 3. There is no doubt, therefore, that a claim arising, for example, from a works or supply contract entered into by the State or a local authority acting as a private person and not with the prerogatives of public power, is a civil or commercial claim within the meaning of Article 44. The same ought to be true of debts of public bodies who are subrogated to the rights employees, whose claims they have satisfied.[111]

Paragraph 3 departs from the rules contained in the /two/ preceding paragraphs in regard to fiscal and social security preferential rights and, broadly, in regard to all general preferential rights securing claims other than civil or commercial, that is to say claims in public law. Precisely because, of their social function, these must remain subject, without restriction, to the principle of territoriality, without any possibility of accepting them in countries other than the one where the claim originated or where the encumbered property is situated[112].

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111 The draft Council Directive (Doc. 7060/80 SOC 156) on the protection of employees in the event of the insolvency of their employers does not deal with such subrogation, which is therefore governed by domestic laws.

112 The question whether such claims, where they arise after the bankruptcy and hence in the interests of the continuation of the debtor's activity must benefit from the same arrangements as the other claims on the general body of creditors (paragraph 1) has not yet been decided.

For fiscal preferential rights - and the same might be said of other debts in public law - there was scarecely any question of finding another solution, since fiscal law, expressing an aspect of State sovereignty, is territorial in its scope. Law-makers have never taken into consideration property situated outside the national territory. One delegation did indeed propose the choice, following the example of certain bilateral conventions on administrative assistance in fiscal matters, of the "assimilation" system whereby the tax authorities of the State where the bankruptcy was declared would act in the common interest of the tax authorities of the other States, who would consequently have rights of preference of the same rank as that of the tax administration of the country where the bankruptcy was opened[113]. But, to be applicable, this system presupposes the possibility of establishing tables of concordance for all the taxes of the Contracting States enjoying a right of preference, which will be the task of other EEC working parties. Such a solution would, moreover, constitute an important de facto extension of the general preferential rights of the tax authorities, whereas in some Member States (e.g. Denmark) they have been abolished.

The preferential fiscal claims referred to are not only those of States but also those of local authorities, such as provinces, departments, communes, etc., irrespective of the nature of these claims, be they direct or indirect taxes.

The preferential rights possessed by the various social security organizations and institutions, understood in the wide sense, for the recovery of various types of contribution (social insurance, family allowances, industrial accidents) should be treated as fiscal preferential rights, since social security contributions can in fact be treated on the same footing as tax payments. A special mention mention was nevertheless required owing to the fact that, in certain countries such as France, social security contributions are connected with the business activities of the debtor and have a commercial character.

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113 Cf. in this connection, Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the EAGGF, and of agricultural levies and customs duties (Art. 6); but the authorities asked to intervene cannot exercise their preferential rights (Art. 10).

It should be noted lastly that, in the Federal Republic of Germany, social security debts incurred prior to the bankruptcy have become "debts incurred by the general body of creditors" (Sec. 59, I, 3 of the Bankruptcy Code). The territorial solution must not, however, impair the application of Article 92 of Council Regulation No. 1408/71 on social security for migrant workers, whereby "Contributions payable to an institution of one Member State may be collected in the territory of another Member State in accordance with the administrative procedure and with the guarantees and privileges applicable to the collection of contributions payable to the corresponding institution of the latter State. The procedure for the implementation of /this provision/ shall be governed by agreements between Member States /which/ may also cover procedures for enforcing payment"[114].

Although, therefore, Article 44(3) in no way changes the current situation in international law as regards fiscal and social security preferential rights, it does introduce a definite innovation by authorizing tax and social security authorities (irrespective, in the case of the latter, of what has just been said) to prove abroad, as unsecured creditors, the unsatisfied portion of their claims[115]. The procedure for admission will be that of the law governing the bankruptcy, though it must be remembered that disputes relating to such claims will remain subject to the jurisdiction of the courts of the State under whose authority these authorities and bodies fall (Article 15(7)(a) of the convention).

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114 The Franco-Belgian Agreement of 30 October 1977 was thus concluded on the basis of these provisions.

115 This is a step forward, as it has been held that the fiscal debt of a foreign State could not even be proved: Marseilles Commercial Court, 4 June 1962, Rev. Trim. Dr. com. 1963, p. 661.

The following example, which anticipates the rules on distribution contained in Article 50(1) and (2), illustrates the application of Article 44:

	GERMANY	UNITED KINGDOM
CLAIM A of 1000 units arising after the opening of the bankruptcy	CLAIM BY CREDITORS IN RESPECT OF DEBTS INCURRED BY THE GENERAL BODY OF CREDITORS (Masse-kosten second rank, Sec. 60	CLAIM BY CREDITORS IN RESPECT OF DEBTS INCURRED BY THE GENERAL BODY OF CREDITORS
CLAIM B of 4000 units, in a civil and commercial matter, arising before the opening of the bankruptcy (wages)	CLAIM BY CREDITORS IN RESPECT OF DEBTS INCURRED BY THE GENERAL BODY OF CREDITORS (Massenschulden third rank, Sec. 60 Bankruptcy Code)	GENERAL PREFERENTIAL RIGHT OF THE FIRST RANK - WITHOUT LIMITATION
CLAIM C of 2000 units, in matters other than civil and commercial, arising before the opening of the bankruptcy (social security)	CLAIM BY CREDITORS IN RESPECT OF DEBTS INCURRED BY THE GENERAL BODY OF CREDITORS (MASSENSCHULDEN third rank, Sec. 60 Bankruptcy Code)	NO PREFERENTIAL RIGHT

	GERMANY	UNITED KINGDOM
Assets available	7.000	5.000
Assets distributed in proportion to the German sub-estate 1.000/4.000/2.000	1.000 4.000 2.000	
CLAIM A OF 1.000 To be satisfied in equal parts out of the two sub-estates	- 500	- 500
	500 4.000 2.000	4.500
CLAIM B OF 4.000 To be satisfied in equal parts out of the two sub-estates	- 2.000	- 2.000
	500 2.000 2.000	2.500
CLAIM C OF 2.000 To be satisfied solely out of the German sub-estate	- 2.000	-
	500 2.000 -	2.500
Balance available for preferential rights of the following rank	2.500	2.500

The rule contained in Article 45, after having determined the law applicable to the satisfaction of general preferential rights is expanded in Article 50 by means of rules on distribution among the sub-estates and envisages the various situations that might arise.

According to Article 45, it is the law of the Contracting State where, at the time when the bankruptcy was opened (subject to what will be said in Article 52), the property is situated or the claims are located which must govern the general preferential rights encumbering them. It is therefore necessary to apply the bankruptcy provisions of the lex rei sitae to determine, not only the ranking of these preferences, but also the extent of the secured claims as to amount and time, and whether they extend to movable or immovable property.

Article 45 is silent on the subject of the location of claims or the situation of property which may be moved. These problems will be broached in Article 51, which contains some rules on this subject. However, Article 43 envisages the case where the liquidator could come into possession of property situated in the territory of a non-contracting State: this property or the net proceeds of its realization will have to be included in the sub-estate in the country where the bankruptcy was opened.

Article 50 concerns the methods of distribution, with a view to the satisfaction of preferential claims, of the sums resulting from the realization of assets which are situated in two or more countries and which form as many "sub-estates" where rights of preference are exercised over several of these sub-estates in accordance with Article 44.

(1) The case of a claim secured by a general right of preference in different sub-estates for the same amount or for different amounts

The rule laid down in paragraph 1 is as follows: where a claim can be satisfied simultaneously out of each of the sub-estates, it is satisfied, either in equal shares if the preferential right attaches to it for the same amount or, if the amounts secured are different, starting from the highest amount in proportion to all the sums to which the right of preference attaches. The proportionality based on the amount of the debt to which the right of preference attaches, and not on the assets available for payment of the debt, was finally adopted as it has two advantages: first, the distribution dividends reflect the amounts secured by the general right of preference in each sub-estate, thereby ensuring a higher degree of compliance with national laws; secondly, this method is independent of the immediate and definitive knowledge by the liquidator of how the assets are constituted after the bankruptcy has been opened.

It is clear, however, that any method, whether proportional or in equal shares, cannot be applied fully unless the assets available in all the sub-estates concerned are sufficient to satisfy the preferential debt completely. If this is not the case, the sums available are to be used for the (partial) satisfaction of the debt and nothing will be left for lower-ranking creditors. It goes without saying that the creditor can claim from each sub-estate only the amount of his debt that is secured there.

If the assets available in the sub-estates are insufficient to pay the debt, the same rules will give rise to as many successive distributions as are necessary to achieve, within the limits of the assets still available in each sub-estate and after each distribution, the complete satisfaction of the preferential part of the debt.

Let us take three examples, each of which illustrates one of the cases envisaged in Article 50(1), which concerns the instance where the same general preferential right can be satisfied simultaneously from several sub-estates.

Example No. 1: the toal amount of wages claims (10 000) is equally preferential for three months (3 x 1 000) in France (A), in Belgium (B) and in Italy (C). The distribution in equal parts will be as follows:

	A	B	C	Total
Assets available	10.000	5.000	500	15.500
Calculation	(1/3)1.000	(1/3)1.000	(1/3)1.000	3.000
First distribution (R1)	1.000	1.000	500	2.500*
500 remain to be distributed in equal parts between A & B				
Remaining assets available	9.000	4.000	- 500	13.000
Second distribution (R2) 1/2	1/2 = 250	1/2 =250	0	500*
R 1 + R 2	1.250	1.250	500	3.000*
Remaining assets available	8.750	3.750	0	12.500

Example No. 2: the same wages debts, amounting to 1 000 a month, are preferential unequally for three months in France (A), five months in Belgium (B) and two months in Italy (C). The successive proportional distributions will be as follows, starting from the highest secured amount, that is to say the subject matter of the preferential right in Belgium (5000):

	A	B	C	Total
General preferential right for	3.000	5.000*	2.000	5.000 in 10/10
Assets available	10.000	2.000	5.000	17.000
Calculation* (5000)	(3/10) 1.500	(5/10) 2.500	(2/10) 1.000	5.000
First distribution (R1)	1.500	2.000	1.000	4.500
	500 remain to be recovered from A and C (A + C = 5/5)			
Remaining assets available	8.500	- 500	4.000	12.500
Second distribution (R2)	(3/5) 300	0	(2/5) 200	500
R 1 + R 2	1.800	2.000	1.200	5.000
Remaining assets available	8.200	0	3.800	12.000

Example No. 3: highlights further the dual territorial limitation based on the amount of assets available and the amount of the debt secured in each sub-estate.

	A	B	Total
General preferential right for	6.000*	2.000	6.000 in 8/8
Assets available	1.000	10.000	11.000
Calculation (6,000)	(6/8)4.500	(2/8) 1.500	6.000
First distribution (R1)	1.000	1.500	2.500
4500 remain to be recovered from B, but the sub-estate must not contribute more than the amount of the debt that is secured therein, with the result that there is only partial satisfaction despite the fact that sub-estate B contains sufficient assets for payment of the debt in full.			
Remaining assets available	- 3.500	8.500	8.500
Second distribution (R2)	0	2.000-1.500=500	500
R 1 + R 2	1.000	2.000	3.000
Remaining assets available	0	8.000	8.000

(2) Case identical with the preceding case but where in certain sub-estates, the debt attains equality with other preferential debts of the same ranking

This case is dealt with in Article 50(2) and necessitates a distribution first of all from the sub-estate where the various debts are equal, of the assets available in proportion to the amounts secured by the respective preferential rights. Example No. 4 illustrates this method.

Example No. 4: wages debts represent a total amount, that is to say twelve months' pay at 300 a month; they are preferential for three months in Belgium (A) and six months in the United Kingdom (B), where they compete with a fiscal debt of the same ranking amounting to 1.800.

B

	Assets available for the wages debts	Assets available for the fiscal debt	Total
Total assets available			800
Distribution in the relationship of equality provided for by the law			
Wages: 1.800 and taxes 1.800, i.e. 1-1	(1/2) 400	(1/2) 400	800
Share payable to the tax authorities limited to the amount available		400	400
Assets available for wages	400	0	400

The preferential debt in respect of wages (1.800 being the highest secured amount) will then be satisfied as follows:

	A	B	Total
General preferential right of employees	900	1.800	1.800
Assets available	7.000	400	7.400
R 1: Debt of 1.800 to be distributed in the ratio 900 to 1.800, i.e., 1-2	(1/3) 600	(2/3) limited to 400	1.000
R 2: Balance of the wages debt (1.800 - 1.000 = 800) payable by A but up to the amount secured by the law (900)	6.400 300	0 0	6.400 300
R 1 + R 2	900	400	1.300
Remaining assets available	6.100	0	6.100

3. The case of different debts secured by general preferential rights not having the same ranking

In this case, each debt cannot be paid simultaneously out of each sub-estate, in contrast to the situation referred to in paragraphs 1 and 2. The rule adopted in Article 50(3) is tantamount to saying that each sub-estate will help satisfy first of all and as a matter of priority the claim which is secured therein by the preferential right which has the highest ranking.

	A	B	C	Total
Ranking: 1	Wages	Wages	Taxes	
2	Taxes	Court costs	Court costs	
3	Court costs	Taxes	Wages	
Preferential amount:				
Wages	(1) 1.800	(1) 1.200	(3) 3.600	3.600
Court costs	(3) 900	(2) 900	(2) 900	900
Taxes	(2) 1.000	(3) 8.000	(1) 3.550	(4.550)
Assets available	3.000	10.000	4.000	17.000
1. Payment of wages in A and B first of all (Article 50(3)(1)	(3/5)1.080	(2/5) 720	-	1.800
Assets available	1.920	9.280	4.000	15.200
2. Payment of fiscal debts on a territorial basis in A and C (Article 44(3)	1.000	-	3.550	
Assets available	920	9.280	450	10.650
3. Payment of court costs (Article 50(1)	300	300	300	900
Assets available	620	8.980	150	9.750
4. Payment of the fiscal debt in B	-	8.000	-	
Remaining assets available	620	980	150	1.750

However imperfect they may be, the solutions adopted in Article 50 are the only ones that are logical given the disparities in the field of preferential rights and that are likely to improve the current situations as they will enable preferential debts to be satisfied out of assets situated in other countries, even if they must be classified there according to the ranking provided for by the law of those countries.

B. Special secured rights: Articles 46 to 48

Special rights relate either to certain movables, whether they be tangible or intangible, or certain immovables. In most of the legal systems, such preferential rights are distinct from a pledge and a mortgage, even if, particularly in French Law, a pledge confers a special preferential right over a movable (cf. Art. 83 of the 1967 French law). In German law, on the other hand, such preferential rights, conceived as statutory rights of pledge and permit the creditor to obtain a "separate settlement" (abgesonderte Befriedigung - cf. Secs. 47 et deq. Bankruptcy Code) which withdraws from the bankruptcy the objects to which such rights relate. The creditor can therefore pay himself out of the price of the object and is only bound to remit the surplus to the liquidator.

Furthermore, in certain legal systems, creditors who enjoy special rights of preference must prove their claims in the bankruptcy; certain creditors are, however, empowered to sell the object and recover their debts from the proceeds.

According to the system recommended by the majority of authors and adopted, moreover, in the majority of treaties, preferential rights and, in general, all special secured rights, whether they be over movables or immovables, are subject to the law of the country in which they are situated at the time when the bankruptcy is opened (subject, as in the case of Article 45, to what is said in Article 52). Article 46 of the Convention does not distinguish any further in this respect between statutory secured rights and contractual

secured rights, which include transfers of ownership as security under German (Sicherungsübereignung) and Dutch law (Eigendomsoverdracht tot zekerheid).[116]

Special preferential rights present a number of problems such as the increase, decrease or loss of the preferential right in the event of removal of the encumbered property. These questions are extremely important for the security of transactions. They generally concern a change of the law applicable to the preferential rights due to the removal of the encumbered property and could therefore not be dealt with in a convention relating to bankruptcy, where they do not arise alone. It will be for the law of the situs at the time when the bankruptcy is opened to provide an answer to these questions.

Article 47 lays down the special rules applicable to rights of preference and secured rights over ships, boats and aircraft (cf. Article 28). This subject is traditionally dealt with in international conventions, so that an effort has been made to ensure consistency of the Convention with the existing special conventions, which are:

- the Brussels Convention of 10 April 1926 for the unification of certain rules relating to maritime liens and mortgages (ratified by Belgium, France and Italy). This Convention is to be gradually replaced by the Brussels Convention of 27 May 1967 (ratified by no Member State of the EEC). A convention of the same date relates to the registration of rights over ships under construction;

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116 Transfers of ownership as security for a debt are current practice in financing operations in Germany and the Netherlands, where the constitutum possessorum may be invoked against third parties and exempts purchasing creditors from application of the law on bankruptcy (cf. Sec. 43 German Bankruptcy Code). Conversely, French case law considers that, where it provides for the creditor's benefit for a reservation of ownership on a pledge securing a loan, an agreement contains a commissoria lex prohibited under French law, which is alone applicable to rights in rem over movable property situated in France, even if the agreement was concluded in the Federal Republic of Germany between two German companies (Cass. civ. 3.5.1973, CLUNET 1975 p. 74, note by Fouchard).

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- the Geneva Convention of 19 June 1948 on the international recognition of the rights in aircraft (ratified by Denmark, France, Italy, the Netherlands and the Federal Republic of Germany);
- Protocol No. 1 relating to rights in rem over inland navigation vessels, annexed to the Geneva Convention of 25 January 1965 concerning the registration of such vessels (ratified by France and the Netherlands, but not yet in force).

These Conventions generally distinguish between unregistered preferential rights and charges and mortgages, which must be registered in the State where the vessel is registered. The former have priority over the latter, which rank before (1967 Convention) or after (1965 Protocol) preferential rights provided for solely by national laws.

To take account of these rules and of the special nature of actions in rem under English law, Article 47 draws a distinction: preferential rights are governed by the law of the State where the property is sold; registered secured rights are governed by that of the State in which the vessel is registered, in which case the State where the sale took place determines the ranking between them.

The right of lien in the bankruptcy is found in all the national laws. However, while Belgian and French law-makers, for example, have regulated the exercise of this right in the same restrictive manner, German law has a more extensive concept of it and authorizes its operation in a large number of cases[117]. The majority of writers on the subject are in favour of the lex rei sitae because a right of lien which can be relied upon by the person holding the property possesses the characteristics of a preferential right over it, and that preferential right is generally governed by the law of the place where the property is situated[118]. Article 48 has adopted this idea. It also has the advantage that the same law will apply to all rights encumbering the same item of property.

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(117) Cf. 570 Belgian Commercial Code and Art. 63 of the 1967 French law; Sec. 49 German Bankruptcy Code.

(118) Cf. Diena cited by Rolin, op. cit. p. 121, who shares this opinion; for the opposite view: Trochu, op. cit. p. 180, who recommends the lex loci contractus.

C - Principles common to preferential and secured rights: Articles 49 to 52

Article 49

determines the law applicable for classifying secured rights in order of priority irrespective of their nature. Having regard to the principle of territoriality enshrined in Articles 41 and 43, the same principle should logically determine the ranking of general rights of preference and other secured rights in each sub-estate.

All that may be stated here is that as a general rule special rights of preference attaching to movables take precedence over general rights of preference. Some general rights of preference, however, have priority over special rights of preference.

Article 51

In accordance with the common provisions relating to all secured rights, Article 51 lays down that movable property, corporeal and incorporeal, other than that already referred to in Article 47 (which contains a special rule in paragraph 5), is deemed, for the purposes of the preceding provisions, to be situated in the State in which it is registered, inscribed or recorded. This concerns mainly industrial property rights (invention patents, designs and models, trade marks etc.) as well as cinematographic films. Rights registered, inscribed or recorded only in an international register[119] are deemed to be situated in the State of the bankruptcy.

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119 Trade marks (Madrid Arrangement of 15.4.1891, revised in 1957) and Community patents (Luxembourg Convention of 15.12.1975).

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Except in the case of registered movables, the Convention, which consistently employs the expression "law of the Contracting State in which the property was situated" in Articles 45 and 46, does not contain any provisions on the situation of incorporeal property such as debts and negotiable securities. After reviewing the various solutions available (application of the law of the bankruptcy or of the law governing the contract), the Working Party noted that this problem was not peculiar to bankruptcy and called for an overall solution. Consequently, they decided that the convention should be silent on this point, and that it should be left to the private international law of the State in which the bankruptcy is opened.

Article 52

This article deals with cases where the bankruptcy is declared after other proceedings have been opened initially. In much circumstances, the sub-estates crystallize on the day on which the last proceedings are opened, that is to say the bankruptcy (stricto sensu) or any other proceedings to deprive the debtor of his power to deal with his property and to realize the debtor's assets. The Working Party did not wish to provide for the reconstitution of the sub-estates as from the day when the initial proceedings were opened, before the debtor had been deprived of this power, since such a provision would have entailed the payment of experts' fees and disputes which it would be better to avoid.

Section VII - Effects of the bankruptcy on the debtor's person

The effects of bankruptcy on the debtor's person, which vary from one legal system to another, may be of two kinds. Bankruptcy generally gives rise, for the future, to a number of disabilities, disqualifications and restrictions of rights with regard to the bankrupt. Bankruptcy proceedings may also involve measures restricting the individual freedom of the debtor. Both kinds of effects will be examined in turn.

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Article 53

1. Taking disabilities, disqualifications and restrictions of rights first, several distinctions must be drawn:

- the bankruptcy of natural persons may result in their being prohibited from directing, managing or administering a commercial undertaking, whether or not in corporate form, or from practising certain profesiona, and may also entail disqualifications and restrictions of rights of a political or civic nature. The laws are far from identical on this point: in the Netherlands, for example, disqualifications automatically cease once the bankruptcy is closed and discharged bankrupts are not prohibited from carrying on a business activity. In England, an order of discharge releases the debtor from his undertakings and removes the absolute or partial disabilities to which he was subject. In France and Italy, where the laws regarding disqualifications and restrictions of rights are very strict, bankruptcy decisions, realization of assets, judicial arrangements and personal bankruptcy are entered in an individual's judicial record; directors and manager of companies declared bankrupt may become subject to special restrictions of rights and disqualifications, such as the right to administer or manage any commercial undertaking[121]. But these penalties are unknown in German and Dutch law, and Italian law recognizes a limited sanction only, namely dismissal of the director or manager (Art. 146 Bankruptcy Law and Art. 2393 Civil Code), so that, save under French law, those affected as directors and managers of companies seem to be treated more favourably in this respect than natural persons.

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120 It should be remembered that, according to the wording of the French Law of 1967, "realization of assets" is the new name for the measures affecting a person's property whereas "personal bankruptcy" now denotes all the civil sanctions (disqualifications and restrictions of rights), in principle independent of any measure concerning property, which affect, either compulsorily or optionally, the natural persons referred to in Art. 104 of the law.

121 With regard to French law, see Art. 10 of the Decree-Law of 8.8.1935 and, more generally, Arts 54, 114, 150 and 260 of the amended Law of 24.7.2966 on commercial companies, which refer back to Art. 105 et seq. of the 1967 law. Civil rights can be recovered, following disqualification, only after creditors have been paid in full.

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Divergences between national concepts throughout this field and, above all, the present lack of adequate and effective means of information, such as would be afforded by a general widening of the practice of registration in an individual's judicial record or from the establishment at European level of a commercial record, militated against the inclusion in the convention of a rule whereby a declaration of bankruptcy in one of the Contracting States, in accordance with the convention, would automatically entail in the other States the disqualifications provided for in the laws of those States, as though the debtor had been declared bankrupt there. Already, Community directives adopted in the field of freedom of establishment and provision of services which encountered the same difficulties merely require, where the law of the host country stipulates that the beneficiary should not have been declared bankrupt, an affidavit by the party concerned when, in the country of origin, proof that he has not been declared bankrupt cannot be given in the form of an extract from his judicial record or of a similar document draw uup by a judicial or administrative authority.

Thus, under Article 53 it is for national law to determine whether and how far bankruptcy decisions given in other States shall entail disabilities, disqualifications and restrictions of rights. Clearly, it would not in any event be possible to ascribe greater effects to foreign judgments than to national decisions[122].

2. The laws of some Member States also provide that the bankrupt may be imprisoned and forbidden to move to another place during th proceedings without authorization. It was impossible to achieve unanimity on the inclusion in the convention of a system of mutual aid between courts which would enable effect to be given in States other than the one in which the bankruptcy was opened to orders made by the bankruptcy court, requiring the bankrupt not to leave his place of residence, or for his arrest and return to the country of the bankruptcy[123]. The objection was raised, in particular, that extradition was possible only in the case of criminal offences.

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122 With regard to French law, see particularly Art. 7 of Decree-Law of 8.8.1935 and Art. 3 of the Law of 30.8.1947 on the improvement of commercial and industrial management.

123 See Articles 467 and 482 of the Belgian Commercial Code; Art. 101 KO; Article 49 of the Italian Bankruptcy Law; Article 87 and 91 of the Dutch F.W.

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Moreover, the question is closely linked with the prosecution of offences committed in bankruptcies. The Contracting States may, if they wish, at any time conclude an agreement between themselves for this purpose. Under Articles 50 and 54, the rules relating to the recognition and enforcement of judgments will consequently not apply to coercive decisions relating to persons.

Section VIII - Special provisions for certain proceedings other than bankruptcy

Article 54

Is one of the cases in which Article 1(2) of the convention applies, where its adaptation to proceedings other than bankruptcy stricto sensu was necessary. This article confines to the territory of the State where one of these proceedings has been initiated the validity as against preferential or secured [124] creditors of any extensions of time for payment and compounding of debts granted to the debtor.

The reasons for this are as follows: in German, Belgian and Dutch law, the "Vergleichsverfahren", the "concordat judiciaire" and the "surséance van betaling", as well as any moratorium allowed to the debtor, are invalid as against preferential creditors, who retain their right to institute individual proceedings. This is not true particularly of French and Italian law:

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124 Creditors enjoying a Vormerkung under German law must be treated as secured creditors (Art. 883 BGB). Such registration in the land register (Grundbuch) ensures priority over secured rights registered subsequently.

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- In the French law on judicial arrangements (Articles 69 and 71 of the 1967 law), preferential creditors, who are in any case (even when assets are realized) obliged to lodge claims and submit them to scrutiny (Article 40 of the 1967 law), are requested to indicate within a period of three months whether they are prepared, in the event of the proposed scheme of arrangement being approved, to grant the debtor extensions of time for payment or compounding of debts and, if so, which. If the composition is approved, they are bound by extensions of time for payment or compounding of debts to which they have agreed. But they can refuse to grant either and the composition remains completely invalid as against them. Only if they fail to reply are they subject, whilst retaining the benefit of their secured rights, to the compounding of debts and extensions fixed by the composition, although employees cannot be forced to agree to any compounding of debts or extensions of time for payment exceeding two years.

In the case of "preliminary compositions", an order provisionally staying proceedings suspends all individual proceedings by any of the creditors, including the Public Treasury (Article 16 of the Ordinance of 23.9.1967) with the sole exception in principle, of employees (Article 27(2)). On the other hand, no compounding of debts is imposed.

- In the Italian law on "concordato preventivo", the latter is valid as against preferential creditors as far as extensions of time for payment are concerned, but it must be possible to satisfy preferential creditors in full for the preliminary composition to be approved. Similarly, moratoria may well be imposed in connection with "amministrazione straordinaria".

Since recognition, in States other than the one in which the preliminary bankruptcy proceedings have been opened, of the validity as against preferential creditors of extensions of time for payment and compounding of debts encountered the strongest misgivings on the part of delegations of countries whose laws do not recognize such validity, it was necessary to stretch the principle of universality in this respect. Moreover, it was pointed out that any rule would have run counter to the provisions adopted on the suspension of procedures for enforcement and on rights of preference.

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Accordingly, Article 54 derogates from the principle of the universality of preliminary proceedings only where that principle has the effect of restricting the rights of preferential creditors.

CHAPTER VI - RECOGNITION AND ENFORCEMENT

In view of the basic principles of the unity and the universality of the bankruptcy and of the very strict rules on direct jurisdiction laid down in the convention, it was possible in Title V to facilitate to the maximum the recognition and enforcement of judgments. This was necessary since, in order to be fully effective, the bankruptcy must not only be recognized but also enforced with the utmost speed wherever the debtor has assets and creditors.

In the introductory part, the reasons for the choices made by the Working Party have already been pointed out and need only be recalled here: automatic recognition of all judgments coming within the scope of the convention, reduction to a minimum of the number of grounds which can be relied upon against recognition and enforcement of judgments, abolition or simplification, depending on the circumstances, of the means of enforcement common to the nine countries.

Under Article 55, which corresponds to Article 25 of the general convention, recognition and enforcement apply to any judgment irrespective of the term used to describe it. It has already been pointed out that this may include decisions taken by administrative authorities (particularly in the case of special proceedings in Germany relating to credit or insurance establishments, and of "amministrazione straordinaria" in Italy) as well as by the members of a company in general meeting (in the case of creditors' voluntary winding-up). These decisions are listed in Article V of the Protocol.

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The concept of "judgment" also embraces enforcement orders (Vollstreckungsbefehl issued by a clerk of the court, see Art. 699 ZPO) and orders as to costs of proceedings (Kostenfestsetzungschluss des Urkundsbeamten, see Art. 104 ZPO) which, in the Federal Republic of Germany, are made by the clerk or the Rechtspfleger[125].

Section I - Recognition of bankruptcy judgments

Article 56

The effect of recognition is to confer on judgments the authority which they enjoy in the Contracting State in which they were given. The convention accords immediate recognition to every judgment that comes within its scope even if it is the subject of appeal proceedings. As a general rule, judgments in cases of bankruptcy or similar proceedings are either provisionally enforceable, or else not subject to appeal.

Article 56, couched in the same terms as Article 26 of the general convention, lays down the principle of recognition as of right; this occurs without there being any need to resort to preliminary proceedings. Recognition is therefore automatic and does not require a decision by a court in the State where the application is made, to enable the liquidator or the beneficiary of the judgment to rely on it, as against any interested party, as though it were a judgment given in that State. This provision involves, as in the case of the general convention, setting aside legal rules which in certain countries like Italy subject the recognition of a foreign judgment to a special procedure (dichiarazione di efficacia). The system adopted is therefore the reverse of the one included in numerous conventions whereby foreign judgments are conclusive only if they fulfil certain preconditions which are moreover, often identical with those for granting enforcement by means of "exequatur". Only the procedure for challenging the bankruptcy referred to in Article 61 can stand in the way of recognition.

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125 Cf. also Art. 18(2) of the Hague Convention of 1.3.1954 concerning civil procedure. In France, secretary-clerks (secrétaires-greffiers) may also issue enforcement orders for the recovery of costs (Art. 702 of the new Code of Civil Procedure).

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In view of the new mechanisms thus created, there was no need to incorporate the provisions of the second and third paragraphs of Article 26 of the general convention providing for the formal recognition of the foreign judgment, either as the principal issue or as an incidental question.

Accordingly, under Article 56, automatic recognition will be accorded inter alia to the state of bankruptcy, cessation of the debtor's power to deal with his property, suspension of individual proceedings and enforcement procedures and the status of the liquidator. The progress achieved by the convention in these matters has already been pointed out.

Recognition will likewise be accorded under the terms of Article 56 to compositions approved by the court and, in the interests of efficiency, to decisions on disputes relating to the powers of the liquidator.

Conversely, Article 56 does not cover:

- decisions which do not come within the scope of the Convention, such as those given in proceedings not mentioned in Article 15, or those given in proceedings not affected by the suspension of individual proceedings, in accordance with the provisions of Article 22, or those concerning the individual liberty of the debtor;

- decisions referred to in Article 67 in respect of which recognition (and enforcement) are expressly governed by the general convention. These are bankruptcy decisions other than those relating to the opening and course of the bankruptcy (see below);

- decisions which, the convention provides, shall have only territorially limited effects. Such are the cases referred to in Articles 5 (jurisdiction based exclusively on national law), 10(2) (non-traders and small undertakings) and 66 (territorial bankruptcy in the case of successful challenge).

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Articles 57 to 59

The purpose of Articles 57 and 59 is to determine which of two or more judgments should be recognized and, consequently, enforced.

These two articles correspond more particularly to the two sets of circumstances set out in Article 13(1) and (2) respectively concerning positive conflicts of jurisdiction. In the first case, a judgment given on a preferable basis of jurisdiction (centre-establishment) will alone be recognized; in the second case, where the judgments in question are given on the same basis of jurisdiction (centre-centre, establishment-establishment ...), only the one given first will be recognized. In the latter set of circumstances, Article 58(2) lays down a rule on the order of precedence where, exceptionally, two judgments have been given on the same day. This rule is modelled on Dutch law (Article 2(5) FW). Admittedly, it is arbitrary, but the Working Party was unable to find a better one, since reference could not be made, for the purpose of choosing between the decisions, either to the date on which they became conclusive, in view of the fact that decisions opening bankruptcy are automatically provisionally enforceable, or to the date of the petition (in view of the possibility that the court may take up the matter of its own motion).

In this way, for example:

- where the same debtor is declared bankrupt first in Germany, the country where one of his establishments is situated, and then in Belgium, the country where his centre of administration is situated, the Belgian judgment alone will be recognized if the rules in Article 13(1) or 14 have not been complied with (Articles 3, 13(1) and 57);

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- when the debtor has transferred his centre of administration from the Netherlands (Maastricht) to France (Lille) and the Maastricht court, seised within the 6-month period provided for in Article 6(1), grants the debtor "surséance van betaling", whereas the Lille court, seised within the same period, orders the realization of the debtor's assets two days later, the Maastricht decision alone will be recognized (Articles 6, 13(2) and 58(1)). If by chance the two judgments are given on the same day, precedence will be given to the judgment of the Lille court even though in Dutch, Lille is called Rijssel (Art. 58(2)).

The machinery of recognition created by Articles 51 and 52, as well as the machinery of enforcement, therefore leads to the following situation: where a bankruptcy judgment takes effect under the convention in the different Contracting States, its recognition and enforcement may not be impeded, even on grounds of public policy, because of the existence of a national judgment also declaring the debtor bankrupt. Similarly, a national judgment cannot take effect when a foreign judgment exists which takes precedence under the convention[126].

In this case, as in every other where there are conflicting judgments, this raises the problem of the procedure for the annulment or declaration of invalidity of a decision which may have become conclusive, but which must not be recognized or take effect even in the country where it was given. The solution of this problem is a matter for national law, since Article 59 merely states that the judgment is ineffective.

By analogy with the solution adopted by national legal systems in the event of the amendment or reversal of a bankruptcy decision, Article 59 lays down that acts performed in the meantime by the liquidator or a third party remain valid.

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126 Subject, however, to what will be said in the commentary on Art. 78 in relation to international agreements concluded with non-member States before the entry into force of this convention.

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Section II - Enforcement of bankruptcy judgments

Article 60

In the case of the judgments referred to in Article 56, the machinery of enforcement included in the convention differs sharply from that of the general convention. Whereas the latter, although providing in principle for recognition as of right of the judgments that come within its scope, subjects their enforcement to an exequatur procedure - albeit a highly simplified one (Art. 31 et seq) - Art. 60 lays down that recognition, which need not be formally decided, entails enforcement, also as of right.

Section III - Proceedings to challenge the bankruptcy

Articles 61 and 62

An action to challenge the bankruptcy is the converse of an action for enforcement. The party seeking enforcement requests prior authority to enforce, in the State in which the application is submitted, a judgment given in another State. On the other hand, an action to challenge the bankruptcy is a request not "to enforce" but "to refrain from enforcing" a judgment. In other words, the aim of an action to challenge the bankruptcy is to ensure post facto that the bankruptcy judgment should "cease to be recognized or to have effect" in another Contracting State (Art. 65(4)). The fundamental result of this difference is that the initiative for taking action to challenge the bankruptcy lies with the person who wishes to oppose recognition and enforcement, whereas, in the case of enforcement, it is for the liquidator to take action.

The Working Party was expressly in favour of this procedure remaining exceptional. To achieve this, it restricted the action to challenge the bankruptcy solely to judgments opening the bankruptcy or other similar proceedings and reduced to a minimum the cases in which these proceedings might be instituted.

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1. Restriction of judgments which may be declared invalid

An action to challenge the bankruptcy is admissible only in the case of judgments declaring the debtor bankrupt or other similar measures, to the exclusion of the other judgments indirectly referred to in Article 60. The latter may be challenged for the purpose of terminating their effects only by recourse to the legal remedies available in the country where the judgments were given. The Working Party did not consider it would be justified in making the action to challenge the bankruptcy available in respect of such judgments, unless it also affected the declaration of bankruptcy itself, on which these judgments are directly based.

The fact that national legal remedies remain available against a judgment declaring the debtor bankrupt does not constitute an obstacle to the admissibility of an action to challenge the bankruptcy, since the judgment takes effect as soon as it is given. Nevertheless, there is nothing to prevent a court seised of action to challenge the bankruptcy (Article 63 and XI of the Protocol) from staying its proceedings until the judgment opening the bankruptcy has become conclusive and ordering that the proceeds from the realization of the debtor's assets be impounded.

2. Restriction of cases in which proceedings to challenge the bankruptcy may be instituted

Article 62 lays down only two cases in which such proceedings may be instituted: failure to observe due process and violations of public policy, and in certain circumstances even the latter case is excluded.

Let us examine these two points:

(a) First case: failure to observe due process. This involves an assessment of the "lawfulness at international level of the procedure" followed in the country where the bankruptcy was opened.

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Initially, the Working Party had considered the possibility of allowing an action to challenge the bankruptcy, in this type of case, to be instituted only before the court of the bankruptcy, but on condition, firstly, that the principle of compulsorily summoning the debtor to appear should be laid down in the convention and, secondly, that there should be an effective system for service and notification of judicial documents abroad. However, it had to recognize that it was difficult to change national laws on such matters as the court's right to entertain bankruptcy proceedings of its own motion[127] and on the means for notifying the public prosecutor. Article 62 (1) covers these two cases in particular but provides for their application only in the absence of any fault or negligence on the debtor's part. The debtor's ignorance of the proceedings must have prevented him from "preparing his defence" and "availing himself of any legal remedy". These two obstacles are cumulative, which is reflected in the dual conjuction "neither ... nor...".

To restrict this case in which action may be taken to challenge the bankruptcy, whilst ensuring safety and speed in the transmission of judicial documents, the Working Party adopted the system set out in Article VIII of the protocol, which is identical with Article IV of the protocol to the general convention of 27 September 1968. This article adds a new method of transmission to those already provided for in the Haggue Convention on Civil Procedure of 1 March 1954 or in agreements between the Contracting States under this convention. It corresponds, moreover, to the option provided for in Article 10(b) of the Hague Convention of 15 November 1965 on the service and notification abroad of judicial and extra-judicial documents in civil and commercial matters. Under the system provided for in the protocol, documents may be transmitted directly by the public officers of one Contracting State to their colleagues in another Contracting State, who forward them to the addressee or to his domicile. As in the case of Article 10(b) of the Hague Convention, Article VIII of the protocol allows a Contracting State to object to this method of transmission.

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127 Cf. however, with regard to French law, Article 2(2) of the 1967 law and Article 6 of the 1967 decree; see Article 442 of the Belgian Commercial Code; Article 6 of the Italian Bankruptcy Law; in Dutch law, the court is entitled to entertain proceedings of its own motion only in exceptional cases.

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(b) Second case: Violations of public policy The question of public policy in connection with proceedings to challenge the the bankruptcy was debated at length within the Working Party. After discarding two possible solutions (exclusion of this ground and express provision for it in general terms), the Working Party considered it preferable to include a provision allowing the possibility of recourse to public policy in the international sense of the term, specifying at the same time, five cases in which public policy could not be relied upon or be used to disguise another ground which had been excluded.

An illustration of a case in which a judgment opening the bankruptcy might be deemed to be contrary to the international public policy of a country of enforcement is that of a commercial delegation of a State with a planned economy or a monopoly of foreign trade, or an office, establishment, agency or branch of a State body carrying on commercial activities being declared bankrupt, where the delegation or office is regarded in the State in which proceedings have been instituted as a government body enjoying immunity from suit or from enforcement and not as an establishment governed by private law.

The various cases referred to in Article 62(2), where violation of public policy may not be relied upon, have already been dealt with in connection with the relevant articles of the convention and attention is drawn here only to the case set out in Article 62(2)(b).

As in the case of the general convention, the Working Party rejected, at the stage of enforcement, verification of the jurisdiction of the court which declared the bankruptcy. As the action to challenge the bankruptcy is not available on the ground of lack of jurisdiction of the court which declared it, the only means of ensuring that a bankruptcy judgment given by a court lacking jurisdiction should cease to be recognized and cease to have effect would have been to have recourse to public policy. However, the Working Party, considering firstly that mutual confidence in the judicial institutions of the Contracting States was at the very basis of the convention

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and secondly that the machinery contained in Articles 13, 57 and 58 was such as to provide a satisfactory solution in cases where several courts belonging to different States considered they had jurisdiction, expressly excluded the possibility of resorting on this point to the concept of public policy.

It follows from this that the debtor or the party wishing to contest the jurisdiction of the court will have to do so in the State where the bankruptcy was declared and utilize the procedures or legal remedies provided for this purpose under the law of that State.

Article 63 to 66

These articles determine which courts have jurisdiction to entertain actions to challenge the bankruptcy, the parties to the proceedings, the time limits and the effects of the proceedings.

This action will constitute a new procedure for the majority of the Contracting States; they will therefore have to adopt internal measures for the purpose of defining this procedure more accurately in relation to those points which it was unnecessary to deal with in the convention. However, to ensure some unity in the case law, the action to challenge the bankruptcy will always have to be brought, in each Contracting State, before the same court (Article 63 and XI of the protocol). The rule peculiar to the United Kingdom which is contained in Article 63(2) lays down a principle that is the converse of the one contained in the second paragraph of Article 31 of the general convention.

According to Article 64, the procedure is one in which both parties are heard and will often be, according to Article XI of the protocol, the one for urgent matters. The action must be brought against the liquidator by the public prosecutor[128], the debtor or any other interested party, with the exception of the person who instituted bankruptcy proceedings. It must be borne in mind that one of the reasons why the Working Party preferred the action to challenge the bankruptcy to the exequatur procedure was precisely that the bankruptcy takes effect erga omnes and the only party entitled to oppose a request for exequatur would have been the debtor.

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128 A reservation on this point in the case of the Federal Republic of Germany is set out in Annex II.

Article 64(2) lays down that the action to challenge the bankruptcy must be brought within a dual time limit: three months from the publication of the bankruptcy judgment in the Official Journal of the European Communities and, at the latest, 6 months from the opening of the bankruptcy or until the closure of the bankruptcy, so that enforcement might not be contested at a stage when it was irreversible.

In order to deprive the action to challenge the bankruptcy of any delaying effect, its operation is not, according to Article 65, suspensory in character. However, the mechanism provided for in this article is extremely flexible: the court entertaining the proceedings and the other courts of the State of enforcement may, pending a decision on the alleged invalidity of the bankruptcy, order a stay of enforcement without prejudice to protective measures such as the sequestration of the proceeds of the realization of the debtor's assets.

Article 65(3) places the judgment allowing or dismissing the application challenging the bankruptcy on the same footing as bankruptcy judgments as far as most of its effects, advertisement and legal remedies are concerned.

The effects of a successful challenge are twofold: they have in common the fact of being strictly territorial, i.e. limited solely to the territory of the State where the bankruptcy was declared invalid:

- invalidity is an obstacle to both recognition and enforcement, not merely of the judgment opening the bankruptcy, but also of all the other judgments which have their requisite legal basis in the opening of the bankruptcy: rulings given in the course of the proceedings, rulings on actions arising from the bankruptcy (Article 61(4). In the case of a bankruptcy declared in Brussels, the only consequence of a successful challenge in Germany is that the Belgian judgment will cease to be recognized and enforced in Germany, but it will continue to take effect in the other seven States of the Community until the bankruptcy has been declared invalid in each of them.

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Admittedly, one disadvantage of this solution may be that failure to observe due process is determined differently in each individual Contracting State, but this would also have been time of enforcement. Acts performed by the liquidator before the declaration of invalidity do not, however, cease to be valid ("a judgment successfully challenged shall cease to be recognized").

- The courts of the State where the bankruptcy has been declared invalid may open the bankruptcy or take other steps if they have jurisdiction under the law of that State (Art. 66). Such a bankruptcy will have no Community effect, in the first place because the courts lack jurisdiction under the convention, and secondly, because the bankruptcy has already been declared in another Contracting State. Thus, there a situation could arise in which two or more bankruptcies were opened on EEC territory, which constitutes an exception to the principle of the unity of the bankruptcy. However, the Working Party was obliged to agree to this solution so as to avoid a legal vacuum in the State where the bankruptcy was declared invalid. It would have been extremely disconcerting if the debtor were allowed in that country to escape the consequences of his acts.

Section IV - Recognition and enforcement of other bankruptcy judgments

Article 67 provides that all judgments, other than those referred to in Article 56, shall be recognized and enforced according to the machinery of Title III of the general convention to which reference must be made. Since these are essentially judgments to be enforced against third parties, the Working Party considered it desirable to make them subject to the same system that would apply where such judgments were given independently of the bankruptcy. The only difference, in practice, compared with the system contained in the bankruptcy convention, consists of the need for the prior apposition of the enforcement order[129].

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[129] Accordingly, enforcement of these judgments may be refused directly, in accordance with the machinery provided for in the general convention (dismissal of the application to append the enforcement order or successful appeal against the judgment granting the enforcement order), or indirectly on the ground of the bankruptcy judgment's invalidity.

The following will therefore be subject to this procedure:

- all bankruptcy judgments other than those opening the proceedings or relating to the course of the bankruptcy;
- judgments in the actions or disputes referred to in Article 15, including those in sub-paragraphs 8 and 9, but excluding those mentioned in sub-paragraph 3;
- judgments relating to company members and to persons managing or directing a firm or company (Article 11);
- transactions approved by the court occurring during the bankruptcy (cf. Article 51 of the general convention);
- enforcement orders granted to creditors whose claims have been admitted but remain unpaid at the closure of the proceedings, who thus recover their individual rights of action (see 164 KO and 85 VglO; Articles 159 and 96 FW; Articles 90 and 91(2) of the French law of 1967 and Article 90 of the French decree of 1967).

Section V - General provisions

Articles 68 and 69 have been taken almost word for word from the corresponding Articles 45-49 of the general convention.

Article 68 relates to the judicatum solvi security. This was also dealt with in the Hague Convention of 1 March 1954, which dispensed from the requirement to lodge such security only nationals of Contracting States who are domiciled in one of those States (Art. 17). Article 68 exempts from the same requirement any party, irrespective of nationality and domicile, who challenges, in a Contracting State, a judgment given in another Contracting State.

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The Working Party regarded the lodging of such security as unjustified in the case of the action to challenge the bankruptcy. This was also true with regard to the granting of enforcement orders, irrespective of the type of procedure employed. On the other hand, the Working Party considered that it was unnecessary to depart from the rules of the 1954 Convention as far as proceedings in the State of origin were concerned.

Article 69

This article dispenses documents produced in the course of proceedings to challenge the bankruptcy from legalization or other similar formalities, that is to say particularly the marginal note provided for in the Hague Convention of 5 October 1961 abolishing the requirement of legalization in respect of foreign public documents.

CHAPTER VII - INTERPRETATION BY THE COURT OF JUSTICE

Articles 70 - 74, entrusting the Court of Justice of the European Communities with the interpretation of the convention in its entirety, are taken almost word for word from Articles 1 - 5 of the Luxembourg Protocol of 3 June 1971, as amended on 9 October 1978, concerning the interpretation by the Court of Justice of the general convention; reference should be made to the commentary thereon.[130] Accordingly, the unity of the system is maintained in this respect also.

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[130] Cf. Jenard Report, op. cit. p. 66 et seq. and the Schlosser Report, op. cit. No 255 and 256.

CHAPTER VIII - TRANSITIONAL PROVISIONS

Article 75

As a general rule, treaties on enforcement have no retrospective effect in order "not to alter a state of affairs which has been reached on the basis of legal relations other than those created between the two States as a result of the introduction of the convention"[131]. Only the Benelux Treaty applies to judgments given before it entered into force.

A solution as drastic as that contained in the Benelux Treaty did not seem acceptable for the reasons set out by Mr. Jenard in his report. The text adopted by the Working Party was therefore based on the first paragraph of Article 54 of the general convention, as well as on the rules of transitional law enacted at the time of the French bankruptcy (Art. 160 of the Law of 13 July 1967).

However, a similar provision to the one in the second paragraph of Article 54 of the general convention relating to judgments given before the convention's entry into force could not be adopted. In the first place, the convention provides for wide powers to be conferred on liquidators in possession of the certificate referred to in Article 29 and, secondly, the machinery of recognition and enforcement has been simplified in view of the introduction of uniform laws and common conflict rules which will come into force only with entry into force of the convention (Cf. Art. 81).

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[131] Cf. Jenard Report, p. 57.

CHAPTER IX - RELATIONSHIP TO OTHER INTERNATIONAL CONVENTIONS

Title VIII, adapted from Title VII of the general convention, concerns relationships between the convention and other international instruments which govern jurisdiction and the recognition and enforcement of bankruptcy judgments. It deals with:

- relationships between the convention and bilateral treaties already in force between certain Community States (Articles 76 and 77);
- relationships between the convention and treaties already concluded with non-member States (Article 78).

Articles 76 and 77

Article 76 contains a list of the conventions which will be abrogated by the entry into force of the EEC convention. Such abrogation will operate only subject to:

- the provisions of Article 76 itself, that is to say these conventions will continue to take effect in matters to which the convention does not apply (insurance and similar undertakings, matters other than bankruptcy, compositions and other similar proceedings, as provided for in the protocol);
- the provisions of Article 77 relating to proceedings opened before the entry into force of the EEC convention.

Article 78

This article deals with the awkward problem of the compatibility of the convention with treaties already concluded between a Contracting State and a third State.

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The Working Party considered that it would be difficult to include the corresponding provisions of the general convention (Articles 57 and 58), firstly, since conflicts might arise with treaties involving direct jurisdiction as with treaties involving indirect jurisdiction and, secondly, because of the basic principles of the convention, which not only contain provisions on jurisdiction, recognition and enforcement but also determine the applicable law. It was consequently considered preferable to adopt a general provision based on the first paragraph of Article 234 of the Treaty of Rome.

Two sets of circumstances must be distinguished, according to the nature of the treaty concluded with a non-member State.

1) In the case of "simple treaties", i.e. treaties which contain only rules of indirect jurisdiction, there should not, in the Working Party's opinion, be any conflict between the rules of jurisdiction laid down in those treaties and those provided for in Title II of the convention. At the recognition and enforcement stage, it should be possible for judgments given in non-member States to be recognized in conformity with the provisions of those treaties, on condition, however, that they are not "paralysed" by prior recognition accorded earlier by a judgment given under this convention. The Scandinavian Convention of 7 November 1933 on bankruptcy comes within this category.

2) "Dual treaties" comprising rules of direct jurisdiction in the field of bankruptcy are very numerous and include the following in particular:

- The treaty concluded on 15 June 1869 between France and the Swiss Confederation on jurisdiction and the enforcement of judgments in civil matters, which lays down rules of direct jurisdiction, with regard to disputes between French and Swiss nationals, tending to favour the defendant's "natural court" whose exclusive jurisdiction must be observed, where necessary, of the court's own motion (Article 11), and which ensures in the field of bankruptcy the unity of the latter (Articles 6 to 9).

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- The Convention between France and the Principality of Monaco of 13 September 1950 on bankruptcy and the realization of assets by the court;
- The Austro-Belgian Convention on Bankruptcy, compositions and suspension of payments signed in Brussels on 16 July 1969, supplemented by the Protocol of 13 June 1973;
- The Franco-Austrian Convention of 27 February 1979 on jurisdiction and the recognition and enforcement of judgments in the field of bankruptcy. Article 21 of that convention makes an express reservation for future multilateral conventions, including this convention.

It should be pointed out that the abovementioned treaties, in contrast to the Franco-Swiss treaty, apply irrespective of whether the debtor or the creditors are nationals of the Contracting States.

The United Kingdom has also concluded conventions applicable in the field of bankruptcy with Norway (12 June 1961), Austria (14 July 1961) and Israel (28 October 1970), not to mention the arrangements for mutual assistance in force between the Commonwealth States which have retained the Bankruptcy Act 1914 in their legal systems.

In the case of these treaties, the problem must be subdivided into its separate components. At the jurisdiction stage, a treaty already concluded with a non-member State takes precedence over this convention since the jurisdiction of the non-member State is exclusive. Thus, in the case of a French debtor having his centre of administration in Switzerland, an establishment in France and another in Germany, the French courts have no jurisdiction to declare him bankrupt, although bankruptcy proceedings could be initiated in Germany under Article 4 of the EEC convention.

As far as recognition and enforcement are concerned, they can be granted only in relation to a judgment given by a court of a non-member State whose exclusive jurisdiction has been established, regardless of which judgment was given earlier. Accordingly, returning to the example taken from the Franco-Swiss treaty, if the German judgment is given first, the objection that it is conclusive cannot be raised to prevent the Swiss

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judgment from being relied upon and enforced in France; if the Swiss judgment was enforced in France before the bankruptcy was declared in Germany, the German bankruptcy can take effect only in the EEC States other than France.

Particularly with the Franco-Swiss Treaty of 1869 in mind, the Working Party therefore expressed in the Joint Declaration the wish that these treaties might be suitably revised to eliminate any inconsistencies between them and the multilateral Convention (cf. the second paragraph of Art. 234 of the Treaty of Rome).[132]

With regard to future conventions with non-member States, the convention does not contain any provisions corresponding to those of Article 59 of the general Convention.

CHAPTER X - FINAL PROVISIONS

Articles 79, 80 and 82 to 87

These Articles, couched in the same terms as Articles 60 to 68 of the general convention, do not call for any particular observations. The Danish law on bankruptcy does not apply to Greenland, which has no national law on the subject.

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[132] Obviously it would be desirable if treaties concluded before the entry into force of the EEC convention contained a reservation identical with the one in Article 27 of the Franco-Austrian Convention of 27 February 1979 to the effect that the convention's provisions in no way prejudice future multilateral conventions to be concluded by either of the two States.

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Article 81

The wording of this article, which deals with the incorporation into each national law of the uniform laws referred to in /Article 41 and/ Annex I, is based on that most often used in connection with such matters in international conventions containing a uniform law.

Certain distinctions are drawn in Article 81(1) and (2) according to the various proceedings listed in Article 1 of the protocol:

- every uniform law must be incorporated into every law relating to bankruptcy stricto sensu (Article 81(1)). This also applies to the French law on judicial arrangements (Article 81(2));
- the uniform laws must be incorporated into laws relating to proceedings other than bankruptcy stricto sensu only in so far as these uniform laws can be applied (Art. 81 (2)). This applies with particular force in France to judicial arrangements.

Two remarks, however, are called for:

firstly, such transposal will be effected having regard to the constitutional rules and legal customs of each of the Contracting States, which will not be obliged to reproduce verbatim the wording of the texts in Annex I. Clearly, incorporation will be necessary only in so far as the national law, in the strict sense (excluding, therefore, solutions derived purely from case law which are always subject to revision), of each State is not already in conformity with the various uniform laws (paragraph 3). In this respect, the transposal or incorporation of uniform laws or the alignment of national law on these laws will be total or partial. It will also be partial or adapted in the case of States which declare that they make the reservations which are available for each of them in Annex II (paragraph 4);

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Secondly, the uniform laws constitute not merely an essential but a decisive factor in the implementation of the convention (see, above, Article 75). They must therefore be transposed in the manner indicated above, if this has not already been effected as a result of, or by the law implementing or authorizing the ratification of the convention, not later than the first day of the sixth month following the lodging the last instrument of ratification, which is the date on which, according to Article 80(2), the convention enters into force.

CHAPTER XI - PROTOCOL

The Protocol's raison d'être lies essentially in the need for flexibility with regard to the indication of the titles of the proceedings or the designation of national authorities, which may change in the future without the machinery of the convention necessarily being called into question. It is for this purpose that most of the articles in the protocol may be amended by a mere declaration and not in accordance with the revision procedure provided for in respect of the convention (Article XIV).

Article 1

The proceedings which come within the scope of the convention are, at present, the following:

1) BELGIUM

- La faillite (Law of 18 April 1851, as amended, on ordinary and criminal bankruptcies included in Book III of the Commercial Code of 15 September 1867. Articles 437 to 572).
- le concordat judiciaire (Consolidated Laws of 29 June 1887 and 10 August 1946).
- sursis de paiement (Law of 18 April 1851 on ordinary and criminal bankruptcies included in Title 4 of Book III of the Commercial Code, Articles 593-614). These proceedings are virtually obsolete.

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2) DENMARK:

- Konkurs (Law No 51 of 25 March 1872, as amended several times). A new law entered into force on 1 April 1978;
- tvangsakkord (Law of 14 April 1905 and Decree-Law No 165 of 2 April 1971). These are judicial arrangements which are not necessarily approved by the court (Skifteretten);
- likvidation af banker og sparekasser, der har standset deres betalinger

  Winding up of banks and savings banks;
- likvidation af pensionskasser - winding up of pension funds;
- likvidation af begravelseskasser - winding up of burial funds;
- betalingsstands (Law of 1975 amending the Bankruptcy Law of 25 March 1872). The debtor declares to the skifteretten that he has ceased to make payments and the latter may then suspend individual proceedings to enable the debtor to come to an amicable arrangement with his creditors and avoid bankruptcy.

3) THE FEDERAL REPUBLIC OF GERMANY

- Konkurs (Konkursordnung of 10 February 1887 in the version of 20 May 1898, as amended, abbreviated to KO).

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- gerichtliche Vergleichsverfahren (Vergleichsordnung of 26 February 1935, as amended, abbreviated to VglO) - Composition by the court;

- nachfolgendes Verfahren bei freiwilliger Unterwerfung des Schuldners

- unter die Überwachung durch einen Sachwalter - Procedure following a composition by the court which involves the debtor giving his consent to supervision by a trustee.

- Verfahren des Vergleichsgerichts nach Aufhebung des Vergleichsverfahrens über die Festellung der mutmasslichen Höhe einer bestrittenen Forderung oder des Ausfalls einer teilweise gedeckten Forderung - Procedure following the suspension of a composition by the court which relates to the calculation of the amount of a disputed debt or to the discharge of a debt paid in part;

Massnahmen der Aufsichtsbehörden für Kreditinstitute und Versicherungsunternehmen zur Vermeidung des Konkurses. These are measures adopted by the Federal Office for the control of credit establishments, pursuant to Article 46(a)(1) of the KWG of 1976, and by the Federal Office responsible for insurance, pursuant to Article 89(1) of the VAG, to rescue undertakings in difficulty and to prevent them from becoming bankrupt (temporary moratorium, non-acceptance of new clients, prohibition against disposals and payments). These measures lapse after 6 months at the latest and, in the event of their failure, the undertaking may be declared bankrupt.

4) FRANCE

- liquidation des biens and règlement judiciaire (Law No 67 - 563 of 13 July 1967 and Decree No 67 - 1120 of 22 December 1967 on judicial arrangements, realization of assets and personal and criminal bankruptcies).

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- procédure de suspension provisoire des poursuites et d'apurement collectif du passif de certaines entreprises

(Order No 67-820 of 23 September 1967 and Decree No 67-1255 of 31 December 1967 facilitating the economic and financial reorganization of certain undertakings; Decree No 67-1254 of 31 December 1967 determining the courts empowered to entertain proceedings instituted under the Order of 23 September 1967). This is a procedure for reorganizing undertakings in financial straits which have not, however, ceased to make payments and whose collapse would be such as to have a serious effect on the economy. Proceedings may not be provisionally suspended for longer than four months, to enable plans to be submitted to the court for the economic and financial reorganization of the undertaking and for the overall settlement of its liabilities over a period not exceeding three years. These measures are binding on the creditors, who, in contrast to their position in judicial arrangements, do not vote.

5) IRELAND

- bankruptcy (Irish Bankrupt and Insolvent Act 1857 and Bankruptcy Amendment Act 1872). These fundamental statutes relating to the bankruptcy of natural persons are supplemented by numerous statutes on specific aspects of bankruptcy, including the Preferential Payments in Bankruptcy Act 1889 (for preferential creditors) and the Succession Act 1965 which governs the winding up of estates of debtors dying insolvent;

- winding up in bankruptcy of partnerships. Bankruptcy rules are, by way of exception, followed in the winding up of partnerships where some or all of the partners are themselves bankrupt;

- compulsory winding-up (Companies Act 1963, Sections 213, 344 and 345) Winding up by the court, on six grounds including insolvency, of registered companies (companies, associations and partnerships of more than 20 persons) and unregistered companies (all other companies, excluding foreign companies, with at least eight members);

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- creditors' voluntary winding up (Companies Act 1963, Section 256). Voluntary winding up of insolvent companies by the creditors. As in the United Kingdom, this form of winding up does not require, in principle and except where necessary, recourse to a court;

- arrangement under the control of the court (Bankruptcy and Insolvent Act 1857, Section 343). Amicable arrangement concluded under the control of the court which, in the meantime, suspends individual proceedings;

- arrangements, reconstructions and compositions of companies whether or not in the course of liquidation where sanction of the court is required and creditors rights are involved.

6) ITALY

- fallimento (Royal Decree No 267 of 16 March 1942, abbreviated to l.f.);

- concordato preventivo (Art. 160 et seq of Royal Decree No 267 of 16 March 1942);

- amministrazione controllata (Art. 187 et seq of Royal Decree No 267 of 16 March 1942);

- liquidazione coatta amministrativa (Art 194 et seq of Royal Decree No 267 of 16 March 1942). This form of winding up occurs for reasons other than the insolvency of the debtor, and for special categories of undertakings of major economic importance. An administrative stage may precede a true judicial stage: the judicial authority may establish that a state of insolvency exists without any intervention on the part of the administrative authorities. As soon as this judgment is given, it gives rise to the same effects as a bankruptcy judgment;

- amministrazione straordinaria delle grandi imprese in crisi (Decree Law No 26 of 30 January 1979 transformed into Law No 95 of 3 April 1979). This is a reorganization procedure lasting three years at the most, which constitutes a special form of liquidazione coatta amministrativa for undertakings whose debts are five time greater than their existing capital, provided the latter amounts to at least Lit 20 thousand million. It commences with a declaration by the court that payments have ceased, followed by a decree of the Minister for Industry initiating the procedure which gives rise to the usual effects (prohibition against disposals, suspension of proceedings, invalidity ...). The objectives of the

procedure are: to replace the head of the undertaking by Government commissioners, to extend the procedure to all the companies belonging to the group, to carry on its operations and to plan a new structure for the group, possibly involving a guarantee from the State.

7) LUXEMBOURG

- faillite (Bankruptcy) (Law of 2 July 1870 included in Title I of Book III of the Commercial Code of 15 September 1807, Articles 437 to 572);
- concordat préventif de la faillite (Law of 14 April 1886 supplemented and amended by the Law of 1 February 1911 and the Grand Ducal Decree of 4 October 1934);
- sursis de paiement (Law of 2 July 1870 included in Title 4 of Book III of the Commercial Code, Articles 593 to 614; Grand Ducal Ducal Decree of 4 October 1934);
- régime spécial de liquidation applicable aux notaires (Grand Ducal Decree of 31 December 1938). This decree lays down, with regard to notaries "whose credit is undermined or where the performance in full of their obligations is jeopardized", a special system of rehabilitation (which does not come within the scope of the convention) or winding up at the option of the Administrative Council of the rehabilitation section of the Luxembourg notarial profession, of its own motion or at the request of a notary or creditor.

  In addition, since the enactment of the Law of 21 December 1912, a notary who has ceased to make payments and whose credit is undermined is treated on the same footing as a trader for the purposes of bankruptcy and the other proceedings; bankruptcy proceedings, however, can be opened only at the request of the Administrative Council and the notary cannot seek the benefit of other measures until the application of the special system has been denied to him. At the request of the Luxembourg delegation, the application of the special system of winding up will give rise only to restricted advertising arrangements at Community level;
- gestion controlée (controlled management) (Grand Ducal Decree of 24 May 1935) is modelled on the Belgian Royal Decree of 15 October 1934 which had introduced this procedure on a provisional basis; this procedure is now hardly ever employed.

8) THE NETHERLANDS

- faillissement (wet 30 September 1893 op het faillisement en de surséance van betaling, Titel I Art 1 - 212, abbreviated to F.W. as amended several times, most recently in 1969);
- surséance van betaling (Titel II of the Faillissementswet, Articles 213 to 284, as amended by the Law of 7 February 1935);
- regeling, vervat in de wet op de vergadering van houders van schuldbrieven aan toonder (of 31 May 1934). Under this law, the provisions of which are seldom used, the rights of bondholders may be modified when a body which issued bonds is unable to meet its obligations in full (reduction of capital and interest, postponement of payment of dividends, etc). Such modification may be decided by an assembly of bondholders meeting with the authorization of the court; the decision must be taken by a two-thirds majority of the votes cast, and approved by the court.
- noodregeling (wet toezicht kredietwesen, 13 April 1978). This law on the control of credit establishments creates an "emergency procedure" (which may follow a period of provisional supervision) whereby the court, at the request of the Nederlandsche Bank, appoints a liquidator for a period of 18 months and authorizes him to transfer the financail commitments in whole or in part or to wind up the establishment. Noodregeling has replaced, in the case of banks, surséance van betaling, to which it bears a strong resemblance. It may be transformed into faillissement.

9) UNITED KINGDOM

- bankruptcy: (in the case of England and Wales, Bankruptcy Acts 1914 and 1926, Bankruptcy Rules 1952, 1956, 1963 and 1965; in the case of Northern Ireland, Bankruptcy Acts 1857-1964). Bankruptcy proceedings involving natural persons and partnerships are divided into two stages: a receiving order (sequestration of the assets) and an adjudication order (declaration of the bankruptcy);

- sequestration (in the case of Scotland: Bankruptcy Act 1913) Scottish variant of bankruptcy;

- administration in bankruptcy of estate of persons dying insolvent (Bankruptcy Acts 1914-1926 and Bankruptcy Acts (Northern Ireland) 1857-1964). Variants of bankruptcy applied to persons dying insolvent. In Scotland, sequestration is applicable in such cases;

- compulsory winding-up (in the case of England, Wales and Scotland, Companies Acts 1948-1967 and in the case of Northern Ireland, Companies Acts 1960-1963). Winding up by the court of companies for insolvency or on other grounds, at the request of the company, a member, a creditor or certain public authorities;

- creditors' voluntary winding up (see above for legal basis) Voluntary winding up is available only to registered companies which are unable to pay their debts within one year. The court intervenes only in the event of difficulties. Any creditor may apply to the court for compulsory winding up;

- winding up under the supervision of the court (see above). This form of winding up, which is very rarely employed, occupies an intermediate position between voluntary winding up, which is opened initially, and compulsory winding up.

- compositions and schemes of arrangement (in the case of England and Wales, Bankruptcy Act 1944, Sections 16 and 21). Compositions by the court during the bankruptcy, provided all the preferential creditors are repaid and the other creditors can receive a dividend of at least 25%;

- compositions (Bankruptcy Act (Northern Ireland) 1857-1964). Northern Ireland variant of the preceding procedure.

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- arrangements under the control of the Court (see above). Northern Ireland procedure enabling a debtor to obtain a protection order freezing his assets pending the acceptance of certain arrangements by the creditors and their approval by the court;
- deeds of arrangement approved by the court (In the case of Northern Ireland, Bankruptcy Amendment Act, 1929, Section 2). These are agreements between a debtor and his creditors for the arrangement of the debtor's affairs, generally by the transfer of part of his assets to a trustee responsible for repaying the creditors. The deed must be registered with the Department of Trade and declared enforceable by the court.
- judicial composition (Bankruptcy (Scotland) Act 1913). Scottish variant of the procedure for compositions and schemes of arrangement.

Articles III to XII

These articles do not call for any special comments. It might therefore be appropriate to consult the comments on the articles of the convention to which these articles refer.

Articles XIII and XIV

Article XIII creates a system of mutual information on law reforms which have occurred or are in prospect in the law of bankruptcy that are likely to affect the application of the convention, so as to enableenable any revision, as provided for in Article 86 of the convention, to be undertaken.

If it is merely a matter of changing the national lists or headings in the protocol, other than those in Articles I which lists the proceedings covered by the convention, this may be done, in accordance with Article XIV, by means of a declaration addressed to the officer with whom the convention is lodged.

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A N N E X I

Examples of the operative parts of German judgments (see pages 53 and 54 of this report).

a) Order to restore the title to immovable property:

The defendant is ordered to:

1. agree that the title to the immovable property registered in the land register kept at the Amtsgericht of ..... volume ..... folio .....[1] serial number ..... shall pass to .....

2. consent to the registration of X in the land register as owner of the immovable property in question.

b) Order to release a mortgage contracted by the bankrupt in respect of Immovable property as security for a debt:

The defendant is ordered to:

1. declare that he releases the mortgage of DM..... registered in his name in the land register of the Amtsgericht of ..... volume ..... folio .....[1] section 111 serial number ..... and transfer the mortgage deed to the plaintiff, and

2. approve the removal from the land register of the mortgage in question.

c) Order to renounce a claim to a mortgage debt contracted in respect of immovable property belonging to the bankrupt:

The defendant is ordered to:

1. renounce his claim to the mortgage debt of DM ..... registered in the land register of the Amtsgericht of ..... volume ..... folio .....[1] section III serial number ..... and

2. approve the registration in the land register of the disclaimer of the mortgage debt in question.

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[1] The above details relating to the description of immovable property may in each individual case be subject to amendment. For example, it should be pointed out that in the greater part of the Land of Baden-Württemberg, responsibility for keeping the land register does not devolve on the "Amtsgerichte". The words "of the Amtsgericht" are then superfluous. Often, land registers are not referred to by volume: in such cases, the number of the volume should be deleted and one number only need be indicated i.e. that of the folio or of the section, since the latter designation may also be encountered.

A N N E X II

Committee of Experts who framed the text of the Convention relating to bankruptcy, composition and analogous procedures

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