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REPORT ON THE CONVENTION
RELATING TO BANKRUPTCIES,
COMPOSITIONS AND ANALOGOUS PROCEDURES

by

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S U M M A R Y

	<u>Pages</u>
<u>CHAPTER I</u> - <u>PRELIMINARY REMARKS</u>	1
<u>CHAPTER II</u> - <u>REASONS FOR THE CONVENTION</u>	3
A. - Differences in private international bankruptcy law in the six States	3
B. - Economic interest of a Community Convention	7
C. - Insufficiencies of existing Conventions	9
D. - General Scheme of the Convention	10
<u>CHAPTER III</u> - <u>THE SCOPE OF THE CONVENTION</u>	18
<u>Examination of Title I of the Convention</u>	
<u>CHAPTER IV</u> - <u>THE JURISDICTION OF COURTS</u>	25
I. - <u>General</u>	25
A. - Jurisdiction - direct and general	25
B. - The criterion of the debtor's business seat.....	26
II. - <u>Examination of the Sections of Title II of the Convention</u>	33
Section I - General provisions	33
Section II - Special provisions	38
Section III - Conflicts of competence	48
Section IV - Proceedings arising from the bankruptcy	54
<u>CHAPTER V</u> - <u>THE LAW APPLICABLE AND THE EFFECTS OF THE BANKRUPTCY</u>	62
I. General remarks and examination of Title III of the Convention	62

	<u>Pages</u>
II. <u>Examination of the sections of Title IV of the Convention</u>	65
Section I - Effects of the bankruptcy independently of any advertisement	65
Section II - Advertisement	69
Section III - Powers of the authorities administering the bankruptcy ..	74
Section IV - Effects of bankruptcy on the debtor's assets	82
Section V - Effects of the bankruptcy on legal acts and current contracts	87
Section VI - Preferential claims and secured rights	113
Section VII - Effects of the bankruptcy on the debtor's person	128
Section VIII - Special provisions for certain proceedings other than bankruptcy	131
<u>CHAPTER VI - RECOGNITION AND ENFORCEMENT</u>	132
<u>Examination of the sections of Title V of the Convention</u>	
Section I - Recognition	133
Section II - Enforcement of bankruptcy judgments	137
Section III - Proceedings to contest the bankruptcy	138
Section IV - Enforcement at certain decisions in bankruptcy matters	144
Section V - The common provisions	148
<u>CHAPTER VII - TRANSITIONAL PROVISIONS</u>	149
Title VI of the Convention	
<u>CHAPTER VIII - RELATIONSHIP TO OTHER INTERNATIONAL CONVENTIONS</u> ..	149
Title VII of the Convention	
<u>CHAPTER IX - FINAL PROVISIONS</u>	153
Title VIII of the Convention	
<u>CHAPTER X - PROTOCOL</u>	154
<u>ANNEX I</u> - Examples of the layout of German decisions	
<u>ANNEX II</u> - Committee of Experts who framed the text of the Convention	

CHAPTER I - PRELIMINARY REMARKS

The present Convention supplements the Convention on the jurisdiction of courts and the enforcement of decisions in civil and commercial matters ("General Convention") signed at Brussels on the 27 September 1968. This excluded from its field of application bankruptcies, compositions and other analogous procedures. These two Conventions flow, moreover, from 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 ensuring for the benefit of their nationals the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of the ordinary courts of law (décisions judiciaires) and arbitral awards".

As is pointed out in a note from the Commission of the European Economic Community addressed on the 22 October 1959 to the Member States inviting 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 if it is not possible to have determined and enforced, if necessary by recourse to the courts, the individual rights which will arise from the multiple legal relationships. As judicial power falls within the sovereignty of the Member States and the effects of judicial acts are limited, even in civil and commercial matters, to the national territory, judicial protection and, therefore, legal security in the Common Market, depend essentially on the adoption between the Member States of a satisfactory solution as regards the recognition and enforcement of judicial decisions". As a result of this note the Committee of Permanent Representatives decided, on 8 February 1960, to convene a Committee of Experts.

This Committee, composed of governmental delegates from the six countries and observers for the Benelux Commission for the study of the unification of law

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and from The Hague Conference on Private International Law, has been assisted by the departments of the Commission of the European Economic Community. It held its first meeting at Brussels from 11 to 13 July, 1960. By reason 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 in the latter for recognition and enforcement of decisions in bankruptcy matters, but to work out a special Convention relating to bankruptcy and proceedings which must be grouped with it, either by reason of their being analogous or because they aim to prevent bankruptcy and to avoid its being pronounced. It remained, however, understood that the present Convention was to be guided as far as possible by the principles laid down by the General Convention.

For this purpose, and under the authority originally of a Plenary Joint Committee presided over by Professor Bulow, then State Secretary in the Federal German Ministry of Justice, a working party on bankruptcy matters was set up which has functioned under the direction, since 1963, of M. Noël, Counsellor in the French Cour de Cassation.

A list of the experts who have participated in the work of the Committee is given as an annex to this Report.

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. In the absence of a satisfactory system founded, either on the general rules of International law or on existing conventional law, it had become above all necessary to strengthen the legal protection of persons established in the Community. To this end, it was important to determine the legal jurisdiction so as to avoid the possibility of more than one judgment being given by Courts of different States in the same matter and between the same parties. It was also necessary to simplify the recognition and enforcement of decisions in all EEC Member States.

What is true in a general way for individual proceedings in civil and commercial matters is even more so for collective proceedings, the national rules of which are extremely complex, in particular because of being entwined with different branches of law.

A. Differences in private international bankruptcy law in the six States

The question arises in international law whether a bankruptcy decision given in a certain State¹ should have effect everywhere that the debtor has property or creditors, which implies that a single set of proceedings can be followed, or if, on the contrary, bankruptcy declarations may be made in each of the States where the insolvency of the debtor has been established so far at least as a foreign bankruptcy decision has not been made enforceable. The first concept is called the universality of bankruptcy, whereas the second is designated as territorial or the system of multiple bankruptcies. Since, in this case, the same debtor can be declared a bankrupt in several countries.

¹ For the convenience of the account, and subject to what will be said in Chapter II concerning the scope of the Convention, we use the term "bankruptcy" (faillite). It goes without saying that according to the cases, it could as well be a matter, for example, of preventive composition, judicial settlement or a procedure of suspension of payment.

The positive law of the Member States of the European Economic Community is divided between these two concepts.² Those which (Luxembourg and, more recently, Belgium)³ consider that bankruptcy stamps the debtor with incapacity are led to maintain the principle of universality, whereas French case law,⁴ which sees in bankruptcy an enforcement procedure, is inclined to adopt that of territoriality. German, Italian and Dutch law participate in the two systems.⁵

² 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 Nihoyet and Lapradelle*, V^e Faillite, N° 8 et seq.; Alberic Rollin in *Rec. des Cours de l'Acad. de La Haye*, 1926, t. IV, p. 22 et seq.; Safa, *La Faillite in DIP*, Beirut, 1954; Müller-Freienfels, *Auslandskonkurs und Inlandsfolgen*, in: *Vom deutschen zum europäischen Recht*, Festschrift für Hans Dölle, Band II, p. 359 et seq.

³ Travers, op. cit. N° 11488 et seq.; Huss, *Reflexions sur la théorie de l'unité et de l'universalité de la faillite et sur son application en jurisprudence luxembourgeoise*, in *Liber amicorum Baron L. Fredericq*, p. 619.

⁴ Travers, op. cit. N° 11543 et seq., 11683; Ripert and Roblot, *Traité élémentaire de droit Commercial*, t. II, 1964, N° 2805.

⁵ The German law rests on the principle of territoriality in a dual sense:

- (1) When the debtor has only a gewerbliche Niederlassung (establishment) in the FGR and not his allgemeine Gerichtsstand (domicile or statutory seat), bankruptcy adjudicated in the FGR extends not to all of his property, as in the case where he has his domicile or his seat (universality).
- (2) Conversely, the German law refuses to a bankruptcy opened abroad any effect on properties situated in the FGR: individual seizure of these properties is expressly declared lawful despite the foreign bankruptcy - cf. *Böble-Stamschröder*, *Konkursordnung*, Secs. 237 and 238.

For the Italian law: cf. Art. 9 of the law of 16.3.1942 and de Semo, *Diritto fallimentare*, 1961, p. 131.

According to Dutch jurisprudence, a bankruptcy in the Netherlands comprises in principle all the bankrupt's assets, which however does not prejudice the right of another State to refuse to recognize this bankruptcy as regards properties situated on its territory (*Hoge Raad* 15.4.1955, N.J. 1955, 542; *Clunet* 1957, p. 478). It is agreed, according to constant case law, that a foreign liquidator can also exercise his powers in the Netherlands.

Foreign bankruptcy decisions are therefore recognized as having constituent legal force. However, for properties situated in the Netherlands, case law does not recognize the legal effects of a bankruptcy pronounced abroad. With respect to these goods creditors can therefore act individually.

The two opposed concepts concerning the territorial or universal character of bankruptcy give rise in international law to complex problems whether it is a matter of the opening of international bankruptcy proceedings in a given country or the recognition and enforcement in the same country of bankruptcies pronounced abroad.

In the first place the rules of international judicial jurisdiction will diverge according to the system to which they are attached. If applied with complete strictness, that of universality and of unity would lead to the situation that resort can only be to the court of the principal establishment of the debtor. Inversely, and also pushed to its ultimate consequences, the territoriality of bankruptcy makes it possible to have the bankruptcy pronounced in every country where an asset exists.

In this regard, although certain laws, such as the Belgian maintain that only the court of the place of domicile or of the principal establishment of the debtor has jurisdiction (Article 440 Commercial Code), the legislations or case law of the other Member States of the European Community are content, if there is neither domicile nor a principal establishment in their territory, with a secondary establishment or the carrying on of a commercial or professional business (Art. 2, F.W., of the Netherlands 30 September 1893) or even the existence of a certain asset, (paragraphs 71 and 238 German KO) (Article 9(2) 1.f. Italian 16 March 1942). French case law, whether it provides for an extensive application of Article 437 of the Commercial Code (at present Art. 1 of Decree N° 67.1120 of 22/12/1967) to international relations or invokes the provisions of Articles 14 and 15 of the Civil Code arrives, in the last analysis, at a situation where French jurisdiction is maintained on the sole circumstance of the location in France of a debt.⁶

⁶ 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 (Istituzioni di diritto fallimentare) and Provinciali (Manuale di diritto fallimentare) think on the same lines.

Moreover, recognition and enforcement of foreign judgments are covered by very different rules in each of the six Member States. On this subject reference should be made to the very thorough Report drawn up by Mr. Jenard for the General Convention.⁷ 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 judgments cannot be made enforceable within the Kingdom except by virtue of a treaty. In default of a treaty, litigations must be pleaded anew before the Netherlands Courts (Art.431 of the Code of Civil Procedure).

It follows from these differences that, outside of the State in which it has been given, the decision pronouncing bankruptcy remains, in general, without effect or produces only limited effects for such time as it has not been made enforceable there.

Where an exequatur order is lacking it is therefore necessary to have pronounced a separate adjudication of bankruptcy in every country where the debtor has an asset at his disposal or can create a new liability. The system of "multiple bankruptcies" is far from being satisfactory. Firstly, from the fact that cessation of the debtor's power to deal with his property and suspension of individual proceedings do not occur everywhere at the same time. The constitution in each country of volumes of assets and liabilities, which can be in very different relationships, also leads to very unequal distributions. True, creditors are permitted to come forward with proof in each bankruptcy, but this involves them in much outlay and many difficulties. Finally, the multiplicity of bankruptcy proceedings unwontedly increase costs.

The advantage of a conventional law in these matters was already recognized at the end of the seventeenth century since when many conventions have been entered into, among which one may cite 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 interpretive declaration of 1 September 1860.

⁷ Cf. Jenard, Rapport sur la convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, p. 3 et seq.; cf. also Martha Weser, Les conflits de juridictions dans le cadre du Marché Commun, Rev. Crit. DIP 1959-1960-1961; Bellet, L'élaboration d'une Convention sur la reconnaissance des jugements dans le Marché Commun, Clunet, 1965, p. 833; Bulow, La Convention concernant la compétence judiciaire et l'exercice des décisions judiciaires en matière civile et commerciale, Rev. MC 1968, p. 1007. .../...

But although it may be a step forward, the conclusion of bilateral agreements or three-party treaties, like that signed at Brussels on 24 November 1971 by the Benelux States, can still only provide an unsatisfactory solution to the problem of bankruptcy in international law. Numerous studies have therefore been undertaken with a view to elaborating multilateral conventions containing provisions calculated to reduce the drawbacks which result from the disparity of laws. It is enough to mention, apart from the Bustaments Code adopted at Havana on 20 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 held in 1925 and 1928, seem to have marked an appreciable progress by leading to a general draft convention which has, however, not been ratified.

Pending the -always problematical- arrival of a Convention of universal or at least very general application, it was necessary to settle the problem of bankruptcy within the confines of the European Economic Community.⁸

B. Economic interest of a Community Convention

Since the legislations of the six countries of the European Community differed appreciably on a number of important points (conditions for opening of bankruptcy, the effects of this, the course of the proceedings and especially the suspect period), the task to be accomplished was necessarily of long duration and the question could be asked at the outset whether such an effort was fully justified from a practical point of view.

The uncertainty of the international law of bankruptcy on many important points, as for example the question of 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 had repercussions abroad. Doubtless, large enterprises have ramifications in foreign countries, but they rarely go bankrupt.

⁸ It should be noted that the transformation of national units into wider federations has generally led to the working out of uniform legislation. In this way, the United States Constitution of 1787 deprived the various States of the right to legislate in the matter of bankruptcy. The Canadian Constitution of 1867 also made bankruptcy a matter of Federal legislation, as also did the Swiss Constitution of 1874. The Convention of 7.11.1933 concluded between the countries of the Scandinavia Union can also be mentioned in this connection.

Moreover, for different reasons, which are not all of a legal nature, commercial activities abroad are often conducted by subsidiary companies legally distinct from the mother company.

But one effect of the Common Market must precisely be to change this situation profoundly. The intention of the Member States of the European Economic Community is to establish between themselves a genuine and vast internal market conforming to the rules of free competition. Everything must therefore be done not only to eliminate obstacles to the functioning of this market, but also to promote its development. In this way, 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 law⁹ and the implementation of the other provisions of Article 220 of the Treaty of Rome relating to the mutual recognition of companies,¹⁰ the maintenance of legal personality in the event of transfer of seat and the possibility of merging companies governed by different national legislations, not to mention the future European company (*société anonyme européenne*), which will doubtless own property in several Member States,¹¹ must ensure mobility of enterprises and encourage them to carry on their businesses in other Community countries in the form of establishments or branches. Thus, the various components of assets and the creditors of many enterprises will be more and more spread over different States. However, in a system of free competition the mere existence of the Common Market does not guarantee that all enterprises will prosper.¹² If some of them are not in a position to face up to their obligations, the effects of bankruptcy or similar measures pronounced against them will extend beyond the frontiers of a single State.

⁹Cf. First Council directive of 9.3.1968 (Art. 54(3 g) of the Rome Treaty).

¹⁰Brussels Convention of 29.2.1968.

¹¹It should be noted that the draft statutes of a European company (SE) which, in the first stage contained special provisions on bankruptcy and analogous procedures coinciding with those of the present Convention (cf. Collection Etudes, serie Concurrence 1967-6, p. 119 et seq.) limits itself, subject to 2 details to referring purely and simply to the application of the present Convention (Art. 261 to 263 of the proposal for a regulation sent by the Commission to the Council on 24.6.70).

¹²Hoein, *Problèmes posés par la faillite dans le Marché Commun*, Journal des Trib. (Belgium) 21 May 1961.

C. Insufficiencies of existing Conventions

In actual fact the only conventions in existence in bankruptcy matters between the six Member States of the European Economic Community, are the five enumerated at Article 71 of the Convention and of which one, the Benelux Treaty, is not yet in force. There is no treaty governing this field between France and Germany, France and the Netherlands, France and Luxembourg, Germany and Luxembourg, Luxembourg and Italy, Germany and Italy, Belgium and Italy, Belgium and Germany and, finally, the Netherlands and Italy.

An examination of the five existing conventions 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 rules of direct jurisdiction, whereas the Franco-Italian Convention of 1930 does not in principle contain such rules. According to the conventions of the first type, also called "dual treaties", the rules of jurisdiction they enumerate are applicable in the State of origin, that is to say, the one in which the initial proceedings take place. They therefore apply independently of any procedure for recognition and exequatur and allow the defendant summoned before a court which would not have jurisdiction in terms of the Convention, to refuse to recognize its jurisdiction. On the contrary, rules of jurisdiction are called indirect where, without applying in the State of origin in which the decision was given, they need be taken into consideration only at the time of recognition and exequatur. They therefore do nothing more than determine the cases in which the judge of the State where the decision is invoked or must be executed, is obliged to recognize the jurisdiction of the judge of the State of origin. One may, therefore, consider that what exists here is a condition for the recognition and the execution of the foreign judgment, and more precisely for the control of the judicial jurisdiction of the foreign judge.

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On the other hand, certain of these conventions do not allow recognition and enforcement of decisions unless they are *res judicata*, whereas the Benelux Treaty, for example, applies to all enforceable judgments. Now, in bankruptcy matters, and to frustrate possible frauds, decisions are enforceable as of right, that is to say, notwithstanding any means of appeal.¹³

Moreover, treaties like the Franco-Belgian Treaty restrict the effect of their provisions to bankruptcies of nationals of the contracting States.

Finally, some existing conventions contain only very fragmentary provisions in bankruptcy matters and are, therefore, difficult to apply for this reason.

A multilateral conventional instrument laying down common rules was therefore a necessity for the members of one and the same economic Community.

D. General Scheme of the Convention

(1) Several approaches were open to the authors of the Convention.

Over and above the solutions drawn from systems subscribing to the territoriality or universality of bankruptcy, another solution could be found by attempting in the framework of Article 100 of the Treaty of Rome to arrive, if not at unification, at least at harmonization or approximation of the legislations of the six countries. In the circumstances, this undertaking would have been ambitious, by the very reason of the disparity of national laws; moreover, bankruptcy is an institution of public policy (*Ordre public*) which touches at once on the law pertaining to persons and on company law, on property law, on rules of procedure and on methods of enforcement.

At the very least, such unification postulated that of the law of obligations, which forms one of the principal legal tasks of the European Community.

¹³ Art. 107 of the French decree of 22.12.1967. Art. 465 Belgian Commercial Code and 167 of the Italian bankruptcy law.

It goes without saying that this unification of the law of obligations is a very wide-ranging task. However, in the present state of the Common Market, a bankruptcy convention is of such interest that it was impossible to postpone its introduction in such a way.

In addition, the members of the Committee agreed, from the outset of their work, that any attempt to unify bankruptcy law in a systematic fashion would require a very long time, and they unanimously addressed themselves, after receiving favourable opinions from numerous professional organizations, both European and national,¹⁴ to the framing of a convention recognizing the unity and universality of bankruptcies. The Convention therefore does not aim at creating a "European" type of bankruptcy or modifying in principle the basic rules of internal laws. It mainly proposes to give Europe-wide effect to bankruptcies by settling conflicts between national laws and between courts of different Contracting States.¹⁵

¹⁴This means, *inter alia*, the Union of Industries of the European Community, the Standing Conference of Chambers of Commerce of the EEC, the Standing Conferences 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 preferred. Cf. also the International Colloquium of European Jurists held in Nice in June 1960 (Rev. Inter. Dt. Comparé 1960, p. 782) and Charousset, *Unité de la faillite et universalité de ses effets dans les Pays du Marché Commun*, Revue Syndics et Adm. Jud. de France, 1963, p. 287.

¹⁵Cf. the articles which have already appeared on the draft Convention: Böhle-Stamschräder, *Von einem Konkursabkommen der EWG-Staaten* (1964); Berges, *Kommt es zu einem EWG-Konkursabkommen?* in *Konkurs-Treuhand- und Schiedsgerichtswesen*, 1965, p. 73-79; W.G. Belinfante, *Faillissementsrecht in de EEG in Europ. monografieën*, N° 4 of Dec. 1965; J. Noel and J. Lemontey, *Aperçus sur le projet de Convention européenne relative à la faillite*, in *Rev. Trim. Dt européen* 1968; p. 703-19 and *Rev. Syndics et Adm. jur. Fr* 1969, p. 121-44; the articles of M. Weser and J. van der Gucht, in *Jurisp. Com. Belgium* 1968, p. 150, 264, 361 and 607; Hirsch: *Vers l'universalité 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* at Louvain (Brussels 1969) and the Acts (to be published) of the International Colloquium organized in Milan in June 1970 by Prof. Giuliano.

But was it necessary to choose only "European bankruptcies", that is to say, those having repercussions on the territory of other countries? This limitation, which could have been justified by concern not to implement very complex rules unnecessarily, had to be abandoned, since it is not always possible when bankruptcy is pronounced to know whether it will or will not have international effects. The situation of property comprising the debtor's assets is not the only factor to be considered; the localization of claims, and the fact that the bankruptcy could produce effects with regard to acts done by the debtor abroad, must also be considered. These diverse implications do not necessarily appear from the outset of the proceedings. Moreover, the Convention contains some provisions of uniform laws and, this being so, a duality of material rules could not be envisaged. Furthermore, and above all, the chief advantage of the Convention, which rests on the system of unity and universality, is to ensure immediately in all the countries the deprivation (le dessaisissement) of the debtor from the time of the adjudication of bankruptcy of power to administer his property, which involves the voidability of acts, of dispositions or of general measures of administration performed by him, so that it would have been disastrous if this debtor had been able to profit by the apparently national character of his bankruptcy to organize his insolvency in the other member countries.

(2) The principal difficulties encountered by the Committee of Experts, and which demanded the making of important choices, were in connection with judicial and legislative jurisdiction and with the machinery of enforcement.

(a) The unity and universality of bankruptcy presuppose the jurisdiction of the courts of a single State. From the outset, it had been understood that the rules of judicial jurisdiction to be chosen must be rules of direct jurisdiction. But it was still necessary to work out a criterion applicable to traders and non-traders, to physical persons and legal persons. This is why the Committee chose as the main consideration the debtors' centre of administration. If there is no such place in the Community territory, jurisdiction will be based on the presence of an establishment and, in an even more subsidiary way, on the internal provisions of each State.

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The order of importance instituted between these criteria does not exclude the possibility of conflicts of jurisdiction, and on this aspect the Convention contains rules that are as complete as possible.

- (b) The unity and universality of bankruptcy also involves recognition of the jurisdiction in principle of *lex fori concursus*. However, although this legislative jurisdiction raises little difficulty in relation to the conditions under which bankruptcy proceedings may be commenced, organized and brought through their various stages, it was necessary, precisely by reason of the present basic disparities of legislations, to ensure the protection of creditors and third parties in addition to organizing advertising arrangements on a European scale. This concern induced the Committee to choose the law which then appeared the most appropriate to it. 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 not have been satisfactory to go no further than a rule of conflict, the choice of which would, moreover, have been very delicate. To apply the law regulating set-off or sale would have resulted in grievous uncertainties and in discriminatory treatment in the same bankruptcy; to choose the law of the bankruptcy, which will depend finally on the place of initiation of proceedings would have ruined security of trade. On these points the Committee has drafted provisions for a uniform law to be substituted from the time of the coming into force of the Convention, for the corresponding provisions of internal bankruptcy law. These uniform rules can, on secondary points, be accompanied by a small number of reservations, listed exhaustively.
- For analogous reasons, the same technique has been used in relation to the suspect period, the effects of bankruptcy on claims by the bankrupt's spouse and the measures which can be taken against the directors of bankrupt companies or firms.

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The problem of determining the law applicable to secured claims and preferences obviously provided a major difficulty for the drafters of a Convention based on the unity and universality of bankruptcy, since bankruptcy is a procedure of collective realization of property and aims at satisfying creditors according to their rank. Although the application of *lex rei sitae* to debts having special preferences, a solution in conformity with the provisions of the different systems of private international law, does not appear to raise great difficulties,¹⁶ by contrast, the question is hotly disputed in relation to the general preferences. Three theses are traditionally put forward - the first advocates the exclusive application of *lex rei sitae*; the second considers that only the law of the bankruptcy should apply, the third, finally, proposes a middle course and recommends simultaneous application of the two laws.

Faced with the impossibility, first of all of working out a solution fully satisfactory on the plane of private international law and, secondly, of envisaging, for the immediate future, a harmonization of preferences, the Committee confined itself to adopting the state of affairs recognized by national practices by submitting the basis, the extent and the classification of general preferences to the law of the situation of the encumbered property. It specified, however, that in civil and commercial matters, creditors could invoke against assets situated in each of the contracting States, the general preferences provided for by the law of this State for the claims they held.

The subjection of general preferences to the law of situation has made it necessary to establish, as a matter of pure accountancy, as many sub-units of assets as there are contracting countries in which there are assets to be realized. The principle of the unity of bankruptcy therefore had to be infringed to some extent, but this disadvantage has been corrected by preparing rules for distribution sufficiently detailed to take account of the fact that the same debt could be guaranteed in several countries for unequal amounts or by secured claims of different nature or rank.

¹⁶ German Law does not recognize the concept of "special preferences" but the exemption from the bankruptcy of certain properties for the benefit of certain creditors (*Absonderungsrecht*) (cf. commentary to Art. 43).
.../...

(c) An important choice to be made by the Committee further concerned the mechanics for recognition and enforcement of bankruptcy decisions. One of the fundamental principles chosen by the Committee and flowing directly from the adoption of the rules of unity and universality, was that the decision pronouncing bankruptcy and those which follow it must have effect in all the Contracting States. This principle having been accepted, the question arose whether it was a matter of submitting these decisions to an exequatur procedure or whether it was possible to make them produce all their effects without any previous formality by providing solely for a procedure aimed at terminating, in certain exceptional cases, the automatic effects of bankruptcy declared in a Contracting State.

The exequatur procedure as a preliminary to any recognition and any measure of enforcement presents grave drawbacks in the matter, since bankruptcy does not countenance any time-wasting. The debtor must not be allowed any opportunity of switching his assets elsewhere, just as certain creditors who are better informed must be prevented from jumping the gun to the detriment of the others. This explains why, in most of the States, every decision in a bankruptcy matter is in principle enforceable by provision. Doubtless one could limit the necessity for the exequatur, which would have resulted from a very simplified procedure based on the General Convention (Article 31), solely to measures for realising assets, while at the same time providing for automatic recognition of the principal effects of bankruptcy, such as the incapacity of the debtor to manage his affairs and the suspension of individual proceedings.

It was fitting, however, to consider that the machinery implemented by the Convention concerning both judicial and legislative jurisdiction, and which the bankruptcy judge has to accept, would have limited to the utmost the functions of the exequatur judge and would not have justified compulsory recourse to exequatur procedure, however simple it might be. Moreover, bankruptcy produces its effects erga omnes and the sole and real "legitimate" objector to a claim for exequatur would have been the debtor, hardly qualified, after bankruptcy, to represent his creditors, and all too often tempted to exploit all the delaying possibilities of such a procedure.

.../...

This last consideration led one delegation to recommend, following the example of the Benelux Treaty, the adoption of the simplified exequatur procedure provided of at Article 31 of the General Convention purely for those cases where the liquidator might encounter resistance or opposition. But then an exequatur decision would have been necessary in respect of each of the third parties who opposed the execution of the bankruptcy decision, such parties normally not being able to represent each other. Apart from the procedural complexities which it would have presented, this system was not compatible with the fundamental principles of bankruptcy, which must produce its effects erga omnes.

The concern to ensure full efficacy of bankruptcies, the desire to provide only such control as necessary, mutual confidence in the judicial institutions of the contracting States which is the basis of the Convention, have therefore led the Committee to rally unanimously to the principle of enforcement as of right, save that there would be eventual recourse to proceedings to challenge the bankruptcy, already known in certain systems of law in matters of status and capacity of persons.¹⁷ The system of challenge presents this advantage that there would not be a break of continuity in the effects of bankruptcy, and that the initiation of its application would be, at his own risk and peril, for the person who sought to oppose recognition and enforcement.

However, insofar as litigations arising from the bankruptcy are concerned, to avoid practical difficulties where it will be necessary to have recourse, against third parties, to measures of forced execution, the Committee has had to admit the prior affixing of the national enforcement formulae for decisions relating to these litigations. The authority whose duty it is to affix the formulae will confine itself to verifying the authenticity of the documents produced.

It remained for the Committee of Experts to define the conditions in which the procedure of challenge might be exercised and its effects.

Some further comments are called for.

¹⁷ Bellet, La jurisprudence du Tribunal de la Seine en matière d'exequatur de jugements étrangers, in Trav. Comité fr. DIP, 1962-1964, p. 259.
Cf. also the abovementioned Nice colloquium R.I.D.C. 1960, p. 782.

We have already observed that the Convention was primarily a convention in private international law and that its authors had had to renounce the idea of harmonizing the substantive laws of bankruptcy. It may, however, be hoped that the beginnings of uniform legislation which the Convention contains to ensure its application as best possible will help to hasten a more generalized approximation of legal systems in the EEC States.

The Common Market proposes to set up a vast internal market recognizing freedom of establishment and competition. But this market must still not be distorted by disparity of the measures ensuring orderliness and fair dealing in commercial competition. In this regard, the Convention, for reasons partially set out above, must necessarily be completed, at least on two levels.

First of all, although the national legislations are at the present time sufficiently close with regard to conditions for the opening of bankruptcy properly so called, it is not the same with regard to other proceedings referred to in the Convention. Let us consider, for example, the conditions governing the granting of judicial settlement, or of a preventive composition, or of suspension of payments.* We must hope that without too much delay the measures which allow a bankrupt debtor to escape from the realization of his assets and to carry on his business may be harmonized. The same wish can be formulated as to the disqualifications and restrictions of rights flowing from the bankruptcy of companies and firms and applicable to those directing or managing them.

The Convention does not cover the criminal aspects of bankruptcy. The insertion of provisions of a penal character would have weighed on its general layout and delayed its conclusion. It should, however, be noted that the application of the Convention will not fail to raise many problems in this respect, especially relating to the prosecution of bankruptcies, and of misdemeanours treated on a similar footing, in countries other than those where the bankruptcy was initiated, when the law of these States makes the bankruptcy judgment, and not only the cessation of payments a constituent element of the offence.

* "règlement judiciaire", "concordato preventivo", "sursis de paiement".

It seems logical that a bankruptcy judgment producing its civil effects as of right in other Contracting States could also enable criminal action to be taken in these States. One would otherwise arrive at the unacceptable conclusion that offences in bankruptcy matters, which are not the least serious, would often remain unpunished. This being so, it must be hoped that a complementary text will be negotiated leading, if not to Community rules on or prosecution of offences in bankruptcy matters, at least to a satisfactory coordination of the spatial application of the various criminal legislations.

CHAPTER III - THE SCOPE OF THE CONVENTION

Title I determines the scope of the Convention.

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

I. Bankruptcy, composition and analogous proceedings

The title of the Convention, the third paragraph of the preamble and the first paragraph of Article 1 reproduce, for reasons of terminological concordance, the terms already used both by the Brussels Convention of 27 September 1968 (Article 1, 2)(18) referring to excluded matters, and that of The Hague, opened for signature on 17 March 1969, relating to the recognition and enforcement of foreign judgments in civil and commercial matters (Article 1, 5).

¹⁸Cf. for the latter, M. Jenard's Report, p. 20.

The convention applies not only to bankruptcy or to realization of assets in the present French sense, but also to the compositions and other proceedings enumerated in Article 1 of the Protocol, that is to say to any proceedings which being founded, according to different legislations, on the condition of cessation of payments, insolvency or undermining of the debtor's credit, imply an intervention of the judicial authority, not only suspending individual proceedings, but achieving forced and collective realization of assets, or simply, control of a debtor's business.¹⁹

Litigations which may arise from a scheme of amicable or out-of-court composition of a purely contractual nature, fall within the application of the General Convention. By reason of its character, the same will be true of personal insolvency ("déconfiture") under French law.²⁰

To simplify their drafting, the articles of the Convention uniformly adopt the term "bankruptcy". But, as provided by Article 1(2), these Articles are equally valid for the other proceedings governed by the Convention. It had become apparent that, as a general rule, special arrangements for these proceedings were not necessary, either because the provisions relating to bankruptcy are, by reason of their object, foreign to other proceedings (for example, deprivation of capacity to manage one's business the suspect period and realization of assets) or because the application of these texts, mutatis mutandis, does not involve any difficulty,

It has been provided otherwise, to use the very terms of Article 1(2) only at:

- Article 6(2) for the removal, whilst a composition is in progress, of the centre of administration.
- Article 46, insofar as it concerns the situation in time, of property encumbered with preferential claims or guarantees for the satisfaction of these.
- Section VIII of Title IV, for the voidability as against preferential creditors of certain effects of proceedings other than bankruptcy.

¹⁹ A solution accepted in the majority of bilateral conventions.

²⁰ Cf. M. Jenard, Report p. 20.

- Paragraph 2 of Articles 50, 54 and 61 for the execution of compositions ratified by the court and of certain orders for enforcement issued to creditors;
- Article 76 relating to the introduction into municipal law of the uniform laws;
- Article 4(5) of Annex I for the starting point of the suspect period, and
- Article IV of the Protocol as regards the contents of extracts of decisions for publication.

Let us mention here that the Convention is equally applicable to certain actions which derive directly from bankruptcy or on which bankruptcy exercises a special influence and which are limitatively set out at Article 17 (*vis attractiva concursus*). Other actions that can arise according to the legislations of Member States from the "*vis attractiva*" are excluded from the "bankruptcy" Convention and come under the General Convention.²¹

II. Binding nature of the Convention

The Convention sets out to harmonize the rules of conflict of laws and of courts of the six States, and the joint declaration at the end recalls the concern to avoid "differences of interpretation of the Convention impairing its unitary character".

Thus, even though Article I does not so state in express terms, the Convention, which is called on to establish a special legal order between the Member States of the Community, is applicable "ex officio". The government experts have formulated, especially in Title II of the Convention, precise rules on jurisdiction which form a whole and whose application must not be foiled "by the negligence or ignorance of the parties".²² This principle finds its formal expression in the provisions of Articles 15 and 16 on conflicts of jurisdiction which presuppose that judges in Contracting States will verify their international jurisdiction.

²¹ Jenard, loc. cit.

²² Batiffol, *Traité de DIP N° 713 on the Franco-Swiss Convention of 15.6.1869 (Art. 11)*.

Apart from the fact that rules of international jurisdiction are a question of public order, at least in Germany and in Italy, the substance of bankruptcy is per se a matter of public order and this feature attaches, in internal law, even to the rules of territorial jurisdiction.²³

The judge must therefore apply these provisions even if they are not invoked by the parties. The same binding character extends to recognition and enforcement.

III. The nationality of the parties does not matter

Avoiding the solution adopted in certain conventions, the Convention applies, according to Article I, 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 no discrimination may be made, as to creditors or third parties on grounds of their nationality (cf. Article 7 of the Treaty of Rome).

It might perhaps be thought that the Committee of Experts has exceeded its terms of reference, since Article 220 of the Treaty of Rome prescribes that States should engage in negotiations for the purpose of ensuring "in favour of their nationals" the simplification of the formalities governing the recognition and execution of judgments.

But the solution agreed on responds to the same imperative considerations as those which guided the authors of the General Convention (Article 2) and which have already been analysed by M. Jenard in his Report to which we refer our readers.²⁴ It is necessary, however, to add an additional consideration here.

This rests on the fact that bankruptcy is a measure of territorial application whose essential aim is to protect creditors, and which is linked to the localization of business activities conducted both by foreigners and by nationals, and with regard to which nationality can play only a very subsidiary role (cf. page 35 below).

²³ Cf. Fredericq, *Traité de Dt. com. belge* 1949, 7.VII, p. 85, Paris 5.11.64, D.S. 65 p. 635 note by Pochon; 14.11.1957, D. 58, p. 277 note by Houvin; see also Sec. 70 KO.

²⁴ Jenard, *op.cit.* p. 25 to 27; Bulow, *op. cit.* p. 1008.

A precise provision which was desired by several of the delegations was not, however, otiose with respect to certain national provisions, like paragraph 5 of the German KO, which, in certain circumstances, allows of the possibility of rules of discrimination.

IV. Excluded enterprises

Only those enterprises which carry on direct insurance of any kind²⁵ and those which are subject as to the method of their liquidation to a system analogous to that of assurance enterprises are excluded (by Article 1, 3) from the field of application of the Convention; Article II of the Protocol gives the national lists of these enterprises treated like assurance enterprises, but, however, specifies the limits of such exclusion for them.

A. The reasons for exclusion

The reasons for this exclusion rest on the consideration that, as a general rule, assurance enterprises are subject to public control in the form of an approval procedure and, in certain EEC States, in the case of insolvency or risk of insolvency, to special modes of liquidation which do not follow the ordinary law and are of more administrative than judicial nature.²⁶

The purpose of these special modes is to avoid as far as possible the dissolution of the Company by appropriate rehabilitation measures. In addition, they associate with the liquidation, when this occurs, the administrative control authority which must watch over the protection of the assured and third parties.

²⁵ It is useful to point out as regards France that the expression "insurance enterprises of every kind, irrespective of their form" covers all the enterprises falling under paras 1, 2 and 5 of Article 1 of the decree-law of 14.6.1938, that is to say, life assurance enterprises, those for marriage and birth insurance and insurance enterprises of all kinds (fire, accident, miscellaneous risks). It also includes the agricultural societies or funds for insurance and reinsurance mentioned in Articles 1235 et seq. of the Rural Code which were made subject, by a decree of 23 May 1964, to the Regulations resulting from the decree-law of 14 June 1938 and the texts pursuant thereto.

²⁶ Cf. Franco-Italian Convention of 1930 Art. 27 and Houin, op.cit. 2345.

Furthermore, according to the proposal for a first directive on coordination in the matter of direct insurance other than life assurance, insurance enterprises, apart from their technical reserves, must possess certain assets (margin of solvency and minimum guarantee fund) which, unlike the technical reserves, will not necessarily be situated in the country where they carry on business. At the time of the compulsory winding up of an enterprise, an equitable division of assets at Community level between the assured parties could not be carried out without extensive harmonization of the rules governing the cancellation of existing contracts and privileged debts.

The harmonization of privileged debts being, as already remarked (cf. page 14) a difficult work of long duration, it was considered preferable to omit insurance and enterprises treated on the same footing from the scope of application of the Convention so as not to delay even more the formulation of the latter and to remit for separate negotiations the recognition and enforcement of administrative or judicial measures relating to these enterprises. This is what was decided by the fourth point of the Joint Declaration.

On the other hand, reinsurance since it does not pose the same problems and is not subject to the regime of direct insurance, remains in principle subject to the Convention.

B. The limits of exclusion

Although exclusion from the scope of application of the Convention is total for direct insurance, it is not, however, the same for enterprises governed by a system of rules analogous to those of insurance. The reason for this is that this subjection to the system of rules for insurance is proper to certain national legislations and has no equivalent in others.

Therefore, in the first place, Article II of the Protocol lists these enterprises under national headings. It also specifies that exclusion is confined only to the territory of the State or States on whose list the enterprises are named. The other States have, therefore, jurisdiction to

decree bankruptcy or one of the other measures provided for by the Convention. The decisions thus given will have effect in all States except those which have named in their list of exclusion the type of enterprise in question, providing, of course, that the specific enterprise concerned carries on business in the territory of these States. It is the carrying on of business governed by a special system of rules which justifies exclusion; the decision given in a Contracting State must therefore be received even in States which have mentioned on their list of exclusion the type of enterprises in question, if this latter does not carry on business in those States.

V. Proceedings commenced are single, universal and exclusive

Article 2 enshrines the principle of the unity and exclusive character of proceedings referred to by the Convention. Subject to what will be said concerning jurisdiction, only one set of proceedings must in principle be pursued and the measure taken in one State produces its effects in the others and thus prevents the institution there of any other proceedings provided for by the Convention.

It has not been possible absolutely to avoid all duality of proceedings, especially when the courts of different States consider themselves to have equal jurisdiction. The unity of bankruptcy means very precisely, that among several judgments only one will be recognized on the European plane in implementation of the rules laid down by Articles 51 and 52, and will be enforced.

Apart from that, it is necessary to read Article 2 in conjunction with Articles 6(1), 60 and 73. The first of these articles institutes, for reasons which will be gone into later, a plurality of jurisdiction, on a transitional basis, in the case of transfer of the centre of administration within the EEC. Article 60 provides for the possibility of a bankruptcy having purely territorial effects in the event of the foreign judgment being declared void in a Contracting State. Article 73, finally, relates to international engagements contracted prior to the Convention with a non-member State when two bankruptcy decisions, one pronounced in one of the EEC States and the other in a non-member country, would fall to be enforced in the same State; this exception flows from the general principles of public international law.

The principle of universality of bankruptcy, which is a corollary to that of unity, is explained in greater detail at Articles 20 and 33 in connection with the effects of bankruptcy.

CHAPTER IV - THE JURISDICTION OF COURTS

I. General

Putting into operation the principle of unity, the Convention provides for rules of direct and general jurisdiction and looks to a community criterion for jurisdiction, the debtor's centre of administration.

A. Jurisdiction - direct and general

Where it was a matter of regulating the problem of territorial jurisdiction the Committee of Experts had to choose between indirect and direct rules.

Rules of indirect jurisdiction would not have been compatible with the principle of unity and universality of bankruptcy, since they operate only at the stage of recognition and enforcement. They would not have prevented multiple bankruptcies continuing to be pronounced in all the EEC countries.

Only a system of direct jurisdiction could be chosen, and it was necessary to apply it without regard to the nationality of the debtor or his creditors to ensure in an absolute and uniform manner recognition and enforcement of decisions pronouncing bankruptcy.

A new solution was therefore chosen:

The system of direct jurisdiction rests on the principle of the debtor's centre of administration. This rule is directly inspired by the principle "actor sequitur forum rei", which is generally acknowledged. It excludes, without the Convention having to say so expressly, exorbitant rules of jurisdiction such as those laid down by Articles 14 and 15 of the French and Luxembourg Civil Codes and which it will no longer be possible to apply except in a very subsidiary manner (Article 5).

.../...

The Convention thus determines the direct jurisdiction of the courts of a State but not that of any particular court of this State. From this point of view, therefore, the internal provisions of the Member States remain applicable. It is for this reason that the Convention uses in Article 3 and following the expression "the Courts of the Contracting State on the territory of which" It is a matter therefore of "international" or "general" jurisdiction and not of "territorial" or "special" jurisdiction.

B. The criterion of the debtor's business seat

The choice of the criterion of jurisdiction to be included in the Convention was the subject of long debates in the Committee.

An examination on this point of the existing laws²⁷ and Conventions permits the conclusion that for physical persons, jurisdiction is generally granted to the court of their domicile, that is to say for traders, to the court of their principal commercial establishment; while for companies it is in principle the court of the place of their registered office (siège social) which must pronounce bankruptcy.

²⁷ Belgium

Article 440 of the Commercial Code:

"Any bankrupt will be required, within three days of cessation of his payments, to reveal this to the registrar of the Commercial Court of his place of domicile".

"In the event of the bankruptcy of a partnership the report will be made to the registrar of the court in whose area of jurisdiction the main seat of the establishment is situated". By "domicile" is to be understood the principal establishment: Cass. 30 Oct. 1933, Pas. P. 45.

"The principal establishment of a trader whose activity has several branches is in the town where he directs his business". For the judicial composition: Cass. 28 September 1959, Pas 1960, p. 125.

"The Commercial Court with jurisdiction to have cognizance of an application for a judicial composition made by a company is that of the arrondissement in which the company has its principal effective establishment, even if the head office indicated in the Articles is situated in another arrondissement". To the same effect, Fredericq, *Traité*, VII, p. 56, van Rijn, *Principes*, t IV, N° 2650; Cloquet-Novelles, *Ve Faillites et Concordats*, p. 793; Rep. Prat. Dr Belge: *V^e Faillite*, N° 125. However, mention must be made of Article 36 of the Code Judiciaire which came into force on 1 January 1969 and Article 631 effective from 1 November 1970.

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contd.

Article 36

For the purposes of this code, the following are to be understood:

- by domicile: the place where the individual has his principal entry in the registers of the population;
- by residence: any other establishment, such as the place where the individual has an office or engages in a trade or industry.

Article 631

The bankruptcy is declared by the court of the domicile of the bankrupt at the time of cessation of payments.

When the bankruptcy is declared in Belgium, litigations concerning it are of the exclusive competence of the court in the arrondissement of which it is opened. As regards judicial compositions, the request must be addressed to the judge of the place of domicile of the applicant. Article 631 of the Judicial Code should normally not prevent the maintenance of the abovementioned constant competence and jurisprudence and of the interpretation given to the law on bankruptcies.

Federal Republic of Germany

- See 71(1)RO: "Exclusive jurisdiction in the matter of bankruptcy lies with the "Amtsgericht" of the place where the bankrupt has his commercial establishment or, failing this, with the "Amtsgericht" of the place which determines general legal jurisdiction with regard to the bankrupt".

Within the meaning of this provision, a "commercial establishment" is the principal establishment. In addition, for physical persons, the general legal jurisdiction (der allgemeine Gerichtsstand) is determined by the domicile, the residence or the latest domicile of the bankrupt and for legal persons in private law, by the statutory head office (cf. Secs 13, 16 and 17 ZPO). An act having legal force (Rechtsverordnung) may, under certain conditions, attribute jurisdiction in a bankruptcy affecting the areas of several "Amtsgerichte" to a single one of these.

- See 238(2)RO: "When the debtor has in the German Reich neither a commercial establishment nor a criterion of attachment by which it would be possible to determine a general legal jurisdiction, a bankruptcy procedure shall be opened with regard to the properties of the debtor situated on the national territory, when he exploits on this territory in the capacity of an owner, holder of the usufruct or lessee, a property comprising buildings for living accommodation or building for economic use. The "Amtsgericht" in whose area the property is situated shall be exclusively competent for the proceedings".

- See 2(1) first clause Vg10 refers to these rules for the "gerichtliches Vergleichsverfahren".

France

Article 1 of decree N° 67-1120 of 22.12.1967:

"The court having territorial jurisdiction to deal with the procedure of judicial settlement or realization of the properties shall be the

Three solutions received the Committee's attention:

- to grant jurisdiction to the court of the State where the debtor has his principal commercial establishment or, in the absence of this, his domicile, especially for non-traders. But, although in Belgium and Luxembourg, where the court having jurisdiction is that of the debtor's domicile, the term "domicile" is accepted in legal writings and law, in a commercial sense,²⁸ it is not the same in the Netherlands, which have abolished every distinction between traders and non-traders, and where case law has precisely stated that the concept of domicile was solely that of civil law.

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.. contd.

one in whose area the debtor has his principal establishment or, if it is a matter of a legal person, his office, or failing an office, in France, his principal establishment."

Italy:

- Art. 9 l.f. (Royal decree of 16.3.1942):
"bankruptcy shall be declared by the court of the place where the entrepreneur has the principal seat of the enterprise. An entrepreneur who has the principal seat of his enterprise abroad may be declared bankrupt in Italy even if a declaration of bankruptcy has been pronounced abroad. This article does not derogate from the international conventions in force".
- Arts 161 and 187 l.f. refer to these rules for the concordato preventivo and the amministrazione controllata. Read in connection with Arts 43, 46(2), 2196 and 2197 of the Civil Code.

Luxembourg

- Art. 440 C. com. (law of 2 July 1870); law of 14 April 1886, amended by the law of 1 February 1911, on the preventive composition in bankruptcy, Art. 3(1). Cf. Belgium.

The Netherlands

- Art. 2 (faillissement) and 214 (surséance van betaling) of the F.W. of 30.9.1893:
 - for physical persons: the rechtbank of the domicile of the debtor or, if the debtor has no domicile in the Netherlands but nevertheless exercises a profession or a commercial or industrial activity there, the rechtbank of the place where the "Kantoor" (= establishment, shop, store) is situated;
 - for legal persons, that of the office considered as the domicile for this purpose.

²⁸ Cf.

Fredericq, *Traité de dt commercial belge*, 1949-VII, part one, 85 et seq. - See for France, Ripert and Roblot, *op. cit.* 5ème ed. 1964, N° 2772, concerning the former art. 438 C. Com. in its 1889 version. Cf. also Tribunal Amsterdam 15.2.1957, N.J. 1957 N° 320 and Clunet 1961, p. 902, concerning Art. 20 of the Belgo-Netherlands Treaty of 28.3.1925 which gives first preference to the jurisdiction of the "domicile".

.../...

- to provide, following the example of the Benelux Treaty (Article 22), for the jurisdiction of the principal commercial establishment and of the domicile, the principle of which court is seized first providing the solution to any conflict between two courts basing their jurisdiction on one or the other. But this solution involved the major drawback of increasing the number of courts having jurisdiction and permitting a finding by a court which, in fact, could be badly situated locally to open the bankruptcy and supervise the ensuing proceedings.
- to introduce a new criterion which had the dual advantage of defining the permanent and unquestionable seat of the debtor's economic activities whilst at the same time best respecting the known criteria of internal systems of law.

This last solution was finally judged the only satisfactory one. The criterion or standard adopted is that of centre of administration (Centre des affaires), an expression inspired by the works of certain authors and by writings prepared by the Institute of International Law at Paris in 1894 and at Brussels in 1902, as well as the Franco-Italian Convention of 1930 (Article 28).²⁹ At Article 3(2), the Convention gives a definition for centre of administration which forms an essential element of this. It therefore merits a special examination.

The centre of administration is the place (a) where (e) the administration (b) of the principal (d) interests (c) of the debtor is usually carried on.

- (a) "place": this is a matter of a material criterion of territorial localization. We recall that, according to its first article, the Convention is applicable whatever the nationality of the parties. This place may, moreover, be situated outside the EEC.
- (b) "where the administration is carried on": this term was preferred to "direction" (management), it is sufficiently neutral to be applied to physical as well as legal persons, to traders as well as non-traders. Everyone administers his property. This element of the definition juxtaposes a material standard and an intellectual standard (the fact of administering by means of decisions). The principal place of operation is therefore to be excluded.

²⁹ It is true to say, that the writings use the formula "principal seat of business" (cf. the Annual of the Institute of International Law Vol. XIII, p.279); the draft German-Austrian Convention of 1966 uses the idea of the centre (or principal place) of economic activity" (Art. 2(1)). L. HUMBLET

In the case of subsidiary companies or firms, the place from which the directives come for the management and administration of business must also be excluded. The centre of administration of a company is the place where it has its main centre for the administration and management of its affairs, even if the decisions taken there follow directives emanating from shareholders residing elsewhere.

As regards more specifically companies and legal persons, Article 3(2) lays down a simple presumption, according to which in the words of the Convention, "this place is presumed" until proved otherwise "to be that of the Registered Office". The objectives being different from those relating to the recognition of companies, the Committee has not made reference to the criteria contained in Article 58 of the Treaty of Rome completed by the General Programmes of 18 December 1961 relating to the abolition of restrictions on freedom of establishment and services.

These criteria are explained by the fact that it is a matter of ensuring to companies really belonging within the Community, the benefit of freedom of establishment provided under the Treaty by placing them on the same footing as national companies.

The centre of administration therefore corresponds for companies and legal persons to their real seat³⁰ in accordance with the bankruptcy laws of the EEC States, with the exception of German and Dutch law.³¹ Proof to the contrary with regard to the presumption of Article 3(2) will be brought if need be by the company itself when the Registered Office is not in the same

²⁹ (cont'd)

is the first author to speak of "centre des affaires" (Traité des faillites 1880, N° 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, Mém. Louvain 1969 and especially p. 112 et seq.

³⁰ Cf The Hague Convention of 1.6.1956 (Article 2(3)) and the Brussels Convention of 29.2.63 (Article 5): those Conventions define the real seat as being the place where the central administration is established. Article 262 of the draft regulation on the Articles of Association of the European Company however transforms the presumption of Article 3(2) into an absolute rule by reason of the guarantees afforded by the constitution of the European Company.

³¹ French Supreme Court 5.5.1952, D. 1972, p. 507 and 15.6.1957, D. 1957-596; Fredericq. op. cit. t. VIII, 2nd Part p. 774. Since then the Netherlands has formulated a new Civil Code, Article 10, Book I of which provides that the domicile of legal persons is at the Registered Office, and one may

place as the real seat and only this latter is to be referred to in situating the centre of administration. It will be the same in Contracting States where the concept of registered office would not or would no longer correspond to the Community idea of a centre of affairs.

- (c) "interests": the Committee proposed to avoid here the word "affaires" (business) which gives too much of an impression of commercial or industrial activity. Of course, what is important in ascertaining jurisdiction is the place where the business is administered and not that where its interests are.
- (d) "principal": in a case where the debtor carries on many business activities from different administrative centres, the one which is related to the principal interests will be chosen.
- (e) "habitually": this term implies continuity in the same way as it qualifies the notions of "residence" or profession in the definition of a trader often given.

The centre of administration, that is the actual place from which the individual enterprise or the company is managed, is thus often found to be very close to the criteria of jurisdiction evolved more or less convergently in the Member States: it seems possible for it to correspond fairly exactly with the definition given by case law in France for "principal establishment" for traders³² and in Italy the definition for "principal seat of the enterprise".³³

³¹ ... (contd)

wonder if the interpretation of "seat" in the meaning of Article 2(6) F.W., understood as being the place where the Company has the principal place of its commercial activities and not its Registered Office (which interpretation was given by case law) remains valid (Rotterdam Court 10.6.1914 Ned. Jur. 1914, 876). See also below Note 34.

³² Paris 14.11.1957 D. 1958, p. 277, note by Houin "place where the trader exercises his management activity, where he concludes contracts with his suppliers, bankers and clients, thus, where the legal and external centre of his business is to be found". Art. 1 of the decret of 22.12.1967, adopting the terms of the former Art. 437 C. Com., also uses for companies the expression "principal establishment" when there is no registered office in France. It is evident that this expression must be understood as meaning a secondary establishment or a branch and, in the case of their being more than one establishment in France, the principal or the most important of these establishments - see below note 37.

³³ According to Italian case-law (Cass. 19 January 1963, N° 64, 28 June 1961, N°. 1563), there is to be understood by "principal seat of operations of the company" the effective centre of the life of the company, either the place where it has its directing and administrative organs and where it

In the case of a debtor having his principal commercial establishment in Antwerp, his centre of administration in Rotterdam, and his personal domicile at The Hague, the Convention confines itself to giving exclusive jurisdiction to Dutch courts in general, and the rule of Dutch law relating to the special jurisdiction of the court of the place of domicile can be applied.

The Committee's concern was in fact to approximate the different legislations and to avoid creating, in relation to them, an entirely new system of law which would be difficult to integrate into them.

Judges will, however, have to be careful not to allow themselves to be misled by apparent similarities. Two remarks are necessary in this respect.

The centre of administration, which constitutes the pivot around which revolves the machinery of the Convention, must for reasons previously expressed, be in principle the criterion to be observed in the first place, ex officio if necessary, for all bankruptcies to be opened in the six Contracting States.

This concept must be examined from a Community point of view and in the very spirit of the Convention, and not as a consequence of the *lex fori*³⁴ in order to avoid, as far as possible, differences of interpretation and conflicts of jurisdiction which are particularly regrettable in bankruptcy matters. As an indication, it should be pointed out here that it follows from the definition in Article 3 that at any given moment there can be only one centre of administration whether it is situated inside or outside the European Communities.³⁵

33 ... (contd)

exercises all its activities or at least its main activity as regards the operation of the enterprise, even if the office declared and registered for administrative purposes is different.

34 Cf. Trochu, *op. cit.* p. 69-70. So it must be pointed out, for example, that according to the Belgian Companies law, the standard for determining the Head Office (*siège social*) is the real office or seat (*siège réel*) and not the statutory office (i.e. registered place of business): the presumption in favour of the statutory office will only operate for the application of the Bankruptcy Convention as specified by Article 5(2).

35 Cf. the opinion expressed by Prof. Beitzke, EEC document 4958/IV/62-F, p. 18. Difficulties could exist for certain international companies such as the Franco-German "Coal Union of Saar and Lorraine" (Saorlar) for which the Treaty of 27 October 1956 relating to the Saar (Article 84) lays down two registered offices, and for the European Company, which could have several such offices (Article 5 of the draft regulation).

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

Section I - General provisions

This first section establishes essential distinctions from which flow rules for the jurisdiction of courts provided by the Convention.

Articles 3 - 5:

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

1. If a debtor, a natural or a legal person, has his centre of administration in one of the EEC States, e.g. in Italy, the Italian Courts have exclusive jurisdiction to pronounce bankruptcy, to conduct the bankruptcy proceedings and to pronounce their closure. All other Contracting States must therefore, even ex officio declare themselves without jurisdiction, subject to what is said at Article 15(1).

2. Suppose on the other hand that the debtor has not a "centre" in one of the EEC States, it being located in the United States or having been transferred there more than six months earlier (cf. Article 7 below), but that he has a single "establishment" situated either in Germany or in Belgium; in this case only the German or Belgian courts inevitably have jurisdiction to pronounce bankruptcy which will produce effects in the other EEC States.³⁶

Article 4 does not define "establishment", a term which is also used in Article 38. It is important to draw attention here to the fact that in these two Articles, the term "establishment" cannot have exactly the same meaning. In Article 4 of the Convention "establishment" must be understood to be secondary business premises, an agency or a branch, that is to say, any base for industrial or commercial activities, which differing from a subsidiary company,³⁷ remains directly dependent on the principal office (seat) of the enterprise and has therefore no debts of its own.³⁸

³⁶ This being contrary to Belgian law (which bases the jurisdiction of Belgian Courts solely on the situation in Belgium of the domicile or the principal business premises 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 inferred from 238 par. 1 K.O.).

³⁷ Cf. Note 32 above. The establishment could thus be equivalent to the "principal business premises" of a legal person not having its "seat" in France (Article 1 of the decree of 22.12.67, in fine).

³⁸ See GAVALDA, op. cit. p. 217 and TROCHU, op. cit. p. 85.

The same enterprise, an individual or a company, can have establishments in several Member States. In this case the courts of these different States have equal jurisdiction whatever the relative importance of the establishments. It might have seemed more logical to give exclusive jurisdiction to the courts of the country where the most important establishment is found. But overriding practical considerations precluded such a solution, which would necessarily involve difficult verification 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 rules for "general" jurisdiction, did not need to bother about the position where there might exist several establishments in the same State. Then it is the internal provisions which determine which court of this State should have jurisdiction, without it being necessary to refer to Article 15(2), which relates to the presence of establishments in several Member States.

This subsidiary rule of jurisdiction, founded on the presence of an establishment, is subject to an important exception, which will be found again later in relation to recognition of judgements, and which flows from Article 73 already mentioned. The hypothesis practically concerns only France, which is linked with Switzerland and the Principality of Monaco by Conventions which lay down rules of direct jurisdiction and which ensure the unity of bankruptcy.³⁹

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

³⁹ Cf. Batiffol, op. cit. 3rd edition, N° 708 et seq.; Valensi, op. cit. N° 556; Trochu, p. 38 and 127 - Adele: Hirsch, Aspects internationaux du droit suisse de la faillite, Mem. Fac. Dt. Geneva, N° 27 (1969).

⁴⁰ Cf. Weser, Projets de Convention entre les Etats de la CEE relative à la faillite, Jurisp. Com. Belgium, 1968, IV, p. 152.

It is therefore in this situation only that application can be made of the special provisions of internal law, no longer to determine which of the courts in the State should be seized but for giving jurisdiction, in compliance with the Convention, to the courts of this State. This will be the case in particular with the rules of internal law which permit summoning before the national courts one of the parties by reason of his nationality or the existence of assets (cf. Art. 9(1).f. and Sec. 238 KO) or of debts (French case law) (40,a). We recall that Belgian law does not recognize this possibility and that, consequently, Article 5 would seem inapplicable in Belgium. We see, further, that these purely national rules of jurisdiction will be the only ones permitting pronouncement of bankruptcy in the case provided for at Article 60 of the Convention.

Articles 6 to 8:

After having defined the possible heads of jurisdiction the Committee had to examine the problem of conflict of jurisdictions in the time resulting from the debtor transferring his centre of administration or establishment before the opening of proceedings. The Committee also had to provide, in the case of transfer, for prolonging the jurisdiction of the seized, as long as the proceedings are not closed.

In bankruptcy matters, the Court's jurisdiction involves legislative jurisdiction. A transfer could therefore be made with the debtor planning to choose his own judge and submit himself to a legislation he considers more favourable.

For the transfer of the centre of administration or of the establishment within the EEC, which it is useful to remember, can be greatly facilitated by freedom of establishment, three solutions were possible:

- exclusive jurisdiction for a time for the courts of the country of origin;
- usual jurisdiction for the courts of the country of transfer, with, however, exclusive jurisdiction for the courts of the country of origin in the event of fraudulent transfer;
- cumulative transitional jurisdiction for the courts of the two countries.

40^a All legislations contain provisions for bankruptcy after death, particularly by providing a fixed time for opening bankruptcy proceedings. German legislation is different from others in so far as it relates especially 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 F.W.).

The last solution was agreed on despite the risk of duality of decisions and the debtor having an opportunity to determine which court shall have jurisdiction and the law applicable. Here again, considerations of a practical nature were decisive. Fraud is often difficult to establish. A transfer can appear normal to a judge of the new business seat and fraudulent to the judge of the country of origin or vice versa, from which irreconcilable decisions could have resulted. Sole jurisdiction granted either to the judge of the former seat or to the judge of the new one would not have been satisfactory. It is impossible to determine a priori who is in the best position to follow the course of the proceedings and one could not allow a non-trading debtor to escape bankruptcy by transferring, in extremis, his centre to a country whose law does not allow bankruptcy of non-traders, or forbid the judge of the new centre from seising himself of a situation which relates to public policy.

This necessary duality of jurisdiction could, however, only be transitional. Since creditors - or judges where they have the power to act ex officio - must be vigilant, a period of six months from the transfer of the centre seemed adequate.

The same considerations applied all the more since, in the event of transfer of a centre or an establishment to a non-contracting State it would have been difficult to deny jurisdiction to courts of third States where the new centre was situated. But it goes without saying that the provisions of Article 7 apply only subject to the possible application of other international Conventions binding the Contracting States with third States.

There remained to examine the more special case of a debtor transferring, while bound by a composition which might take several years to carry out, his centre of administration or the establishment which had been the basis of jurisdiction for the Court seised, to another Contracting State. The first sentence of Article 6(2) conveys the generally accepted idea that the jurisdiction of a court is assessed at the moment it is seised and not at the time of the judgment; from the time when a court is validly seised, changes which occur either in the capacity or domicile of the parties have no influence on jurisdiction. Moreover, it is not possible successively to

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apply two laws which might be totally irreconcilable: from the time a court has pronounced one of the measures provided for by the Convention, it must retain jurisdiction, not only to supervise the course of the proceedings, but also to decide on all incidental matters which may lead to making other arrangements. This text is, however, not imperative but only permissive; for if, in certain systems of laws such as the French law of "Règlement Judiciaire" (judicial administration) the cancellation of the "concordat" brings back into operation the old procedure of "règlement judiciaire" and leads of necessity to all the creditors being in a state of union, in other legislations, like the Dutch, the final approval of the composition in bankruptcy or in suspension of payment, in principle closes the proceedings, and if the cancellation of the composition may nevertheless be pronounced, this cancellation does not automatically cause the resumption of the old procedure of bankruptcy or suspension of payment.

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

The only difficulty to resolve was that flowing from the existence of new debts arising from new business activities in the country of transfer, incurred by a debtor who was in enjoyment of a composition. The Committee was satisfied by a solution which departs from the ordinary operation of the rules of jurisdiction laid down by the Convention only if the first court, which virtually has priority of jurisdiction, itself draws the conclusions from the debtor's new situation sufficiently early. The rule included in the last sentence of Article 6(2) therefore became necessary to avoid the possible survival of the former proceedings which, but for this provision, would have had to be considered the first in date.

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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, the judicial administration into realization of assets. Any decision which is nevertheless made pronouncing such a conversion would have to be declared worthless (cf. p. 137 below, Article 52). 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 debtors who are non-traders, and secondly for companies and legal persons and their directors or managers (Art. 10 to 14).

Article 9 must be read in conjunction with Article 56 in order better to understand the system - moreover fairly simple - applicable to bankruptcy of non-traders or small businessmen* in the meaning of Italian law.⁴¹

This system rests on the distinction between jurisdiction to pronounce the bankruptcy of these debtors and the recognition of such a bankruptcy.

We know that, regarding the opening of civil bankruptcy proceedings, 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 order, whereas German and Dutch law, like the common law systems, make no distinction following the category of the debtor. The evolution of Dutch 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 erased any distinction between traders and non-traders and has abolished the concept of a commercial act; the new Civil Code will embrace all commercial law and the Commercial Code will be repealed. Since the law of 13.7.1967 France

⁴¹ By "small business" must be understood one whose income is less than the taxable minimum 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.

* "piccoli imprenditori".

has occupied an intermediate position. Although it now allows the liquidation of property owned by a legal person in private law, even a non-trader, it has retained for physical persons the distinction between traders and non-traders.⁴²

On the other hand, the case laws of States which do not allow the initiation 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 does not make the same demands, depending on whether its a question of giving effect in a national territory to a state of affairs regularly brought about abroad or directly bringing it about there.⁴³ This special application to bankruptcy of the idea of the attenuated effect of public policy is approved by modern legal writings, which see in it a consequence of the universality of bankruptcy.⁴⁴

To confine the Convention to bankruptcies of traders, as certain Conventions have done,⁴⁵ would have struck an unjustified blow at the fundamental principle of universality. Article 9 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. But, according to the provisions of Article 56, which obviously reserve the case of Article 9(2), a voidability action may not be brought in any Contracting State on the grounds that the foreign bankruptcy judgment is contrary to public policy for the sole reason that it concerned a non-trader (Art. 56(2)(d)).

⁴² Save in the special legislation applicable in the three departments of Alsace-Lorraine, French law allows also the extension of liquidation of property of companies to their directors and managers who are not always traders in law (Articles 100 and 101 of the 1967 Law).

⁴³ Civ. 20.5.1967, Rev. crit. DIP 1968, p. 87, note Gavalda; Cluzat 1967, p. 629, note Bredin; Jur. com. Belgique 1968, IV, p. 493, note Lemontay.

⁴⁴ Trochu, op. cit. p. 98 et s.

⁴⁵ The draft Convention prepared by The Hague Conference in 1925-28 did indeed contemplate 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 the case of a trading debtor (Art. 9(2)). The Benelux Treaty is applicable to proceedings relating only to traders and makes provision for rules governing qualification under it (Art. 28).

Some examples will help us better to grasp the combination of these two rules:

- If a non-trader has his centre of administration in Germany or failing a centre in the EEC, he has an establishment in Germany, his bankruptcy can be pronounced in Germany and will produce effects in all the other Contracting States.
- If this debtor has his centre in France and an establishment in Germany, bankruptcy can be pronounced in Germany (Art. 9(1) and will produce its effects in the other States, with the exception of France (Art. 9(2)).
- If the same debtor has two establishments within EEC territory, one in Germany and the other in France, his bankruptcy can be adjudicated only in Germany but will have effect in all the other Contracting States including France (combination of Articles 9 and 56).

Thus, without this involving a uniform system of civil bankruptcy, the enforcement of a foreign bankruptcy decision will only be ineffective in the country where the centre of administration is located if this measure could not be taken there.

Article 10. Several legislations provide that the bankruptcy of a company automatically involves the bankruptcy of the partners where they are held to have unlimited and joint and several liability for company debts (partners in trading partnerships, partners in limited partnerships).⁴⁶

The court of the "siège social" (head office of the company) then normally has jurisdiction to pronounce bankruptcy of partners, even if these or some of them are domiciled elsewhere.⁴⁷

⁴⁶ Cf. Arts. 97 of the French law of 1967 (former Art. 445 C. Com), 4(2) F.W. and 147 Italian bankruptcy law. See also, for Belgian jurisprudence, Coppens, "L'extension de la faillite du maître de la société" in *Idées nouvelles dans le droit de la faillite*, Travaux de la IV^{ème} journée d'études juridiques Jean Dabin, Louvain (Brussels 1969), p. 171 et seq.

⁴⁷ Cf. combined provisions of Art. 97 of the French law of 1967 and 4(2), 5th decree of 22.12.1967 - Ripert and Roblot op. cit. N° 2748 and 2773.

On the other hand, other legal systems, such as the German, do not recognise the principle of "bankruptcy common to partners"⁴⁸ and confine themselves to providing for certain contingences when the bankruptcy of the partnership coincides with that of a partner (cf. 211 and 212 K.O.).

Article 10 does not change national legislations in any way as regards the possibility of adjudicating the bankruptcy of partners consequent on that of the company. It confines itself, when this possibility exists under the law of the country where the bankruptcy of the company was initiated, to giving jurisdiction to the courts of this country to declare the partners bankrupt. The decision thus taken will be recognized and will have effect in the territory of the other Contracting States. This is an appreciable advance on the existing treaties and - especially the Franco-Belgian Treaty of 8 July 1899⁴⁹ - which did not envisage the case of the bankruptcy of partners.

Certain delegations had expressed the fear that this common bankruptcy, unknown to their legislation, might be a surprise for partners not having their personal centre of administration in the country of the registered office, particularly when the civil bankruptcy is pronounced ex officio. It is quite certain that the partners will have to be personally summoned before the tribunal and given an opportunity to prepare their defense⁵⁰ and to make use of the legal remedies provided by the law of the court. Any violation of this fundamental rule would justify an action to challenge (Art. 56).

⁴⁸ This expression used in French practice is inexact, there being as many distinct bankruptcies as there are partners, since it is obvious that the assets and liabilities are not the same for all. Moreover certain partners can be allowed judicial administration while liquidation of property will be pronounced against others. Bankruptcy is called "common" in the sense that it is often convenient to nominate the same assignee and the same "juge commissaire" (bankruptcy judge) and the cessation of payments of the partners results from that of the company.

⁴⁹ In a judgment of 4.1.1927 (Clunet 1928 p. 942) the Paris Court of Appeal rejected the unity of bankruptcy enshrined in Article 8 of the Treaty, considering that although this treaty was opposed to several bankruptcies being declared against the same assets it did not demand that the same bankruptcy should embrace different objects such as the distinct assets of the corporation and of the partners.

⁵⁰ Under the terms of Article 2 of the French law of 13.7.1967, when the court takes up the case ex officio, the debtor must be heard or duly summoned. Art. 6 of the decree of 22.12.1967 lays down that, before the judicial settlement or realization of the assets are pronounced ex officio, the President of the court shall have the debtor convened by the clerk of court, by extra-judicial instrument, to appear within a time-limit he fixes before the court sitting in council. In Italian law (Art. 147 l.f.) partners with indefinite liability must be given a prior bearing. .../...

The provision of Article 10 also needs to be examined in relation with those in Articles 13 and 14. As these are also common to the cases covered in Articles 11 and 12, they will be studied in the second place.

Articles 11 and 12 which must be studied together as well as Articles 1 and 2 of Annex 1, to which they refer the reader, present two special features in relation to the above Article 10. Contrary to the latter which, by its very contents, does not apply to joint-stock companies, Articles 11 and 12 concern all companies and legal persons. Furthermore, they refer to uniform provisions of substantial law. A rapid examination of the various legislations involved will reveal the reasons for this solution.

French law allows of "extending" the judicial settlement (*règlement judiciaire*) or the realization of properties of any legal person to the de jure or de facto directors (a physical person or another legal person) of the latter who act as if the company were their personal business.⁵¹ Although there does not exist in any other of the six States a legislative provision identical to that of French law, a fairly similar result is, however, obtained in Luxembourg and Belgium thanks to the theory of the fiction and the straw-man⁵² and in Italy by using the concepts of the de facto hidden partner or "tyrant".⁵³

⁵¹ Cf. Art. 101 of the law of 13.7.1967 which took over and extended the old provisions of Art. 446 C. com. Strictly speaking, what is "extended" is not the measure inflicted on the company but its debts to which will be added the personal debts of the director(s). Two or more distinct measures are pronounced: their particular feature is that they are of the competence of the same court and are attached to the same date of cessation of payments, that of the legal person, for the cessation of payments exists only with respect to the latter. If the director is solvent, the measure pronounced against him will be rescinded after payment of the global debt for lack of interest of the general body of creditors. Cf. Legeais, *L'extension de la faillite sociale* Rev. Trim. Dt Com 1957, p. 289 et seq. Plaisant, *Durchgriffshaftung im französischen Konkursrecht, in Konkurs-Treuhand- und Schiedsgerichtswesen* 1962, p. 74.

⁵² Cf. Coppens, *op. cit.*

⁵³ Cf. Biglavi *L'imprenditore occulto*, Padua 1954, see Secs. 414, N° 1, 428, N° 9; Resp. ill. del socio tiranno, Foro it. 1960, I, 1180 and Cass. 29.10.1963 N°. 2982, Foro. it. 1964, I, 543. But see against: Provinciali: *L'uomo di Cirene et la società irregolare* in Dir. Fall. 1962, II, 620; and Cass. 10.4.1957, N°. 937, Giur. it, 1953, I, 1, 777; as regards the consequences in international law, cf. also Fois, *Considerazioni sulla deliberazione delle sentenze straniere di estensione del fallimento*, Riv. di diritto, intern. priv. e proc., t III, 1967, p. 246.

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But it is not the same in the Netherlands or Germany.

Apart from this possible application, French law permits in the event of insufficiency of registered assets of the company that any directors or managers who have not shown the required diligence be charged with the whole or part of the debts of the company and if they do not pay these debts, the court may pronounce judicial administration or liquidation of their property.⁵⁵

In all cases the Court having jurisdiction is that which pronounced the judicial administration or the liquidation of the property of the legal person.

These provisions have no parallel in other legislations.

It is therefore easy to understand the difficulties to be solved where the directors involved have their centre of administration in a country other than where the bankruptcy was initiated.⁵⁶ To recognize, according to

⁵⁴The theory of *Durchgriffshaftung* worked out by German case law and doctrine enables the party which has suffered damage following a legal act, not only to proceed against his co-contractor, but also, under certain conditions, to get at the "Hintermann". Cf. Unger, *Die Inanspruchnahme des verdeckten Kapitalgebers*, in *Konkurs-Treuhand- und Schiedsgerichtswesen* 1959, p. 33 and Erman, *Zur Frage der Haftung der Hintermänner Überschuldeter Gesellschaften*, *ibid*, p. 129.

⁵⁵Articles 99 and 100 of the 1967 Statute and 95 to 97 of the decree of 22.12.67 to which reference is made by Articles 54, 114, 150, 248, 249 and 260 of the law of 24.7.1966 on commercial companies (former Articles 4(5) of the Statute of 16.11.1940 and 25(2 and 3) of the amended law of 7.3.1925) to free themselves from their presumed responsibility the directors or managers involved must prove that they exercised in the management of the affairs of the company all necessary activity and diligence. This presumption of responsibility applies not only to those directors or managers who were in office on the date when the company was declared to be in a state of "judicial administration" or liquidation of its property but also to former directors or managers since deceased or retired if the company's difficulties stem from a time when they were still in office (Cass. Com. 4-2, 19-3 and 12.5.1969, D 1969, p. 584).

⁵⁶The Paris Appeal Court, in a judgment of 7.11.1962 (*Revue Trim. Drt. com.* 1963, p. 378 note by Houin and the *Revue Droit Comm.* DIP 1965, p. 125 note by Weser) considered that, in application of Article 8 of the Franco-Belgian Convention of 1899, according to which the court of the company's head office has sole jurisdiction to declare the bankruptcy of a French or Belgian company, a French court which has adjudicated bankrupt a French company has no jurisdiction to pronounce, under Article 446 of the Commercial Code, the extension of this bankruptcy of a Belgian company or firm having its seat at Antwerp. The court specified that there was no need to have regard to rules of French international law giving jurisdiction to the court of the bankruptcy to pronounce such an extension, which was, moreover, unknown to French law in 1899. See also Cass. Com 19.3.1957 B. III N°, 106 and 15.11.1961 J.C.P.

the general rule, the jurisdiction of the court of the principal establishment of a director or manager would lead to an impasse where the law of the court did not recognize provisions analogous to those of French law in the matter. Concern to ensure the good administration of justice moreover made it imperative to give jurisdiction, as far as possible, to the court that had pronounced the bankruptcy of the company. But the problem went beyond questions of competence. It was desirable to enter upon the path of legislative unification to avoid over-clever directors locating their personal centre of administration in a country where they might consider they would be sheltered from the consequences of their machinations.

In these conditions, the Committee took as its aim the framing of a dual uniform law (Articles 1 and 2 of Annex 1) based on the provisions of French law already mentioned, after having laid down in Articles 11 and 12 of the Convention rules of general jurisdiction in favour of the State where the bankruptcy of the company was initiated, which is best placed to assess the true position of a legal person.

The first of these laws establishes a uniform system for the bankruptcy of directors of a company itself in bankruptcy by extending to these directors under whose authority the company debts were incurred (Art. 1 of Annex 1) measures within the jurisdiction of the courts of the country where the bankruptcy proceedings began (Art. 11 of the Convention).

The Contracting States which consider that they cannot adopt this uniform law as they may do in accordance with (a) of Annex II (such is the position of the German Federal Republic), undertake, however, to recognise a bankruptcy pronounced in other States by application of this uniform law, even if the director or manager has his personal centre of administration within their territory.

The gaps left by these regulations are filled by the second uniform law contained in Article 2 of Annex 1.

56(contd)

1962 11.12.1963. On the other hand, the Ghent Court of Appeal, in a decision on the enforcement of a French decision which condemned the Belgian managing director of a Luxembourg company having an establishment in France to pay part of the debts (Douai 1.12.1955, Rev. crit. D.I.P. (p. 496) 1956 note by Loussouarn) considered that the presumed liability and the power to make the director responsible for part of the company debts was not contrary to Belgian international public policy (Ghent 16.11.1959, Clunet 1962 p. 1066) See Trochu, op. cit. p. 241 et s.

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Without unifying the system of liability for company directors and managers⁵⁷ this Article gives jurisdiction to the courts of the country where the bankruptcy of the company was initiated, to assess the liability of these directors and managers (Article 12(1) of the Convention) and to adjudicate their bankruptcy (Article 12(2) if they do not pay the company debts for which they are made liable (Article 2 of Annex 1).

Hence Articles 1 and 2 of Annex I have defined, for each internal legal system, two uniform cases of initiation of bankruptcy accompanied, in Articles 11 and 12 of the Convention, by rules of international jurisdiction ensuring the unity of the bankruptcy⁵⁸ and which operate even when the personal centre of administration of the director or person responsible for the management of the company is not situated in the State which had pronounced the bankruptcy.

These provisions call for the following further remarks.

As these are uniform texts, the provisions of Annex 1, whilst becoming provisions of internal law, must be interpreted in a uniform manner in the case law of each Contracting State. This is particularly so for Articles 1 and 2, which constitute an innovation for countries other than France. For this purpose, it is important to spell out precisely the scope of these texts. First of all, and in a general way, the directors to whom these provisions may be applied are those who de jure or de facto, overtly or covertly, have taken part in the management of the company or legal person. These directors may be physical as well as legal persons. The fact that certain directors or managers are bound to the company by a contract of employment does not itself exclude them from being directors de facto.

⁵⁷ For the law applicable, one may well hesitate between the law governing the company, the *lex loci delicti* and the law of bankruptcy c.f. Gavalda op.cit. p. 221 and Trochu op. cit. p. 245.

⁵⁸ This attachment to the jurisdiction of the courts of the country where the bankruptcy was initiated conforms with French jurisprudence, which has specified that an action for making good the insufficiency of company assets is an action arising from the bankruptcy which is a precondition for it. (Cass. com. 14.10.1959, J.C.P. 1959 - 11 - 11.308, note by Nectoux).

The Committee has not drawn up a list of these directors which would have had to be revised to take into account changes in company law, and which would have been of necessity incomplete especially in reference to companies whose head office is situated outside the Community. Moreover, since the Committee was understood to have in view de facto as well as de jure directors, a list was of no interest.

The formula, closely following French law⁵⁹ is more restrictive than that of "agents of the company" (mandataires sociaux) and excludes in principle, controlling and supervisory bodies unless they intervene in company management. Their responsibility does not enter into the provisions of the present Convention.

The confusion of assets of the company and personal assets or the pursuit of personal business under the guise of the company allows adjudication of the bankruptcy of the director or manager, provided these dealings have lead or contributed to the cessation of payments by the company.⁶⁰

It goes without saying that such provisions do not apply ipso jure to one man companies which are recognized by German (Einmanngesellschaft) and Dutch law (eenmans - N.V.).

The liability provided for in Articles 12 of the Convention and 2 of Annex I is that of the directors towards the company. Individual actions that can be brought by third parties for personal and distinct damages are not covered by these texts.

The provision included at Article 2 of Annex I should not prohibit the verification, before the opening of the bankruptcy proceedings, of the existence of the conditions prescribed by the lex fori with the exception of those relating to the quality of trader.

⁵⁹ Articles 98, 99 and 101 of the 1967 law are aimed at "company directors or managers, be they physical or legal persons, and physical persons who are permanent representatives of legal persons who are directors or managers of companies be they "company directors in law or in fact, apparent or sleeping, paid or not".

⁶⁰ The drafting of this Article differs, particularly on this point, from that of Article 101 of the French law of 1967 where this supplementary condition is not required except in the case of the wrongful pursuit of an unprofitable company venture for personal gain.

Finally, we would point out that the provisions of Article 1(3) of Annex I are accompanied at Italy's request by the reservation inserted at letter (b) of Annex 11, since the legal system of this country does not acknowledge that a director personally declared bankrupt should be held liable for only a part of the company's debts.

The provisions of Articles 13 and 14 are for the greater part common to the situations envisaged by Articles 10 to 12.

In particular because of the reference back to national legislations in Article 10 and, above all, because of the reservation affecting the provisions of Article 1 of Annexe I, it was necessary to determine rules of subsidiary jurisdiction for the adjudication of partners or directors by the courts of States other than that where the bankruptcy of the legal person was pronounced when the extension of the jurisdiction of the courts of the last-mentioned State cannot operate. It is necessary to remember here that this extension of jurisdiction departs from the normal operation of the Convention rules in the cases of partners and directors of a company who are established in a country other than where the company bankruptcy was instituted.

This derogation need not be applied when its *raison d'être* does not exist.

Likewise the usual rules of jurisdiction provided at Articles 3 to 8 of the Convention may already have been applied for the bankruptcy of a partner or director in regard to business of his own as distinct from that of the company. In this case, Article 13 lays down a rule of priority to avoid useless dispersion of proceedings.

61

⁶¹ Cf. Articles 98 and 99 of the French law of 22.12.67 and Ripert and Roblot op. cit. no. 2273. See for the contrary attitude Article 147 of the Italian l.f. We should remember also that in French law, the bankruptcy of the associate (who is a partner) or of a limited partner causes the dissolution of the partnership unless there is a contrary clause in the Articles or a unanimous decision of the other partners. German Law allows the proceedings to be conducted separately and on parallel lines, subject to some rules of co-ordination (211 and 212 K.O.).

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Article 14 specifies that in the cases provided for in Articles 11 to 13, proof in the bankruptcy of the director is made solely by the liquidator in the company bankruptcy on behalf of the general body of creditors. In the case of Article 11, the liquidator in the company bankruptcy must ask the court having seisin of this bankruptcy to determine the share or amount of company debts⁶² for which the director is to be made liable and must then prove for the amount thus fixed in the director's bankruptcy. As regards the situation referred to at Article 12, the liquidator will prove in the director's bankruptcy for the amount of the condemnation pronounced by virtue of paragraph 1 of this Article.

Section III - Conflicts of competence

Preliminary remarks

Conflicts of competence or of jurisdiction do not pose the same problems or present the same degree of keenness depending on whether several courts consider they all have equal jurisdiction (positive conflicts) or whether none considers itself competent (negative conflicts).

In internal law these conflicts are adequately resolved by several procedural means. At the seisin stage, the rule of priority or the interests of good administration of justice lead one of two judges to remit the matter to the other. Conflict of jurisdiction, if it exists, is resolved by a judges' ruling calling on the jurisdiction of a higher court. At the time of the decision, the rule of priority combined with the authority of res judicate makes it possible to recognize only one decision. Finally, the procedure of rejoinder (Article 169 French Code of Civil Procedure) (which is a technique common to declinatory procedure and to judges' rulings) and the regolamento di competenza also make it possible to obtain, from the outset of the proceedings, a prompt ruling on every objection to jurisdiction by an imperative decision of the court having jurisdiction.⁶³

Projection to the international plane of the rule of priority of seising or of a decision handed down is calculated to give a relatively satisfactory solution to positive conflicts of courts having jurisdiction of the same rank according to Articles 3 to 8 of the Convention. The hierarchy of

⁶²The German delegation requested during the negotiations that the amount for which the company director is held liable, should be determined precisely, so as to facilitate recognition of the decision.

⁶³It is appropriate to point out here that, according to a judgment of the

Jurisdictions laid down by those Articles must lead naturally to eliminating even positive conflicts when the jurisdictions are of unequal rank.

But there is no blinking the fact that the priority criterion in deciding between two courts both seised on the basis of Article 3 (conflicts between centres) is not the most rational solution. However, it has the advantage of speed. Judges' rulings or an imperative award of jurisdiction, which would be preferable, would presuppose the existence of an international court which alone could provide a remedy for negative conflicts of jurisdiction when contrary decisions are handed down. But at present there exists no international jurisdiction with such powers.⁶⁴ An appeal to the Court of Justice of the European Communities, which seems to be the court best qualified, would necessitate an extension of its jurisdiction, which is at present limited by the Treaty of Rome. It would have been possible to envisage settling this question in the Convention itself, which legally would have constituted the instrument at once necessary and sufficient. But it has been pointed out that conflicts of jurisdiction are pretty closely linked to a uniform interpretation of the criteria of jurisdiction. Now, the question of uniform interpretation which arises for all Conventions founded on Article 220 of the Treaty of Rome is currently the subject of general studies within another Committee set up within the Council of the Communities.

The Committee has therefore expressed the strong wish that certain further powers be devolved upon the Court of Justice and has included a motion to this effect in the Joint Declaration given in the Annex.⁶⁵ However this may

63(contd.)

French Cassation Court (Civil 6.7.1967. Rev. crit. DIM 1967 p. 362) in relation to the application of the rejoinder procedure in an international case, it was recalled that the Court of Appeal could not adjudicate on the jurisdiction of a foreign court, that is to say that in such a case the Court of Appeal must confine itself to noting the lack of jurisdiction of French courts.

⁶⁴The international regulations proposed in 1959 by the International Law Association provided for an international tribunal.

⁶⁵The joint declarations annexed to the Conventions signed in Brussels on 29 February and 27 September 1968 contain identical provisions. It must also be pointed out that the draft regulation on the Articles of Association of the European Company provides for the devolution upon the Court of Justice of the European Communities of considerable powers of control in the constitution of the European Company and also that of determining whether a European Company is part of a group of companies (Title VII), which would justify extending verification by it of the concept of centre of administration in the judges' ruling.

be, for the immediate future, the Committee has endeavoured to frame rules by which to solve the greatest possible number of conflicts and at least to prevent duplication of legal proceedings⁶⁶ and denials of justice. Respect for these rules must be ensured by using to the full all national possibilities of appeal.

Articles 15 and 16. Three types of cases must be clearly distinguished in this respect.

1. The first is where one court seised in application for example of Article 4 (establishment) or 5 (purely national jurisdiction), considers, either at the request of one of the parties, or ex officio as required by the Convention, that the courts of another State have jurisdiction preferable to its own because, according to the case, the centre of administration or an establishment is in this State.

The operation of the provisions of Article 3 to 8 which regulate jurisdiction by determining the rank of the courts and fixing their priority and the derogations provided for in the following articles, make it possible by themselves to arrive at the solution.

Article 16, however, which can be applied when only one court is seised, contains two provisions aimed at preventing negative conflicts of jurisdiction.

In the first place, rather than confining itself to declaring that it lacks jurisdiction, at the risk that no other court will regard itself as competent, the court seised has the power to refrain from deciding and to fix a period in which the court which appears to have jurisdiction may be seised.

Furthermore, Article 16(2) contains a provision already found, differently worded, in several Conventions,⁶⁷ and whose aim is to avoid a flood of contrary declarations that courts lack jurisdiction resulting in a denial of justice.

⁶⁶ Contrary to the case of the General Convention (Art. 21), the term "pendency" has not been used, for there can only be pendency to the extent that the two courts present identity as to the object of the proceedings and as to the personality of the parties. In the cases envisaged by the Convention on bankruptcy, applications for bankruptcy, although aimed at the same debtor, generally do not emanate, in the different countries from the same creditor(s).

⁶⁷ See the Germano-Belgian Convention of 30.6.1958 (Art. 5(1)); Convention of The Hague on the recognition and execution of foreign judgments in civil and commercial matters (Art. 9); General Convention (Art. 28(2)) and draft Germano-Austrian Convention of 1966 (Art. 5).

It could perhaps have seemed desirable that, in the event of a negative conflict, the court which abstains from judging in application of Article 16(1) might have the opportunity of making provisional orders on the lines of those provided for in German law (106 KO and 12 Vg10) and Dutch law (Article 7 F.W.) or even of making a provisional adjudication of bankruptcy.

But agreement was not possible on the principle even of such a bankruptcy declared provisionally, as certain delegations saw more drawbacks than advantages in it. The essential objection was that it would be difficult to accept that a court which regarded itself as being without jurisdiction might nevertheless adjudicate a bankruptcy which, if it could not be pursued later in the country where it had been initiated, would be very damaging to the debtor's interests. Provisional measures of varying extent from one Contracting State to another would produce effects more or less similar to those of bankruptcy and it seemed, moreover, difficult to organize such measures at international level, so that the question is left to the resources of each legislation.

2. The first paragraph of Article 15 considers the case where courts of different Contracting States having unequal jurisdiction under Article 3 to 8 have been actually seised.⁶⁸ The provision chosen begins from the principle that the Court having a lower rank of jurisdiction must in principle declare that it lacks jurisdiction if there is a preferable jurisdiction in the E.E.C. This is a further confirmation of the principle which flows from Articles 3 to 8. However, this reminder was useful in that

⁶⁸ Article 15 purposely avoids using the term "saisine" ("seisin"), which would have been difficult to define in the case of bankruptcy adjudicated ex officio. The expression chosen in the two paragraphs of this Article "Courts called on to pronounce on the bankruptcy" therefore does not prejudice the different procedural concepts of the internal legal systems.

it makes it easier to envisage the possibility of the competence of the court apparently having prior rank being contested or contestable. It is laid down that the court of lower rank, instead of deciding immediately not to proceed with the case, shall abstain from ruling in order to take account of the decision to be handed down by the other court. This provision thus makes it possible again to eliminate the risk of negative conflicts of jurisdiction.

If, despite these provisions, competing Courts had each adjudicated the same debtor bankrupt, either because one of them is unaware of the existence of a superior jurisdiction, or because the rules referred to above have not been observed, we then have a conflict of decisions the solution of which will be found at Article 51 on recognition and the commentary to which readers are referred.

3. The second paragraph of Article 15 deals with the case where two or more courts of Contracting States having the same rank of jurisdiction are seised (e.g. on the basis of two centres of administration by virtue of Article 6 or - a more frequent case - of two establishments). Preference is then given to the Court which has adjudicated bankruptcy in the first instance,⁶⁹ and the other courts must abstain from deciding until the first decision has acquired the force of res judicata.

The hypothetical case of the bankruptcy having nevertheless been adjudicated by more than one court comes under Article 52, which governs recognition.

There is therefore a parallel between the two paragraphs of Article 15, and the solutions for conflicts of jurisdiction supplemented by the rules on recognition effectively safeguard the unity of bankruptcy.

Let us take a few examples to illustrate these different provisions which highlight the system for suspending decisions common to them.

⁶⁹ See on the same lines, the Benelux Treaty (Art. 63) and Art. 565 of the Belgian law of 10 October 1967 introducing the Judicial Code. See also Arts. 169 and 172 of the French C.P.C. and Ripert and Rablot, op. cit. no. 2772. See 71(2) KO which gives the preference to the first application.

1st example. If the judge in Milan, the town where a company has its head office and the court of Lyons, the place where this company has an establishment are both seized, the second must declare itself without jurisdiction and withdraw in favour of the Milan judge, or if it is submitted to the latter that the Milan seat is fictitious and that the centre of administration is in fact in Paris, it must suspend judgment pending a final decision on the jurisdiction of the Milan court. If the jurisdiction of the latter is confirmed after exhausting all available means of appeal, the Lyons court will wind up its proceedings and withdraw in favour of the Milan judge after deciding on the costs of the proceedings in Lyons. If on the contrary, it is confirmed that the centre of the company is in fact in France and not at Milan, the Milan judge will declare himself without jurisdiction and the French internal rules of conflict of jurisdiction will determine which French court will finally have to rule on the petition.

2nd example. Suppose now that the company indeed had 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 period of six months provided for in Article 6 of the Convention, while, at the same time, the company makes a declaration of cessation of payments to the Lyons court. The two courts are equally justified in taking up the case, but when one of them, the Milan court for example, has been the first to pronounce bankruptcy, the other, the Lyons court, must refrain from deciding until the Milan decision can no longer be appealed against or until all modes of appeal have been exhausted.⁷⁰ In the event of the rule of suspending judgment not being respected by the Lyons court - which would have pronounced the judicial settlement of the company - the bankruptcy adjudicated in Milan would nevertheless be the only one recognized and enforced in all the Contracting States under the application of Article 52(1) and the Lyons court will have to find, on the application of the more diligent liquidation, that its own judgment is void and without effect (see below p. 137, re Art.52).

⁷⁰ Despite the general nature of the terms used, the spirit of Art. 15 seems to demand that only the decision on jurisdiction should become *res judicata*; in certain legal systems, the ruling on the question of jurisdiction may be definitely taken before that on the substance of the case.

To sum up, the different mechanisms of the Convention are organized in such a way as to provide a solution for all positive conflicts.

The general principle of the graduation of the criteria for allotment to a given court, the suspension of decision on the part of the court whose jurisdiction does not have precedence or which is seised although bankruptcy has already been adjudicated in another EEC country, should provide a satisfactory solution to the problem posed by the conflict of courts of different Contracting States.

If, however, despite these rules, two decisions to initiate bankruptcy proceedings have been taken, the Convention provides that the decision later in date, or which it is agreed is from a court of lesser rank of jurisdiction, must not be recognized nor bear effects.

Section IV. Proceedings arising from the bankruptcy

Article 17 is based, on the international plane, on the theory of the "vis attractiva concursus", recognized in different degrees by the internal legal systems, and according to which, the court which has adjudicated bankruptcy has sole jurisdiction to deal, not only with the subsequent proceedings, but also with litigations arising out of the bankruptcy. Besides the question of jurisdiction, the chief interest of this theory resides in the fact that these disputes are subject to the system of procedure proper to the bankruptcy, especially in relation to appeals.

Already the Benelux Treaty (Article 22(4)) gave jurisdiction to the judge who declared bankruptcy to decide on "all actions directly flowing from the bankruptcy".⁷¹ But the mere inclusion in the Convention of a general provision of this kind could not be sufficient.

⁷¹ See also the Resolutions of the Institute of International Law at the 1902 meeting (Art. 7), the Franco-Italian Convention of 1930 (Article 25) and the 1960 International Colloquium of European Jurists (RDC International Revue of Comparative Law 1960 p. 782). The General Convention does not necessarily exclude from its field of application all the disputes relating to a bankruptcy; only those which derive directly from the bankruptcy are excluded (c.f. Jenard, Report p. 20).

German and Dutch law hardly recognize in practice or no longer recognize "vis attractiva concursus"; the internal laws of other Member States, supplemented most often by case law - uncertain moreover - differ perceptibly on the meaning and importance of the idea of "actions arising or deriving directly from the bankruptcy".⁷²

⁷² Cf. For Belgium Article 631(2) of the Judicial Code, which lays down that when bankruptcy is initiated in Belgium, disputes "in relation with it are of the exclusive jurisdiction of the court of the "arrondissement" in which the bankruptcy proceedings were opened. Cf. Fredericq, op. cit. T.I. N° 328 and VII p. 131 et seq.

For the Federal Republic of Germany, the jurisdiction of the court of the bankruptcy (Amtsgericht) is in principle limited to decisions which directly concern the course of the proceedings. The principle of "vis attractiva concursus", which had been applied before the promulgation of the "Konkursordnung" in certain "law" territories, has been abandoned. The jurisdiction of the court for other suits ("Klagen") is laid down by other provisions (23, 71 of the Gerichtsverfassungsgesetz and 12 of the Zivilprozessordnung) even if such litigation is related to the bankruptcy. However, according to 146(2) second clause KO, the Amtsgericht before which the proceedings in bankruptcy are going on in principle has jurisdiction to decide suits relating to the ascertainment of a civil law claim which has remained in dispute. Where the object of a litigation does not fall within the jurisdiction of the Amtsgericht, the Landgericht in whose area the bankruptcy court is situated has exclusive jurisdiction.

For France. Articles 112 of the Décret of 21.12.1967 (formerly Article 635 of the Commercial Code) and 59(9) of the Code of Civil Procedure contain identical provisions to those of Belgian law. Case law has developed these by declaring that the court of the bankrupt's domicile has sole jurisdiction to try "litigations arising from the bankruptcy or on which the status of bankruptcy exercises a legal influence" subject to the exclusive competence of allocation of other courts. It is a matter in each particular case of ascertaining whether the bankruptcy is indeed the cause which engendered the litigation and not merely the occasion of it: cf. Gauger JCP 1957 - I - 1359 and Ripert-Roblot, op. cit. 2857 et seq.

For Italy. According to Article 24 l.f. (Bankruptcy Law) the court which adjudicated bankruptcy has jurisdiction to try all suits which flow from it irrespective of the sum involved (Article 429 cpc.) except suits concerning immovables, for which the ordinary rules of jurisdiction remain unchanged (Articles 8 and 21 cpc).

For Luxembourg. The situation is not appreciably different from that in Belgium.

For the Netherlands. Art. 126(13) of the Code of Civil Procedure (RV) according to which "in bankruptcy matters (the defendant will appear) before the court which declared the debtor in a state of bankruptcy" is interpreted restrictively and scarcely relates to any actions save those relative to claims which have remained in dispute after closure of proof of debts (Article 122(1)F.W.), and those concerning the debts, the administration and the division of the general estate. For all other suits it does not depart from the ordinary rules of territorial jurisdiction of the Rechtbank (Art. 126 RV) or of the Kantongerecht (Art. 97 and seq. RV) Cf. Polak Handboek voor het Nederlandse Handels-en Faillissementsrecht, Deel I, 2de Gedeelte, Faillissement en surséance van betaling, 6de druk, p. 96 et s. 234 et s.

Not to define expressly proceedings which, without strictly forming part of the course of the bankruptcy, must be considered as being born of 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 therefore agreed on the principle of a common list of actions and disputes limitatively named which will be of the exclusive jurisdiction of the State one of whose courts has pronounced the bankruptcy. Here again the system of general jurisdiction is the only one calculated to get round most of the difficulties arising from internal allocations of jurisdiction between different courts of the same State, especially if this State does not recognize the vis attractiva concursus or sets little store by it, so that Article 17 transposes to the plane of international jurisdiction only one aspect of the vis attractiva concursus, that is the concentration of territorial jurisdiction. The other aspect, the concentration of jurisdiction of attribution *ratione materiae* is a matter solely for internal rules.

Finally, it should be observed that the vis attractiva concursus thus envisaged is in principle only a rule of judicial jurisdiction and procedure. It does not prejudge the law applicable to litigations which fall within its scope, as this law will be determined by the law of the State where the bankruptcy was opened, including its rules of conflict (Cf. Art. 35(2) Paulian actions). It must indeed be noted in the majority of cases that the law of the bankruptcy would apply directly to the substance of the case, by the very reason of the particular attraction of bankruptcy and the purpose of the institution, as for example as regards actions to challenge of the suspect period.

(1) and (2) Actions to challenge of the suspect period and payments or refunds flowing from them

This point on the joint list is the very type of actions arising from the bankruptcy in that they bring into play the rules proper to bankruptcy. Their "insertion" in the list was decided all the more easily since the system of the suspect period and its actions to challenge are the subject of a uniform law as to the substance. (Art. 4 of Annex I).

The *vis attractiva* will apply even if the litigious acts relate to immovables. In choosing this solution the Committee considered that in the case in point the question is not to ascertain whether the act is valid of itself according to the general provisions of the civil law of the *lex rei sitae*, but to ascertain whether, according to the provisions of the law of the State where the bankruptcy was initiated relating to the suspect period, the act may or may not be invoked against the general body of creditors.

The impossibility of being evoked, as against the general body of creditors, of an act of the bankrupt is governed by different systems in the different Contracting States. German law provides, in principle, that there is an obligation to restore that which has been alienated, given or abandoned by the bankrupt (see 37(1) KO). The purchaser must, in principle, re-establish the assets to the position that would have existed if the act had not taken place. It is ultimately possible that restitution might be pursued by means of a suit brought by the liquidator in the name of the general creditors against the purchaser for the purpose of obliging him to agree to a forced sale by auction of the real property to be restored. In this case, the forced sale by auction can take place without the prior retransfer of ownership of the real property. For the transfer of a real property situated in the Federal Republic of Germany, the provisions of German law must be respected: the consent of the seller and purchaser as well as registration in the Lands Register of the change in the legal situation are necessary (See 873(1), 925(1) of the German Civil Code). In addition, and in the light of each particular case, other conditions may be required; e.g. the authorization of public authorities (e.g. in town planning matters). Moreover, it should be pointed out that, at the time of the retransfer of mortgages or of mortgage loans on real properties or for the release of such rights or their renunciation, the provisions of the law pertaining to property and the legal rules relating to the Lands Register provided for by German law must be observed, and that these differ in part from those relating to transfer of ownership. In the framework of acts which may not be evoked done during the suspect period, the defendant is expressly obliged to produce the declarations of will demanded of him and to execute the acts incumbent on him. From the time when such a decision becomes *res judicata*, it takes the place, in accordance with Sec 894(1) clause 1 of the Z.P.O. (Ordinance on Civil Procedure), of these declarations of will. When the judgment is only enforceable

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by provision it gives authority to enter in the Lands Register a preliminary note or an objection. (See 895 clause 1 Z.P.O.). In addition, and, according to the circumstances of the particular case, certain acts of the liquidator or approval of third parties are necessary in order to complete the change in the legal situation.

When, by a decision which has acquired the force of *res judicata*, the defendant has, for example, been condemned to produce the declarations of will concerning the retransfer of an immovable property, the liquidator accepts the defendant's declaration of consent (replaced by the decision) before a German notary or, abroad, before a German consul empowered to take official note of the agreements of the parties for the transfer of ownership of an immovable (Sec. 925(1) clause 2 German Civil Code). The last phase of the transfer of ownership can then be effected by the registration on request in the Lands Register.

For further precision, this report contains in an annex some examples of decisions which show how parties should word their documents so that the change in the legal situation of the property can take place without difficulty in the Federal Republic of Germany.

(3) Paulian Actions

This means here actions for the cancellation of fraudulent acts executed by the debtor to the detriment of his creditors' rights, referred to in Articles 1167 of the French and Belgian Civil Codes, 2901 of the Italian Civil Code, 1377 of the Dutch Civil Code and 311 of the German KO. When instituted against the acts of a bankrupt debtor, these actions, to which are related actions to void (Cf. Art. 4F of Annex I)⁷³ admit of some latitude, especially as regards the question of jurisdiction.⁷⁴

(4) Disputes relating to the sale of movables by a liquidator exceeding his powers

This point does not call for comment. The necessary condition of these disputes is the state of bankruptcy and thus they would not be instituted

⁷³ Cf. Art. 448 Belgian Commercial Code, 66 Italian Bankruptcy law, 42 Dutch F.W. and 31 German KO.

⁷⁴ Whereas in French and Italian Law the Paulian actions thus instituted are considered as actions arising out of the bankruptcy (Com. 7.6.1967 B. III p. 224), this is not the case in Belgian law (Cf. Fredericq, op. cit. t. VII, p. 133).

if the debtor were in bonis. Disputes relating to sales of immovables, however, excluded for reasons to be explained later.

(5) Claims for recovery of movables against the general estate

This is a matter, not only of certain claims organized by bankruptcy law which may be brought against the general body of creditors, but, by reason of the general nature of the terms employed, of all movable property claims in ordinary law, even of a civil nature, such as the recoveries of real property of the bankrupt's spouse.

Even though such an extension is questioned in countries which recognize the *vis attractiva*,⁷⁵ this matter was nevertheless included by reason of the basic relationship which can exist with bankruptcy law. For example, when the claim for recovery is based on a clause of reservation of ownership, it will be incumbent on the courts of the country of bankruptcy to pronounce on whether such a clause can be invoked against the general body of creditors. The frequent application of the law of bankruptcy to such claims made it desirable that the courts of the country where the bankruptcy was opened should have jurisdiction, subject to the provisions of Article 21(4).

Moreover, the jurisdiction thus granted to the State where the bankruptcy was opened coincides with the usual rules giving jurisdiction to the court of the defendant, in this case the liquidator representing the general body of creditors.

(6) Actions brought against the spouse

As spelled out by the Convention, this is a matter solely of suits which bring into play a provision proper to the law of bankruptcy (Cf. Art. 34 of the Convention) and does not relate to other suits which the liquidator may bring against the bankrupt's spouse.

(7) Liability suits against the liquidator

This refers not only to disputes concerning the furnishing of accounts by the liquidator but also to civil liability actions brought against him for professional faults.⁷⁶

⁷⁵ In this way, French case law, after hesitation, excluded the *vis attractiva*, and considered that these claims suits remain subject to the rules of ordinary law and would be brought in the same way if there were no bankruptcy (Com. 17.5.1961 JCP 1961 IV 98). For Belgium, Cf. Fredericq, op. cit. p. 133).

⁷⁶ Cf. Van der Gucht, op. cit. 1964, p. 156.

The most opportune place to include this seemed to be the joint list, the country of the bankruptcy being in the best position to try these questions, which often have a quasi-disciplinary character. In any case, here again, the same remark as made above, according to which the ordinary jurisdiction and that flowing from the vis attractiva overlap in the majority of cases, is confirmed, save in the hypothesis mentioned in Article 28(3) of co-liquidators who belong to States other than the one where the bankruptcy was initiated.

(8) Disputes in respect of allowance of claims

This heading systematizes and generalizes the solutions of certain internal laws by transposing them.⁷⁷ The only exceptions to the vis attractiva are disputes relating to certain claims in respect of which the courts of the country where the debts are payable have jurisdiction according to its law or case law (tax claims of the State or other local authorities or public departments, social security and family allowances contributions) or the law applicable to the employment contract. By reason of the very nature of these debts, it did not seem possible nor opportune to depart from the usual rules of jurisdiction of the country to which such claims relate, in the same way as in internal law the jurisdiction of the court of the bankruptcy is limited by the exclusive competence of another court or another type of court.⁷⁸ It should be stressed that this exception concerns, not only litigations relative to the existence and amount of the tax or social security claim or flowing from an employment contract, but also those concerning the existence and extent of the preference.

Thus, on this point, the conventional rule shows two peculiarities in relation to what would have been the case if internal rules on the division of jurisdiction had been strictly adopted for the international situation. On the one hand all disputes re debts, including actions relating to the

⁷⁷ Cf. Arts. 502 and 504 Belgian Commercial Code; 53 and 56 of the French Decree of 22.12.1967 and 100 to 102 of the Italian bankruptcy law.

⁷⁸ Cf. Fredericq, op. cit. N° 57 and Ripert-Roblot, N° 2859.

existence (save the three exceptions referred to above) and the rank of secured rights come in principle under the jurisdiction of the courts of the country where the bankruptcy was initiated. On the other hand, as regards the three exceptions provided for, the division of the same litigation between the ordinary courts and the bankruptcy court recognized, for example, in French law is abandoned, at least on the plane of general jurisdiction.

(9) Disputes relating to the termination of current contracts

This point does not call for special commentary if it is made clear that the termination must be based on bankruptcy law. It is only to this extent that, for example, the rule of jurisdiction provided for in the present paragraph replaces those relating to time-payment sales in Articles 13 to 15 of the General Convention. The two exceptions referred to confirm, as in the previous heading, the irreducible nature of exclusive jurisdiction in certain matters (Cf. Art. 16(1) of the General Convention referred to above).

Apart from these nine types of proceedings arising out of bankruptcy, we should recall here for memory that suits relating to the liability of directors and managers of companies by reason of their management are, under the terms of Article 11, matters for the courts of the State where the bankruptcy of the company or legal person was initiated, and constitute a tenth case of proceedings arising out of the bankruptcy within the meaning of the Convention (Cf. above note 58).

A contrario, the following are not actions arising from the bankruptcy within the meaning of the Convention:

- Suits relating to acts or contracts in respect of which the bankruptcy was merely incidental and which could have occurred without it;
- Suits for restitution or claim for moveable property supplied by the bankrupt, brought by the liquidator against a third party;
- Suits relating to real properties and real property rights other than those referred to at points 1, 2, 3 and 6 of Article 17;
- Finally, suits which are expressly excepted at headings 8 and 9 of Article 17.

.../...

These various proceedings, as well as those which, according to the different internal laws, are considered as suits arising out of the bankruptcy but are not included in the restrictive list in Article 17 of the Convention, as for example suits for annulment of acts executed by the debtor after bankruptcy is pronounced and in violation of the debtor's incapacity to administer his affairs, must fall within the scope of the General Convention.

On the other hand, in respect of the proceedings enumerated in Article 17, the Bankruptcy Convention does not merely govern the relevant conflicts of international jurisdiction (consequently, without for this reason changing internal laws) but it also subjects them to its own machinery for their recognition and execution, as these are organized in sections I and IV of Title V, to the commentaries on which reference should be made.

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

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

The aim of Titles III and IV of the Convention is to determine the law applicable to the course of the proceedings and to the extraterritorial effects of the bankruptcy.

Articles 18 and 19, which on their own constitute Title III, lay down general principles of reference to the law of the Contracting State whose court has jurisdiction according to the provisions of Title II.

Title IV elaborates on certain consequences of these general principles, especially in relation to invoking the bankruptcy as against third parties, and provides for the derogations made as to the effects of the bankruptcy, from the application of the principle of the law of the country where it was opened.

Article 18 recalls that the decision to initiate bankruptcy proceedings or one of the proceedings provided for by the Convention shall be rendered in implementation of "the law of the State where the court having competence is situated". In principle, this expression generally extends to the whole of the legislation of the State concerned, including, where appropriate, its system of private international law. But in most cases, by reason of the purpose for which the bankruptcy was instituted, and because it is a matter of public policy, what we will henceforth call the law of the bankruptcy or lex concursus, will directly represent the internal law of the court.

This will indisputably be the position, first of all, for ascertaining the causes for opening bankruptcy proceedings.⁷⁹ At first sight one might think

⁷⁹ Cf. Van der Gucht, op. cit. 1964, p. 143 et seq. We recall here the state of internal laws.

In France: the state of cessation of payments is the condition for liquidation of property and for judicial settlement: the latter is only pronounced if the debtor is in a position to make a worthwhile proposal for a composition. The state of cessation of payments is the fact that debts are not paid when they fall due. The cessation of payments is therefore a quite distinct concept from insolvency.

In Belgium and Luxembourg: to cessation of payments, that is to say the condition of the debtor being unable to meet his obligations, must be added "l'ébranlement du crédit" (undermining of credit): the court must assess if "the cessation of payments adversely affects the debtor's credit and solvency and jeopardizes his transactions as a whole."

The Netherlands: bankruptcy is pronounced if proof is adduced of the existence of facts and circumstances establishing that the debtor is in the situation of having ceased his payments. It is neither necessary nor sufficient that debts should exceed assets.

In Germany: -for physical persons and associations of persons, the only cause for instituting bankruptcy proceedings is insolvency, that is to say the probably permanent impossibility on the debtor's part, due to lack of means of payment, of settling the essential part of his debts immediately claimable. The cessation of payments is not, by itself, a cause for initiating bankruptcy but only an indication of insolvency (Cf. Bohle-Stamschräder, Konkursordnung 9th edition, see 102, notes 1-3).

-for joint-stock companies and other legal persons, insolvency is not the only cause for initiating bankruptcy proceedings. Bankruptcy can also be initiated when debts exceed assets. (Überschuldung). However, special provisions exist in this respect for producer and consumer cooperatives. ("Erwerbs- und Wirtschaftsgenossenschaften").

In Italy: The state of insolvency is the determining factor: A person is in a state of insolvency if he is no longer in a position regularly to fulfill his own obligations at the due date. The cessation of payments can be an indication of insolvency.

.../...

that deep differences exist between the six legislations concerning these conditions. These differences are, however, more apparent than real (see the deduction in Article 52(2c). In fact, examination of case law shows that litigations relating to the conditions for initiating bankruptcy, which are subject to the courts of the six countries, are in fact solved in a very similar way, so that a uniform text was not essential in this field. No derogation from internal law is therefore prescribed. Two points which flow directly from the universality of the bankruptcy must, however, be specified; in the first place, the law of the bankruptcy will apply irrespective of the place where the facts on which the judgment is based occurred; in the second place, when the initiation of the bankruptcy is based on shakiness of credit or the fact that debts exceed assets, account will have to be taken of the entirety of the debtor's estate on the territory of the six States. The *lex fori* determines to what extent effect must be given to the bankruptcy in regard to property situated in non-Contracting States.

Similarly, it is the internal bankruptcy law which will govern the possibility of adjudicating the bankruptcy of a non-trader and the definition of trader or of "piccolo imprenditore" (small entrepreneur).

It is the same law which will say by whom the bankruptcy can be brought about, whether this right belongs only to creditors or if it can be adjudicated by the court *ex officio*, in what forms the decision must be rendered and by what processes of appeal it can be challenged.

Again it is this law which will determine which measure to order from among those provided for in the Convention.

The law of the bankruptcy, in so far as it is an internal law of the court, will govern the general progress of the proceedings, the conditions of appointment and the powers of the bankruptcy authorities, as well as the constitution of the creditors as a body. It will establish the conditions under which claims are verified and allowed and the effects of such allowance. The competence of this law appears no less indisputable for fixing the terms and effects of the different modes of closing the proceedings, especially composition.

.../...

Again it is this law which should be applied in relation to the claimability of term debts as well as the suspension of current interest payments.

The unity and universality of bankruptcy which already justify the unity of judicial competence must also lead as far as possible to the unity of the law applicable for the benefit of the law of the court.

Such is the meaning of the provisions of Article 19(2) which have a value of general scope. In principle, the effects of the bankruptcy vis-à-vis the debtor, the creditors and third parties are governed by the law of the bankruptcy - the internal law of the court, possibly adapted to take account of the rules of the Convention and the uniform laws annexed thereto - unless otherwise provided in Title IV, which we now consider.

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

Section I. Effects of the bankruptcy independently of any advertisement

Article 20:

Dispossessing the debtor of the administration and disposition of his property⁸⁰ poses two problems in international law.

The first problem is to ascertain from which moment and subject to what formality the dispossession of the debtor applies in countries other than the one where the bankruptcy was initiated. The internal laws of the six States are at one in recognizing that such incapacity is an effect of the judgment pronouncing bankruptcy which comes into operation instantly⁸¹ and independently of any publication. Hence, the solution chosen on the Community plane in Article 20. Although incapacity applies in all the

⁸⁰ It goes without saying that the term dispossession (dessaisissement) must be understood to apply equally to analogous institutions flowing from measures other than bankruptcy in the strict sense, as for example, in judicial administration, the compulsory assistance of the debtor by the liquidator for all acts relating to the administration and disposal of his property.

⁸¹ French and Belgian practice generally admit that the whole day of the declaratory judgment is included in the period during which the debtor is deprived of his capacity to administer his business. Dutch legislation (Art. 23 F.W.) contains an express provision to this effect.

.../...

... States independently of advertisement measures, it is also...
 recognized automatically there without any formality as a direct and main...
 consequence of the bankruptcy judgment itself. Thus, an end is put, in the...
 relations between the six States, to uncertainty in case law as to whether...
 the extraterritorial effect of deprivation of capacity is or is not subject...
 to the need for an exequatur and, if so, whether the starting point of the...
 declaration of the incapacity to manage his affairs could go back...
 to the date of the foreign judgment.⁸² This solution in itself is therefore...

The second problem relates to the law applicable. In private international...
 law, hesitation on the law applicable to deprivation of capacity is permitted...
 since the legal system of deprivation of capacity varies quite considerably...
 from one legislation to another. French and more recently, Belgian law have...
 given up analyzing deprivation of capacity as a form of incapacity governed...
 by the national law of the debtor, it therefore becomes an inalienability...
 decreed in the interest of the general body of creditors.

The Convention has implicitly adopted this latter concept, since Article 25...
 which has no provision on the law applicable, must of necessity refer to the...
 law of the bankruptcy. In conformity with Article 19(2). The law of the...
 bankruptcy will therefore govern the incapacity, as it governs the suspect...
 period, which is closely limited to it. The question of disqualification of a debtor from managing his business is...
 again studied at Article 33, which will be commented on later.

Articles 21 and 22
 The suspension of individual proceedings, permitted in the majority of...
 legislation, is to the creditors, whose ultimate objective is the proof...
 of their claims or the recognition of a right in the general estate, what...
 deprivation of capacity to the debtor...

⁸² Cf. Gayaldu op. cit. p. 220 and 225; Trochu op. cit. p. 228.
 Rigaux, *Droit International Privé* N. 54.
⁸³ Cf. Art. 452 of the Belgian Code de Commerce, Art. 35 and 26...
 of the French law of 1967, and Art. 55 of the decree of 1967, Art. 51 of...
 the Italian bankruptcy law and Art. 27-29 F.W. Netherlands. See also for...
 the law applicable Trochu op. cit. p. 143 et seq.

Paragraph 1 of Article 21, to which must here be attached the provisions of paragraph 3, delimits its field of application, taking into account the nature of certain debts. The point is to forbid the lodging of any new individual action, either regarding payment or enforcement procedures.

The Committee considered it advisable to settle the case of actions for payment already in train, and that of actions for claims, in two distinct paragraphs (Art. 21, 2 and 4) thus taking over a formal distinction of German and Dutch law, the claims actions not leading to admission to the debts but to the earmarking of a property among the assets. But these two cases have in common that the initial instance could be taken up again abroad,⁸⁴ by derogation from the jurisdiction granted to the courts of the country of the bankruptcy for suits claiming recovery of moveables (see Article 17 - 5° above) if the litigation was ripe for judgment. Taking into account the peculiarities of the different legislations, it seemed that the best criterion was whether a contentious decision existed even if it had ordered only inquiry measures, but excluding decisions on jurisdiction.

This provision, which is in conformity with certain legislations but derogates from others having a stricter concept of the suspensions of individual suits, was chosen to avoid useless expenses and delays.

When the Court initially seised has given its verdict in the dispute, it will be solely for the courts of the State where the bankruptcy began to decide whether the claim resulting from this finding is a debt in the general estate, against the general estate or, being neither one nor the other, should remain personal to the debtor.

84. It must always be borne in mind that suspension of proceedings instituted in courts of the country of bankruptcy in no way derogates from internal law. The provisions of Article 21, which do not constitute a uniform law, apply only to proceedings in progress in another Contracting State at the time of the bankruptcy.

In other words, the first court cannot condemn the debtor to pay, but must limit itself to finding that a debt exists in principle. The law applicable before the first court, will be determined by the rules of private international law of this court, but it will be the law of the bankruptcy which will apply in the second phase.

Forms of enforcement are among the individual proceedings suspended by the bankruptcy decision. In face of the multitude of cases, closely linked to different national procedures, that can be imagined and the impossibility of defining exactly in the text of a Convention the stage which each of these different procedures should have reached so that the prosecuting creditor might be considered as having an "acquired right" which would enable him to escape the suspension of means of enforcement already initiated, the Committee confined itself, in Article 22, to the application of local law in bankruptcy matters.

Article 23 concerns the interruption of the period of prescription. This provision refers, for example, to the hypothesis that, after the initiation of the bankruptcy but before its publication, a third party would have summoned the debtor. This summons would have the effect of interrupting a prescription which was running. Similarly, if, within the time limit laid down, the third party, after opening of the bankruptcy but before its publication, exercises, for example, a sale option granted to him, it could not be pleaded against him that his taking up of the option is not valid by reason of the fact that he should have notified the liquidator and not the debtor deprived of power to manage his affairs.

The sole object of Article 24 is to fix in a uniform way the time allowed for opposition or third-party opposition if these grounds for appeal exist in the law of the State where the bankruptcy was opened.⁸⁵

Advertisement can be taken into consideration only for these grounds for appeal, since, in so far as the appeal is concerned, in the legislations of the majority of Contracting States the time-limit begins to run from the

⁸⁵ It should be noted that German law does not recognize third-party opposition. As for French law (cf. Article 105 of the Decree of 1967) the admissibility of opposition 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 by Article 149 of the Code of Civil Procedure, as these judgments are always susceptible of appeal. See also Art. 18 of the Italian bankruptcy law on the exercise of opposition.

pronouncement of the judgment or notice of it, but independently of any advertisement.⁸⁶ On the other hand, the period for opposition varies, running either from the pronouncement of the judgment or from a formality of advertisement.

It seemed equitable, when referring to the law of the country of the bankruptcy to fix the time within which to bring opposition shall begin, to provide that a uniform 31 days would be allowed for the exercise of these grounds of appeal when the party concerned had no connection with the country of the bankruptcy. This provision is, however, applicable only to persons who have at least their residence on Community territory.

The starting point of the period is therefore that prescribed by local bankruptcy law. Generally, the day of commencement of the period (dies a quo) is not counted (c.f. Article 111 of the French 1967 decree). On the other hand, the method of computation adopted "up to the 31st day following the starting point" eliminates the problem of whether the day of expiration of the period (dies ad quem) must be counted or not in a 30-day period. The solution varies from country to country, the majority of countries having abandoned the system of clear days.

The second paragraph of Article 24 also refers to the law of the court for the possible extension of this period to the first working day (Cf. Art. 111(2) of the 1967 decree). We would point out in this respect that the studies at present going on in the Council of Europe for the harmonization of the idea of "délai" (time-limit), should make it possible to arrive at a uniform system in this matter.

Section II - Advertisement

Articles 25 and 26

The systems of advertisement of bankruptcy judgments are not entirely the same in the six States of the Community, some which publish the judgment

⁸⁶ Cf. however 76 of the German KO where publication in the official gazette of the court may be determinant. In German law, the legal remedies provided against a decision to initiate bankruptcy proceedings are not appeal but "Sofortige Beschwerde" (immediate complaint).

.../...

declaring bankruptcy in an official journal or in a journal of legal notices, while others provide in addition for it to be posted up.⁸⁷

But the different means used can have only territorial effect. Moreover, no advertisement is organized for foreign bankruptcies; conventions alone provide for some extension of the advertisement laid down by the law under which the bankruptcy was initiated by juxtaposing with it the publication provided for by the law of another State as if the bankruptcy had been adjudicated there.

The need to organize advertisement at international level having been recognized, three solutions were possible:

- to systematize the German procedure whereby an individual notice is sent to the known creditors;
- to use all the different national modes of advertisement simultaneously;
- to create an official European Bulletin.

The first solution was considered insufficient on the international plane and will be applied only if the law governing the bankruptcy provides for such notification. The last two procedures were adopted and combined, but in such a way that the machinery of Article 25 and 26 is very flexible, any automatic operation being excluded.

⁸⁷The principal means of advertisement are:

- In Belgium: insertion of an excerpt of the judgment in the local newspaper and in the "Moniteur belge" (Article 472 rev. of the Commercial Code); mention in the Commercial Register (Art. 25 of the Royal Order of 20.7.1964).
- In Germany: insertion in the journal which publishes official information of the Bankruptcy Court (Sec 75 KO). Publication in the Bundesanzeiger (Sec III KO); entry in different registers, including the Lands Register (Secs 112 and 113 KO).
- In France: mention in the Commercial 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 (Arts. 13 and 14 of the 1967 decree).
- In Italy: the judgment is notified to different authorities, such as the office of Registration of undertakings. It is also posted up and is published in the journal for legal notices in the Province concerned (Art. 17 of the Bankruptcy Law).
- In Holland: publication in the Nederlandsche Staatscourant and in one or more newspapers (Article 14 F.W.); a note in the Commercial Register (Art. 18 of the Law of 26 July 1918).

Experience shows that numerous bankruptcies have only local effect and do not concern either foreign creditors or debtors. Therefore, it did not appear desirable to provide, for all bankruptcies declared in a country, publicity arrangements having effects in the other Community countries. The fairly considerable expense that this advertisement would involve for the general estate would not be justified.

(1) Advertisement arrangements at European level: It is only when a bankruptcy pronounced in a State will present a sufficiently important international implication which it is left to the court or the liquidator to assess (Article 25(1)) - an assessment made immediately or, more frequently, some time after declaration of bankruptcy - that an excerpt from the judgment containing the information specified in Article III of the Protocol will be published by the liquidator, the clerk of court or any other person empowered to do so (Art. 25(5)) in the Official Journal of the European Communities.

Only this publication, which concerns third parties to the exclusion of the debtor (cf. Art. 20), will have effects on the legal plane in countries other than that where the bankruptcy was initiated. This publication is first of all useful in that it notifies foreign creditors that they must prove their claims. But, above all, it alone will determine the conditions under which debtors of the bankrupt can validly obtain discharge, and this without any possibility of the reference date varying from one country to another.

Thus it will be impossible to invoke against the general creditors payments made from the 8th day following publication in the Official Journal of the European Communities without any opportunity for third parties in good faith to prove to the contrary.⁸⁸ The "from the 8th day" formulation was preferred to "after a period of 7 days" so as to avoid, here again, any uncertainty on the question whether what was involved was or was not a period of clear days (Art. 26(1)).

⁸⁸This solution is therefore more rigorous than that chosen in the Benelux Treaty (Art. 24(3) in fine), German law (Sec 8, 3 KO) and Dutch law (Art. 52(2) F.W.).

With regard to payments made before expiration of the abovementioned period, their fate, according to a provision suggested by the Benelux Treaty⁸⁹ depends on the knowledge that the debtor might in fact have had of the bankruptcy. The decision will thus depend on the circumstances. In any case, the burden of proof is on the liquidator (Art. 26(2)).

Acts carried out in the transition period between pronouncement of the bankruptcy and the time when it may be invoked erga omnes can be challenged by bringing a Paulian suit or by operation of the rules of the suspect period. This is specified in Article 26(3).

(2) Supplementary advertising arrangements: The liquidator has, in addition, power to advertise in the different official bulletins of the States other than the one where the bankruptcy began and which are referred to at Article VI of the Protocol, without prejudice to any other advertisement which would seem indicated (Art. 25(3)). This advertisement, the advisability of which is left to the discretion of the liquidator, will, however, not produce any of the effects provided by national laws, since the sole determining factor is the advertisement in the OJEC even if this is later than the local advertisement. Payment of advertisement expenses abroad will be settled according to the law of the country where the bankruptcy began, in that the Public Treasury of this State may advance these expenses where appropriate but that the Public Treasury of the foreign state where the advertisement was effected may not be asked to cover them.

Likewise entry of the bankruptcy in the various Commercial Registers where the debtor may be registered⁹⁰ and which is the only compulsory formality for the liquidator (Art. 25(2)) is made solely for purposes of complementary information.

⁸⁹ Art. 24(3), 1st clause of the Treaty. Being concerned to simplify matters and taking account of the machinery adopted for publication, the Committee departed from the Benelux Treaty by not including in the Convention either the condition that the bankrupt should have an establishment abroad, or the condition - simultaneous or not - that the third party should have his domicile in a country other than that where the bankruptcy was initiated and where publication has not yet been made, and that payment has been effected in a country where there had not yet been any publication.

⁹⁰ Art. 263 of the draft regulation on the Articles of the European Company provides that the liquidator of the bankruptcy of a European Company should ensure registration of this in the European Commercial Register before publication in the OJEC and in the journals of the seat of the European Company.

.../...

Article 25(4), finally provides that all these advertisement measures shall apply equally to decisions other than bankruptcy or realization of property in the strict sense (see wording of Article III of the Protocol) as well as to complementary or amending decisions which occur later in the course of the proceedings (closing down of operations, changing of the date of cessation of payments, cancellation or annulment of the composition, etc.). These last mentioned are listed by categories of proceedings in Article IV of the Protocol. Article V of this Protocol refers back to Article III as regards the various matters to be included in the advertisement.

Article 27

The laws of the Contracting States differ considerably as regards both noting the bankruptcy and a general prohibition on disposing of property in the public registers in which are entered certain properties or rights (buildings, ships, boats, aircraft, cinematographic films, ⁹¹ industrial property rights, etc.) and the effects attached to such mention. Sometimes, as in German law (Secs. 7 and 15 KO, 62 VglO and 892 s. Civil Code), entry in the Lands Register transfers ownership of the building, and mention in this register of the bankruptcy or the general prohibition against alienation then constitutes an important factor in assessing the good faith of a purchaser having contracted after the bankruptcy. At other times, it is merely a question, as in French or Belgian law, of registering the legal claim which the general creditors have on the property of the debtor. Although for property subject to registration in Holland the act must be entered or copied into the register provided for this purpose so as to effect transfer of ownership, Dutch law does not provide for entry of the bankruptcy in these registers. Article 35 F.W. merely lays down that, after pronouncement of the bankruptcy, deeds drawn up before such pronouncement can no longer be validly entered or copied into the register.

⁹¹The proposal for a directive for the coordination of certain laws, regulations and administrative provisions concerning cinematography provides for the creation of a public register of cinematography for those Member States which do not yet have such a register.

In view of the impossibility of amending national laws on this matter, which is in very close relationship with property law, the only reasonable solution - in conformity moreover with the rules of private international law - was to refer, by derogation from the law of the bankruptcy, to the law of the Contracting State where the registers and books are kept to determine the entries to be made and the legal consequences flowing from them in respect of property subject to entry on these registers (compare, for the jurisdiction of the courts, with Article 16(3) of the General Convention).

Section III - Powers of the authorities administering the bankruptcy

Articles 28 to 32 of the Convention concern very specially the bankruptcy administering authorities and apply the principles of unity and universality of bankruptcy, particularly as regards the powers of the liquidator. The allocation of powers between the various authorities varies from one body of legislation to another.⁹²

Although the laws of the six countries have recourse to the liquidator or trustee (syndic or curateur) (Belgium, Italy, Netherlands) or the administrator (Verwalter) (Germany) and have instituted a meeting of creditors, France, Belgium, the Netherlands, Luxembourg, and Italy, but not Germany, have a "juge-commissaire" (judge sitting in bankruptcy cases) whereas the action of "contrôleurs" (inspectors) is proper to France. In three EEC countries there exists, side by side with the meeting of creditors, a committee which is more limited and comprises only some of them. In Germany this is called "Glaubigerausschuss", in Italy "Comitato dei Creditori", in Holland "Commissie uit de schuldeisers". The functions of these various committees do not correspond on all points. These disparities necessarily have repercussions on the powers of the bankruptcy authorities.

⁹² On all the points touched on below see the thorough comparative examination of the different legislations in Van der Gucht, op. cit. 1964, p. 151 et seq.

Moreover, fairly appreciable divergences exist in the six countries, relating in particular to:

- the nomination and status of the liquidator;⁹³
- the role and capacity in which the liquidator acts.

In certain countries (France, Belgium, Luxembourg) the "syndic" (liquidator) or "curatuer" (trustee) simultaneously represents the bankrupt and the body of general creditors. In the others, legal writing and case law are divided on this point. In Germany, the law has not expressly determined the legal standing of the Verwalter and essentially there are two opposing theories: that of representation (Vertretungstheorie) and that of legal institution (Amtstheorie), which has prevailed in case law. In Italy the "Curatore" exercises a public function: he is responsible for watching over the attainment of the objectives proper to the bankruptcy.

The Committee did not consider that these differences, which concern, not fundamental principles, but practical methods, were major obstacles to the application of a multilateral convention based on machinery to solve conflicts of laws. The essential point is that, in the six countries, there should be provision for the intervention of a person, qualified professionally and subject to effective control, to ensure the management of the property, possible continuation of the business, the realization of the assets and the sharing out of the proceeds.

The Committee of Experts therefore did not consider it indispensable to establish for the time being a unification or harmonization of laws relating to the bankruptcy authorities. Such a harmonization, in an area intimately connected with the various judicial organizations and with the national procedures, is seen to be a long-term undertaking which does not have to be tackled in the immediate future.

⁹³ It should be noted that France is the only country to provide an autonomous professional organization for liquidators (Decrees of 20.5.1955, 18.6.1956 and 29.5.1959); Cf. Argenson, Toujas and Duthell, Règlement judiciaire et faillite, 3rd edition 1963, N° 133 et seq. In the other EEC countries it is for the Court to choose the liquidators from among persons who appear qualified (barristers, chartered accountants, etc.).

This is all the more the case as the differences noted in the six legislations or, more exactly, between some of them notably do not, in practice, lead to special difficulties, it being laid down that the law applicable to the course of the bankruptcy can only be the internal law of the court which adjudicated it.

Thus, according to Article 19 of the Convention, this law will govern not only the organization and course of the procedure (nomination and revocation of liquidators, consultation of creditors, powers of the "juge-commissaire" if one exists, etc.) but will also answer the question of whether in particular:

- creditors, who have an interest distinct from that of the general body, can intervene in their own names in a litigation where the liquidator is defendant or plaintiff;
- whether the bankrupt can intervene in a litigation concerning the general body of creditors;
- whether and by what procedures the liquidator or the bankrupt can bring a civil action in criminal proceedings or if a condemnation for civil purposes pronounced against the bankrupt by a criminal court, in the absence of the liquidator in the proceedings, is valid as against the general body of creditors⁹⁴ subject in the first case to an assessment being made on the admissibility of the civil suit according to the law of the State concerned;
- whether the creditors or the bankrupt can be heard as witnesses in the proceedings;
- whether the grounds of defence which can be pleaded against the bankrupt, can also be pleaded 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.⁹⁵

⁹⁴ It should be pointed out that the principle of unity of bankruptcy will not operate without posing certain problems in penal law as regards the prosecution of fraudulent bankruptcy and infringements treated on the same footing in countries other than the one where the bankruptcy was initiated when the law of these States makes the pronouncement of bankruptcy a constituent factor of the infringement, which must be committed on the national territory. But the solution of these questions was outside the Committee's terms of reference (Cf. above p. 17).

⁹⁵ Often, in the present state of case law, the fact that the debtor or the majority of the body of creditors are outside the country limits the powers of the national liquidator: Cf., particularly in reference to "caution judicatum solvi", Trochu op. cit. p. 116. .../...

for countries which draw a distinction in this matter between civil and commercial cases, what modes of proof are admissible against the liquidator in litigations where the latter acts either as the representative of a bankrupt trader, or as representative of the general body of creditors.

Having recalled the general principle contained in Article 19 of the Convention, the provisions of Articles 28 to 32, which specify the respective application of the local bankruptcy law and the law of the other States where enforcement of the bankruptcy is pursued, appear sufficiently clear to make any detailed commentary unnecessary. We will therefore limit ourselves to giving some clarification concerning each of these Articles.

Article 28

The first paragraph of this article merely explains in detail, in relation to the liquidator, the rule recalled above, which makes reference to the local bankruptcy law in order to ascertain the extent of its powers in States other than the one where the bankruptcy was initiated. The scope of this article is made clear by the provisions of Article 32 on the realization of assets and by the system of automatic recognition and execution of bankruptcy judgments (Articles 46 et seq.).

Thus, all uncertainty as to the powers of a foreign liquidator before any decision of exequatur disappears. In French law, for example, even though the question is still disputed⁹⁶ it seems widely admitted that foreign bankruptcy judgments constitute in themselves a title having conclusive force, conferring on the liquidator the power to sue at law on behalf of the general body of creditors, to take certain conservatory measures, to prove in a disputed bankruptcy initiated in France, etc.

To help the liquidator in fulfilling his mission abroad the document provided for in Article 28(2) will enable him to establish his status.

⁹⁶Cf. Trochu, op. cit. p. 117 and seq.; Galvada, op. cit. p. 225-227.

however, this attestation, which brings to mind the model formula annexed to the Hague Convention of 15 November 1965 relative to serving and notifying abroad judicial and extrajudicial acts in civil and commercial matters, is no more than an identity document. Legally the bankruptcy judgment automatically recognized and automatically enforceable is the only document which allows the liquidator to act.

With the same concern for efficacy, Article 28(3) allows a liquidator to be assisted, for acts to be accomplished abroad, by one or more co-liquidators possibly chosen from among the persons who follow this calling in the country concerned, or to delegate certain of his powers, where the law governing the bankruptcy authorized such procedures on the internal place.⁹⁷ This provision which is merely a "facility" to enable the "principal" liquidator to overcome difficulties arising from the limited knowledge which he may have of the laws of other countries where he is led to carry out his tasks, is drafted in such a way that it neither prejudices nor implements, even indirectly, the application to "legal activities" of the provisions of the Rome Treaty relating to the right of establishment and supply of services.

In practice this assistance will be justified by the amount of property to be realized abroad, the foreseeable difficulties of execution or those pertaining to fulfillment of the obligations incumbent on the liquidator, by virtue of the legislation of other Contracting States, for example in fiscal, customs or social security matters.⁹⁸

It will be for the law under which the bankruptcy was adjudicated to say whether the liquidators must act as a college or whether each of them may deal separately. Similarly, the fees of the foreign co-liquidator(s) will be fixed in accordance with the law of the country of adjudication. Finally, it should be recalled that, in conformity with the provisions of Article 17-7, any possible liability of these liquidators will be a matter for the courts of the State where the bankruptcy was initiated.

⁹⁷ Belgian, French and Dutch law permit the establishment of several liquidators. Italian law does not recognize such a possibility, but authorizes to a certain extent, the liquidator to delegate his powers to do certain acts with the authority of the bankruptcy judge. German law provides for the appointment of several administrators only when an enterprise comprises distinct branches of business.

⁹⁸ Secs. 103 and 104 of the Reichsabgabenordnung and Article 41 of the French Decree of 1967.

Article 29,

which refers to a special aspect of the debtor's deprivation of capacity to manage his business, lays down the procedures for the transmission of his correspondence to the liquidator by the postal service. The latter, when consulted by the Committee, had requested for the sake of convenience that redirecting mail to the liquidator should be specially ordered by the judicial authority, as in the case in Germany (Sec. 121 KO).

Under the terms of Article VIII of the Protocol, the postal authorities will be informed by the liquidator of the stopping of mail and of the termination of this measure. However, as has already been pointed out, the liquidator has the powers which are conferred on him by the law of the bankruptcy: nevertheless if by virtue of this law, the stopping of mail has not been expressly ordered by the judge, the liquidator will have to obtain an express decision from the authority specified in Article 29.

Article 30

calls for few particular comments. The opportunity for creditors residing abroad to state their claims or to contest other claims submitted, simply by letter addressed to the authorities referred to at Article IX of the Protocol, is designed to reduce the draw-backs which can result from creditors, for example, when the law governing the bankruptcy required the presence of creditors submitting claims against the assets or special formalities to establish their proofs.

Although it is specified that creditors will be free to draft their declaration of claims in their own language, the translation being a matter for the bankruptcy authorities,⁹⁹ it is not provided, on the other hand, that any correspondence sent to foreign creditors by the bankruptcy authorities must be translated by the latter. But these are minor points. The problems of substance relating to the declaration, the verification

⁹⁹Cf. however against this, Paris 6.12.1889, Jour. Faill. 1890, p. 30 (inadmissibility).

and the admission of claims¹⁰⁰ (time periods, informing the creditors as to the position of their claims, whether creditors are or are not subject to the procedures of declaration and verification, the legal nature of the verification of a claim, the problem of term claims, joint and several debtors, debenture-holding creditors, provisional admission of a claim, etc...) concerning which the Convention makes no special arrangements, are part of this course of the bankruptcy itself governed by the relevant bankruptcy law under the terms of Article 19.

By reason of the differences shown on these points by different legislations, it will be desirable to keep the interested parties well informed as to the actions they will have to accomplish in order to safeguard their rights in proceedings opened in another State and as to the legal officers to whom they may turn in this matter.

Articles 31 and 32

The first paragraph of Article 32 takes up again, in connection with methods for conserving and realizing property to be carried out by the liquidator, the principle already laid down at Article 28.

Amongst the conservatory measures referred to at Article 32(1) may be inventory, registration of mortgages, certain recoveries and, more particularly, the affixing of seals and the sale of movables which are perishable or costly to preserve (merchandise or business as the case may be). These last two points demonstrate the divergences of legislation, which are pronounced as regards the authority from which the necessary authorization must come.¹⁰¹

In this matter, conflicts are to be expected between the *lex concursus* and the *lex rei sitae*. In accordance with the general principles already deduced above, the first will lay down the extent of the liquidator's powers and will say by whom and how he would be authorized to act (enabling formalities). In application of bankruptcy law, it will be the same for the operation of an undertaking or business which is specifically provided for in Article 31.

¹⁰⁰ Cf. the examination of comparative law made by M. Van der Gucht, op. cit. 1964, p. 193 and seq.

¹⁰¹ Cf. specially Van der Gucht, op. cit. 1964, p.164 and seq.

The *lex sitae* will determine the local procedure which it may be necessary to use, for example, in affixing the seals (purely implementing formalities).

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

- the form of the sale is determined according to the law of the bankruptcy. However, as these forms are not identical in bankruptcy matters in the six countries, a choice must be made, in the country where the property is situated, of the procedure which is closest to that which may be laid down by the bankruptcy law;
- the form of the sale is determined by the bankruptcy law in force in the country where the property is situated.

The Committee came out for the first system, since only the law under which the bankruptcy was adjudicated should govern its course. Article 32(2) therefore makes a distinction, on the one hand, between the possibility of realization and the forms in which this is done - both being determined by the law of the bankruptcy - and, on the other, the procedural rules of realization, which will be those of the law obtaining where the property is situated.¹⁰² Thus, if a debtor whose bankruptcy has been adjudicated in Belgium possesses real property in Germany and, assuming that because of the Belgian law of bankruptcy immovables can be sold only by auction, the sale of the property situated in Germany must be by auction even if German law provides that in bankruptcy matters there may equally well be sale by private treaty as sale by auction. However, sale by auction in Germany will be in accordance with the procedure laid down by German law for this purpose.

¹⁰² In addition to the fact that this solution, which is also the one underlying Art. 32(1), is sufficiently justified by the prevalence of the law of the bankruptcy applied universally, it also seems totally with the attitude of certain modern authors (Cf. Istvan Szasz, *International Civil Procedure, a comparative study*, Leyden 1967). These authors, taking up the very mechanism of the conflicts of laws, advocate the application of the procedural law most closely related with the various acts of procedure to be accomplished and the relationships of substantial law and criticize the competence traditionally attributed to the *lex fori* (which here corresponds to *lex rei sitae* by transposition).

Conversely, if the law of the country where the real property is situated makes it obligatory that the sale be by auction, the sale may nevertheless be by private treaty or by other means when, according to the law of the bankruptcy, the liquidator has such a possibility.

Whether, for conservatory measures or acts of liquidation, it finally appeared indispensable to provide expressly in the Convention (Article 32 last paragraph) for the possibility of appeal, to safeguard legitimate interests, to local procedures instituted in emergency cases.¹⁰³ Thus, when the liquidator might wish to sell a movable which he considers perishable, although in fact it is not, any interested person, for example, the owner hiring out the property or the debtor himself, could appeal to the courts of the country of the bankruptcy which alone would have power to rule on whether such appeal was admissible and duly founded. However, if it appears necessary to say execution as a matter of urgency, the opposing party could seize the judge of the place of enforcement to obtain where possible a stay of execution up to the time when the dispute would be decided by the court having jurisdiction in the country of the bankruptcy.

Section IV. Effects of bankruptcy on the debtor's assets

Article 33:

The first paragraph of this Article affirms in the clearest fashion the principle of the universality of bankruptcy. Already, Article 20 provided that privation of capacity of the debtor applies as of right and automatically in all the Contracting States independently of any formality of recognition or publication of the judgment. Article 33 develops this principle, in relation to the assets thus affected by deprivation of capacity in space and time.

¹⁰³ French jurisprudence contests the right of the appeal judge to interfere once the case has been laid before the bankruptcy court (Cf. Paris, 6 May 1867, p. 69-11-53 and 15-1-1966 D.S. 66.327). But the point here is not to determine who is the judge (the appeal judge or another) who will be competent for disputes in case of emergency, but to know whether a judge (French for example) will be competent in this respect.

Contrary to the conceptions of certain legislations,¹⁰⁴ the movable and immovable assets of the bankrupt situated in the other Contracting States will form part of the assets which the liquidator is required to seize and realize. This will also apply to assets situated in third States, (always providing that the liquidator is able effectively to seize), only to the extent fixed by the *lex fori* (cf. Art. 19 and 41(1) in fine). To this principle the Convention admits only the two exceptions, examined under Articles 9(2) and 60. (The case where, by reason of some special characteristic of the debtor, the bankruptcy cannot produce its effects in all the Contracting States; a bankruptcy which is purely territorial in the event of a successful voidability action in a country).

The principle of universality is tempered somewhat by Article 33(2 and 3) relating respectively to future assets and assets of which the debtor cannot be dispossessed.

The majority of European legislations specify that deprivation of capacity affects not only the present assets of the bankrupt but applies equally to assets which may accrue to him while he is in the state of bankruptcy (inheritance, assets acquired as a result of a new business venture),¹⁰⁵ but this is not the case in German law (Sec 1(1) KO). It was important therefore to specify the law which would make it possible to say whether future property does or does not form part of the assets when a debtor, declared bankrupt in Belgium, for example, possesses property in Germany. This demanded a choice between Belgian law, the law of the bankruptcy, and German law, the *lex rei sitae*. The question is much disputed among legal writers.¹⁰⁶ At the suggestion of the German delegation, the Committee pronounced in favour of the law of the bankruptcy; it appeared logical to the Committee that this law which governs the deprivation should also govern its extent. Thus, when the bankruptcy is adjudicated in the Federal Republic, deprivation of capacity will not affect future property no matter where this is situated.

¹⁰⁴ Cf. p. 4, note 5 and p. 33, note 36 of this Report.

¹⁰⁵ 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 F.W.

¹⁰⁶ Cf. Trochu, *op. cit.* p. 225 .../...

The conflict between the provisions of the law of the bankruptcy and those of the *lex sitae* does not solely concern future property. In the majority of the legislations, certain properties, the list of which can vary from country to country, escape deprivation of capacity to administer by reason of the fact that they cannot be seized. In most cases this is for reasons of a social nature proper to each State. Article 33(3) therefore refers only to the law of situation.

There is little danger of this solution leading to the simultaneous establishment of six masses 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, rarely paid to the bankrupt in more than one State.¹⁰⁷

Finally, it must be pointed out that Article 33(3) does not use the term "property which may not be seized" but deliberately uses the wider expression of property "excluded from the bankruptcy assets".

Article 34

Law-makers have generally shown themselves severe with regard to the bankrupt's spouse, and more particularly with regard to the wife. This severity usually takes the form of certain restrictions on the rights and benefits which the spouse may claim, and this in order to avoid any attempted fraud to the detriment of the creditors.

First of all, bankruptcy of a debtor considerably curtails any opportunity for the spouse to resume possession of personal property. Thus the laws of the Contracting States, with the exception of France and Germany¹⁰⁸ 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 money and, consequently is included in the bankruptcy assets.

¹⁰⁷ This can nevertheless be the case for immigrant workers. In this connection Art. 10 of Regulation No 3 on the Social Security of Migrant Workers lays down that "the pensions or annuities and the allowances for decess acquired by virtue of the legislation of one or more of the Member States may not be subjected to any reduction, change, suppression or confiscation because of the fact that the beneficiary resides in the territory of a Member State other than that in which the debtor institution is situated."

¹⁰⁸ Cf. Art. 56 of the 1967 French law; Sec. 45 KO was annulled by the Federal Constitutional Court on 24.7.1968 (BGBl I p. 994).

This presumption, which is a provision proper to bankruptcy law and not a rule of the law of matrimonial systems, is considered as being of a public nature and is applicable no matter what the matrimonial system may be and no matter what law governs it.

But the legislations which recognize such a presumption are in opposition as to the system to be applied. Some implement it only with regard to the wife,¹⁰⁹ whereas others apply it to both husband and wife.¹¹⁰ But it is especially with regard to the type of proof necessary to rebut the presumption that a difficulty has arisen with the solution under Belgian law, which demands as a general rule an inventory or an authenticated document with distinctions according to the nature of the property claimed, the time and the method of its acquisition.

As such disparities are serious obstacles to the application pure and simple of the law of bankruptcy unanimously recommended by legal writers and generally upheld by law,¹¹¹ the Committee formulated a uniform law according to which contrary proof may henceforth be brought by all means (Article 3 of Annex 1). The scope of this law must be clearly specified: it is merely a rule of proof where the purpose is to rebut the "mucian presumption" in the case where the particular bankruptcy law recognizes this presumption.

The question of gifts and matrimonial benefits granted by one spouse to the other and which is treated in Article 34(2) also shows legislative differences which do not relate merely to the law of bankruptcy:

- In Belgian (Art. 557 Commercial Code) and in French law (Art. 58 of the 1967 law), matrimonial benefits, under certain conditions, cannot be pleaded against the general body of creditors, which as a compensatory measure, cannot invoke those awarded to the bankrupt.

¹⁰⁹ Belgium (553 and seq. Commercial Code) and Luxembourg.

¹¹⁰ Italy (Art. 70, bankruptcy law) and the Netherlands (Art. 61 F.W. and 205 B.W.)

¹¹¹ Cf. Trochu, op. cit. p. 215 V. and also Orleans 17.7.1895 Clunet 1895, p. 1038 and Brussels 2.7.1902, Clunet 1904, p. 202.

- According to Dutch law, only the promises of matrimonial benefits are void as against the general body of creditors (Article 62 F.W.).
- German law governs this question in the setting of the provisions relating to the suspect period: under the terms of Sec. 32(2) KO, only such gratuitous acts executed by the bankrupt in favour of his spouse may be annulled as occurred during the two years preceding the bankruptcy;
- Deeds of gift executed during the two years preceding the bankruptcy are declared to be without effect in regard to creditors by Article 64 of the Italian bankruptcy law, which makes no distinction between the spouse and other beneficiaries. But this provision is considerably strengthened by the prohibition of gifts between spouses contained in Article 731 of the Civil Code, which may be invoked by the liquidator.¹¹²

The formulation of a general law, limited to bankruptcy law, would have presented many great difficulties. The Committee therefore considered it preferable simply to give competency to the law of the bankruptcy in accordance with the solution most often accepted.

Finally, legislations which recognize the prior legal claim of a married woman generally provide, in the case of the husband's bankruptcy, for restrictions both as to the basis of the claim and to claims secured when the husband was a trader at the time of the marriage or had become one within a certain period after it.¹¹³ The convention does not contain any express provisions on this point.

Firstly, it seems incontestable that the solution based on the application of the law which governs the material interests of the spouses should not be rejected as in the preceding case, as this problem does not come with the

¹¹² For the combination of these two arrangements, *Provinciali, Manuale di Fall.*, Milan, p. 358 and for that between Art. 781 of the Civil Code and nuncian presumption, *Cass. ital.* 20.3.1959, *Giur. it.* 1960, I, I. col. 49.

¹¹³ This is the case of Belgian law (Art 64 of the mortgage law of 16.12.1851 and 559 of the Commercial Code) and of Italian law solely for gift properties of the wife (Art. 2817 of the Civil Code and 69 of the bankruptcy law). French law since the reform of the matrimonial systems by the law of 13.7.1965, now recognizes the legal claim of the spouses, but the 1967 law has rescinded Art. 544 of the Commercial Code which contained provisions almost identical to those of Art. 559 of the Belgian Commercial Code.

normal framework of situations governed by the law applicable to the matrimonial regime which, at the most, has creative power to the extent that the spouse can claim certain benefits or certain secured rights only when these are allowed by the law governing the pecuniary interests of the spouses. Writers on the matter are divided between application of the law of the bankruptcy and that of the State where the encumbered property is situated.¹¹⁴

According to the Convention, for reasons already set out in the introductory part, and to which we will return in relation to Section VI, the basis and extent of the secured rights, be they general or special, are determined by the *lex rei sitae* (Art. 41 and 43). It will therefore be the provisions proper to bankruptcy of the *lex rei sitae* that will in the end delimit the restrictions on the prior legal claim of the wife to her husband's real property, subject of course, to the rules relating to the suspect period as regards pleading against the general body of creditors of this prior claim.

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

Articles 35 to 39 of the Convention contain the bulk of the provisions of Title IV reserved by Article 19(2) in so far as their object is to derogate from the application of the *lex concursus* to the effects of the bankruptcy.

In truth, only certain provisions of Section V lay down rules for solving conflict by referring to a law other than that of the bankruptcy; this is the case for the law applicable to labour contracts (Art. 36) to hiring contracts (Art. 37) and to sales contracts (Art. 38). In these cases it is indeed a matter of derogations from the principle of Article 19(2) demanded either by the normal functioning of rules of private international law or by special considerations concerning social order or the security of transactions.

¹¹⁴ Cf. Trochu, *op. cit.* pages 211-13.

But the uniform laws provided for in Articles 35 and 39 pursue another and dual objective:

- to avoid very great disparities for situations which cannot be governed except by the law of the bankruptcy, irrespective of the country where this was initiated. Such is the system for the suspect period;
- to remedy the present uncertainties as to determination of the law applicable to certain matters, such as compensation and reserved ownership clauses, where many laws are in conflict (the law of the bankruptcy, laws which govern debts, the law of situation), whereas, moreover, the application of one or the other, or even a combination of them, would not have yielded a satisfactory result.

The technique of the unification of internal bankruptcy laws has therefore been utilized in matters where these laws gave very different solutions, and this by reason of the serious economic consequences which any other solution would have allowed to exist or would have created.¹¹⁵

Article 35 relates at once to matters which cannot be invoked against the general estate and to set-off in cases of bankruptcy.

A. Actions in the suspect period and Paulian actions

The legislations of the six Common Market countries recognize special provisions in relation to the voidability (Germany and France) nullity (Belgium, Luxembourg, Netherlands) or ineffectiveness (Italy) of certain acts accomplished by the debtor before bankruptcy was adjudicated.¹¹⁶

But national legislations are fairly far from each other on this point. French, Belgian and Luxembourg law link the question of the voidability or nullity of the bankrupt's acts with that of the cessation of payments. It was the same in Italy until the Commercial Code was repealed, but there the ineffectiveness of these acts has been linked, since the 1942 decree, with the insolvency of the bankrupt.

¹¹⁵ Van der Gucht, Draft bankruptcy convention between the EEC States
J. Comm. Belgium 1968, III, 361 et seq.

¹¹⁶ For Belgium and Luxembourg, Art 445-49, Commercial Code; France, Art. 29 to 34 of the 1967 law; Italy Art 64 et seq of the bankruptcy law; the Netherlands, Art 42 to 48 F.W.; the Federal Republic, Secs 29 to 42 KO, 222 KO, Sec. 342, HGB.

These four countries have systems of presumption which are more detailed and, in any case, wider in their effects than the Netherlands and Germany, and have remained closer to the Paulian action.¹¹⁷

Very great differences are to be noted with regard to the period preceding the bankruptcy judgment during which acts must have been executed if it is to be impossible to evoke them: the period varies from 40 days in Dutch to 2 years in Italian law: the legislations of Belgium, Luxembourg and Germany provide in general for a period of six months, whereas French law recognized up to 1967, a period which, in theory, was unlimited.¹¹⁸

Despite these differences, common elements, which are both numerous and essential and which flow from the same concern, i.e. how to find a balance between the creditors' interests and credit in general, and deriving their source from the same original machinery, the Paulian action, have made it possible to achieve, in this matter a unification of substantive law, based on Belgian law¹¹⁹ and contained in Article 4 of Annex I, with reservations and options relating to relatively secondary points at (e) to (g) of Annex II.

Let us note first of all that Article 35 of the Convention, as well as Article 4 of Annex I, preferred the term "voidability" to that of "nullity": it is solely a question of determining whether the act in question can or cannot be pleaded against the general body of creditors: the system of the suspect period in no way affects the validity of the act in relations between the parties.

One difficulty to be overcome was that of the date of cessation of payments. On the one hand, in the Netherlands, the court which adjudicates bankruptcy does not fix this date: in Germany, on the other hand, it is not fixed at the time when the bankruptcy begins but subsequently, in the light of each appeal

¹¹⁷ Heenen, *Les nullités de la période suspecte dans les pays de la CEE*. *Liber amicorum Baron Fredericq*, 1965, p. 357 et seq.; Van der Gucht, *J. Comm.* Brussels, 1964, p. 219 et seq.

¹¹⁸ Since the 1967 law (Art. 29), the date of the cessation of payments may not be more than 18 months earlier than the pronouncement of the judgment.

¹¹⁹ On the question as a whole, Cf. Fredericq, *op. cit.* Vol. VII N° 104 et seq. French law in its pre-1967 wording was itself very close to Belgium, apart from the questions of time-limits: Cf. Ripert and Roblot, *op. cit.* N° 2952 and Argenson, Toujas and Dutheil *op. cit.* N° 276 et seq.

in opposition (Anfechtung), so that it is possible, in theory at least, that there be several dates for cessation of payments in the same bankruptcy. It was therefore necessary in order to cover the case of the Netherlands, to introduce into Annex II a reservation making it possible, if required, to omit any reference to the date of cessation of payments in the uniform law texts.

The real importance of the uniform law lies not so much in the unification of the basic rules relating to the suspect period (since it is largely the same acts which are reflected in the different systems of law) as in the unification of the time-limits which, as we have seen, were very different at the outset. In principle, the duration of the suspect period between the date of cessation of payments and the adjudication of bankruptcy cannot exceed one year, save for payment of debts which have not fallen due, when the maximum period is only six months. Annex II provides, however, that the Contracting States may fix other time-limits, within agreed maxima and minima. There may not be less than six months or more than two years for gratuitous acts and one year for acts for valuable consideration.

The uniform law has taken account, at paragraph E, of the fact that proceedings other than bankruptcy may have been initially opened without being successfully carried through, so that bankruptcy was finally pronounced; in this case the length of the suspect period is increased by the duration of the initial proceedings. This will be the position in the case of:

- Gerichtliches Vergleichsverfahren leading to subsequent bankruptcy or Anschlusskonkurs (see also Secs. 28 and 107 VgLO);
- The conversion into bankruptcy of the Belgian judicial composition (concordat) and of the Italian and Luxembourg preventative composition in bankruptcy;
- A finding that there was cessation of payments or cancellation of a scheme to reorganize the debtor's affairs in a procedure for the provisional suspension of the proceedings and of collective settlement of the debts (Articles 27(2) and 38(3) of the French ordinance of 23.9.1967);
- Declaration of bankruptcy consequent upon a suspension "van betalen" (of payments) (Art. 242 E.W.).

.../...

In conformity with Belgian and French law, the uniform law establishes a distinction between two sorts of acts void as against the general body of creditors.

Article 4 of Annex I provides that certain acts may not be invoked against the general body of creditors. This is a question of legal voidability. It does not mean that the acts are automatically void. Voidability must be declared by the judge seised at the request of the liquidator, but such a declaration will necessarily be made if the legal conditions for it exist.

By contrast, other acts "may be declared invalid" as against the general body of creditors. Voidability is then only optional for the judge, who therefore has power of assessment and must give grounds for his decision.

Let us now examine the different paragraphs of Article 4, grouping their provisions.

(1) Acts which are void in law as against the general body of creditors:

these are of four kinds:

- Gratuitous acts (paragraph A)

All legislations provide that donations and gifts by the bankrupt can be challenged, but the uniform law contains on this point the principle of voidability by law of ex lege known only to certain systems of law (France, Belgium, Italy). Among such gifts, there is express reference to a dowry settlement by a parent or third party on one of the future spouses, which were considered in Belgium, and in France up to 1967, as acts for valuable consideration in the relationships between the donor and his creditors.

On the other hand, the uniform law, by borrowing from German and Italian law, has freed from this voidability gifts made to fulfil a moral duty and presents customarily given (Gelegenheitsgeschenke Sec. 1524 BGB) on the condition that they are proportionate to the debtor's property and to the circumstances. Likewise, but by means of the reservation inserted at letter (e) of Annex II, if the bankruptcy is initiated in Italy, gifts made for purposes of general utility may be pleaded against creditors. (Art. 62 bankruptcy law. ¹²⁰

¹²⁰ These are gifts which do not take into consideration the different beneficiaires separately but a category of persons as a whole and the aim of which is socially worthy of interest.

Automatic voidability will operate if the gifts have been made less than one year before the declaration of bankruptcy, irrespective of the date of cessation of payments. In other words, the dual condition required later in Article 4, that the act which has been challenged must have been executed after the cessation of payments and at the maximum within a year (or six months) before the declaration of bankruptcy is not found here.

Paragraph A - 2° of Article 4 reproduces a provision of Article 445 of the Belgian Commercial Code, which likewise exists in Italian (Article 67, 1. 1f) and Dutch law (Article 43, 1° F.W.), which has guided the French legislature (Article 29 of the 1967 law) and which is aimed essentially at disguised gifts. This would be the case, for example, when the price is appreciably less than the value of the goods sold; there is a gift at least in part. The court will have to assess the circumstances of the matter to decide if the act is for valuable consideration or gratuitous. In the latter case, voidability will operate for the whole and will not be partial.

Finally, in conformity with Annex II(f), the introduction of the uniform law will not prejudice the retention of the present German law in two special cases of unequal interest: services rendered by an heir, before the initiation of the bankruptcy of a deceased's estate to meet the rights of an illegitimate child (222 KO) and repayment of their contributions to sleeping partners of a Stille Gesellschaft (342 HGB).

- Payments of debts which have not matured (Par. B - 1° - a)

If the debtor pays a term creditor who could not claim anything further from him because the bankruptcy in itself will cause the lapse of the term, this payment appears particularly suspect.

To ascertain whether such a payment should be declared invalid as against the general body of creditors, the text contains two criteria as to time. On the one hand, the date when the bankruptcy was adjudicated must be taken in assessing whether the debt is demandable: this provision is taken over from Article 65 of the Italian law (see also Article 29 - 3° of the French law of 1967). On the other hand the payment must have been made after cessation of payments and less than six months before adjudication of bankruptcy, and this without there being any need to worry about the time when the debt was contracted.

.../...

The Committee did not choose the German (Sec. 30 KO) and the Dutch systems, which are more favourable to the debtor, permitting the creditor to bring proof that he was ignorant moreover of the debtor's cessation of payments, a proof which is difficult to provide.

The terms "payment" and "debts" must be understood in a wide sense: the text must apply to any discharge of an obligation, civil or commercial, which has not fallen due at the time of declaration of bankruptcy, either by payment in kind or by delivery of goods or otherwise irrespective of the source of this obligation.

In compliance with the solutions worked out in particular by Belgian and French case law,¹²¹ a payment made before the due date by a debtor who had the opportunity of obtaining discount would not be automatically impossible to invoke if this had been provided in the initial contract, since in this case the debtor has an interest in paying in this way. But such a payment can be made the object of optional voidability as provided at Article 4 - C 1°.

- Abnormal payments of debts due (pars. B - 1° b and c)

While the discharge of debts not due can never be invoked against the general body of creditors, the opposability of payment of debts due depends on the mode of discharge. True payment is that which is made by the remittance to the creditor of the object of the obligation.

If the obligation in question relates to a sum of money, this will have to be done by the payment of an amount of money equal to the nominal amount of the claim. Modern commercial and banking practices treat on the same footing as payment in cash, payments made by bills of exchange, by transfers or by entry into a current account made in the normal way.

¹²¹ Cf Fredericq, op. cit. N° 114 and 115 and Ripert-Roblot, op. cit.

If the obligation requires remittance of an object, delivery of this by the debtor constitutes a normal payment.

The criterion applied by the text is therefore the abnormal procedure of payment not provided for by the contract. Such would be the case, for example, where a payment is made by remittance of something other than that agreed on, with payment by transfer or assignment of a claim or by the amiable conclusion of a sale.

The drafting of paragraph B - 1°, understood in sufficiently wide terms, thus made it possible to overcome the divergences on this point in national legislations.¹²² No more than in the previous case, was the possibility in German and Dutch law of reserving to third parties the proof of their ignorance of the debtor's cessation of payments chosen by the Committee.

- Real sureties for previous debts (par - B - 2°)

In conformity with the models on which it is based, the uniform law subjects real secured claims to a different system according to whether they arose at the same time as the principal obligation or afterwards (Cf. par. D).

A secured right given after the event destroys the necessary equality between creditors of the same common fund. In the meaning of par. B - 2° it is the priority of the debt, due or not due, in relation to the secured right given which alone is important. To be voidable in law the real secured right must therefore have been constituted during the suspect period, but after the creation of the principal obligation; it is of little importance whether the latter was contracted before or after this period. This situation frequently arises as regards current account.

What is important here is the constitution of the secured claim and not its registration. When the constituent act is validly executed having regard to the provisions of par. B - 2° but registration is made later, the validity of the registration will be assessed according to the provisions of par. D, which moreover relate only to secured rights given by contract.

¹²² Cf. Van der Gucht, op. cit. 1964, p. 269 et seq.

The text refers to legal secured rights in the same way as to conventional and judicial. In reality, by reason of the exceptions provided for, voidability as against the general body of creditors will in practice scarcely ever arise except with regard to the prior claim of spouses (Cf. Art. 29 - 6° of the French law of 1967) or of a married woman, since in principle these prior claims arise at the same time as the debt which they guarantee. By virtue of an express provision, the following would escape from the voidability in law of par. B - 2°: legal prior claims securing sums due to the Public Treasury, to tax departments and to social security bodies and those of minors or minors habendi in wardship (Cf. particularly Art. 2143 of the French Civil Code).

(2) Acts which may be declared void if the Court so wishes

These may be acts for valuable consideration and late registration of secured rights.¹²³

- Acts for valuable consideration (par. C)

Under the conditions set out below, all acts done by the debtor may be declared void as against the general body of creditors. These are first of all, as in the Paulian action, transfers for valuable consideration (assignment of rights, contributions to the capital of a company, endorsement of a bill of exchange to a bearer in bad faith) and the constituting or subrogating of real secured rights simultaneously with the creation of the debt. But they also include acts which cannot be challenged in civil law, such as payments and sharing-out of the estate of an inheritance or joint assets, which retain the character of acts for valuable consideration where bankruptcy is concerned.

For these acts to be declared void as against the general body of creditors, three conditions must be met, the burden of proving which is on the liquidator:

- the act must have been executed during the suspect period fixed by the Court;
- the third party must have had knowledge of the cessation of payments at the time when the act was agreed on. This is a question of knowledge of a fact, apart from any fraudulent agreement within the meaning of civil law;

¹²³ Cf. for Belgian law (Arts. 446 et seq. Commercial Code), Fredericq, op. cit. N° 132 et seq.; for French law (Art. 31 et seq. of the 1967 law) Ripert and Roblot, op. cit. N° 2974 et seq.

- the act of the debtor must have prejudiced the general estate.

This condition is the foundation of the interest in acting.

An exception to the rule that all payments can be so declared void, is contained in par. C - 2° in favour of the bearer of a bill of exchange, a cheque or a bill payable to order. Bad faith cannot be alleged against this bearer since he is obliged by law to present the bill for payment when it falls due. This exception is, however, corrected by a special provision by which the general body of creditors may bring an action for cancellation against a person who has derived profit from putting the bill into circulation after cessation of payments knowing the state of affairs of the person against whom it was drawn. Otherwise utilization of a bill of exchange would be a much too convenient means of making a payment that could not be attacked.

- Late registrations of contractual secured rights (par. D)

This voidability is different in character from the preceding ones; it affects an act to which the debtor is a stranger and punishes the negligence of a creditor who is the holder of a real surety subject to registration (mortgage, pledge, preference).

As distinct from the case at par. B - 2°, it must be supposed that the right was validly constituted, either because this had been done before cessation of payments, or because the creditor was unaware of the latter and it was not a case of guaranteeing an earlier debt. If registration is effected during the suspect period, it can be declared voidable when more than fifteen days has elapsed between the constitution of the secured right and the request for registration or for prenotation (Vormerkung). The court seized by the liquidator has power to assess the reasons for the creditor's delay.

(3) The exercise of Paulian actions

The voidability actions under Article 4 are particularly severe since they make it possible to obtain even payments which the ordinary law leaves outside the scope of the Paulian suit sanctioning proven fraud by the debtor.

.../...

In none of the six legislations do the special provisions for bankruptcy place any obstacle in the way of the possibility of bringing the Paulian action of ordinary law in the framework of the bankruptcy.¹²⁴ This last means is even the only one which allows the upsetting of acts prior to the suspect period and those executed between ratification and cancellation of a composition. It may also be exercised in relation to acts executed during the suspect period, and even though the conditions which it presupposes may generally be stricter than those governed by Article 4, it could happen that the two means might be invoked simultaneously. The Paulian action can be brought in bankruptcy only by the liquidator as in the case of suits to have special acts declared void as against the General body of creditors.¹²⁵ However, Article 4 par. F provides the opportunity to apply the reservation contained at letter (d) of Annex II so as to take account of a peculiarity of Dutch law according to which creditors can bring the Paulian action in contesting the admission of a claim (Cf. Art. 49 par. 2 F.W.).

As for the rest, and ignoring the question of jurisdiction, (Cf. Art. 17-3) the exercise of the Paulian action in bankruptcy is governed by the rules of ordinary law. It is for this reason, therefore, that it did not seem desirable to uniformize its basic rules, which extend beyond the subject of bankruptcy, and Article 35(2) refers on this matter to bankruptcy law the jurisdiction of which is generally admitted.¹²⁶ Likewise this law will apply for all points not governed by uniform law.

B. Set-off

Set-off in bankruptcy proceedings, between two reciprocal obligations arising under the aegis of two different legislations, poses a problem particularly difficult to resolve by the application of rules of private international law.

¹²⁴ Cf. above p. 58

¹²⁵ In French law, since two recent judgments of the Cour de Cassation (Com. 7.6.1967, Bull III p. 224), as in other legal systems, the Paulian suit in bankruptcy cases is an action by the body of creditors which cannot be exercised by the liquidator alone. Before this ruling it was admitted that any creditor could also act individually, but then, in this case, the properties recouped benefited the general body only.

¹²⁶ Cf. Trochu, op. cit. 167: for Dutch case law, Amsterdam Appeal Court 11.6.1954 and Hoge Road 15.4.1955, Clunet 1957, p. 478.

To determine the law applicable is all the more difficult since it already settles a disagreement in case law and legal writing in this field, even where there is no bankruptcy.¹²⁷ Moreover, as internal legislations are in disagreement on the basic principles, the adoption of a simple rule of conflict would inevitably create scandalous inequalities between creditors.¹²⁸

However, in all the existing legislations, set-off is always shown as having a dual role: it is a simplified mode of settlement and a guarantee of payment. But whereas in France, Belgium and Luxembourg no inferences are drawn from its guarantee function, German, Italian and Dutch authors, quite to the contrary, and without neglecting the simplifying or accountancy aspects of set-off, have highlighted the idea of secured right which it confers on the creditor-debtor. These two tendencies lead to a complete contrast when there is bankruptcy. In the concept of guarantee, set-off is seen as established and developed,¹²⁹ while in that of a mode of payment, it is checked by the deprivation of the debtor's capacity to administer and the rule of equality of creditors.

Thus, in the latter case, from the time of the judgment adjudicating bankruptcy, no set-off whether legal, judicial or contractual, is admissible for the benefit of a person who is both a creditor and debtor of the bankrupt. As debtor he must pay all that he owes: as creditor he is subject to the law of dividend. As an exception, however, Belgian and, above all, French case law admit that set-off may operate after bankruptcy is declared, that is to say although the conditions as to liquidity and payability of the two debts do not arise until after bankruptcy, where the claims and the debts are in the same account or if the two debts result from the same contract.

¹²⁷ Cf. the analysis of the doctrine by Trochu, op. cit. p. 181.

¹²⁸ Cf. Van der Gucht, op. cit. 1964, p. 274; and Coppens "Pour la compensation après la faillite" in "Idées nouvelles dans le droit de la faillite" p. 201 et seq. and Jur. com. belge 1968 II 205.

¹²⁹ Cf. Secs 54 et seq. KO and Art. 53 et seq. F.W. Italian law accepted compensation in 1942: see Art. 56 bankruptcy law and Foschini, La compensazione nel fallimento, Morano, 1965.

The need for a uniform law was evident. But the working out of common laws presupposes reciprocal concessions, each country showing some hesitation in abandoning solutions which are traditional for it and which have their own justification. Choices had to be made. Although French and Belgian legislations could, to a great extent, serve as models in relation to the suspect period and measures affecting company directors or managers they seemed, on the other hand, unacceptable regarding set-off.

The uniform law, as contained in Article 5 of Annex I represents a compromise between German, Dutch and Italian law.

According to Article 5(1) - and this is the real objective of the uniform law - set-off is possible when the conditions for payability or liquidity of the claims to be set off or of one of them, are not met until after the initiation of bankruptcy. Set-off which arises when bankruptcy is adjudicated, particularly legal set-off, which generally comes into operation automatically, is not the subject of the text. For set-off to be possible, claim and debt must exist in the same estate at the latest at the time when the bankruptcy is adjudicated. Consequently, set-off resulting from the acquisition of a claim or debt subsequent to the bankruptcy, for example, by inheritance, and a fortiori for a claim arising after bankruptcy, is excluded. Paragraph 1 has spelt out, with concern for clarity, that set-off operated just as much between debts resulting from the fulfilment of an obligation, as between debts of which one is not stipulated in the contract but arises from its non-fulfilment.

Let us take one after another the cases where the conditions for payability and liquidity are not met at the time of the bankruptcy.

There are first of all term claims. Following in this matter the legal systems which allow set-off in bankruptcy, Article 5(2) in a way effects a forfeiture of the term with regard to the creditor, whereas generally, such forfeiture operates only in respect of the bankrupt's debts. The evaluation of the claim against the bankrupt will be made on the day bankruptcy is adjudicated according to the special rules for this purpose provided for by the law of the bankruptcy if it contains any such (Cf. S65 - KO; Art. 190 and 131 F.W.) and, failing this, by transposition of those relating to the liability to demand of the bankrupt's immatured debts (Cf. Art. 450 Belgian Commercial Code).

.../...

Set-off will apply likewise to credits expressed in foreign currency.¹³⁰

Stipulation in foreign currency is most often only the choice of a unit of account leading to payment in the currency of the court, the mechanics of which are related to those of an index-linking clause. The same solution should logically prevail when the bankrupt's debt is a debt in kind which is not evaluated in money terms (Cf. Secs. 54 - 4°, 69 and 70 KO).

On the other hand, the uniform law does not permit set-off of claims subject to a suspensive condition (para. 3). The problem here is different from that of term credits. The credit subject to a suspensive condition does not exist as long as this condition has not come about, and the declaration of bankruptcy changes nothing in this respect. The Committee considered it reasonable not to go as far as German and Dutch law, which facilitate set-off in bankruptcy matters often extending even further than the provisions of civil law.¹³¹ However, the Federal Republic of Germany, on the basis of the possibility contained in Annex II(h), will be able, in respect of proceedings adjudicated on its territory, to bring set-off into operation when the condition occurs in the course of the bankruptcy or even after its closure. On the other hand, paragraph 3 does not envisage the case of a claim subject to a cancellation condition; the set-off will disappear retroactively if the condition is fulfilled.

¹³⁰ Cf. the European Convention on commitments in foreign currency concluded in 1967 under the aegis of the Council of Europe. See also, for conversion, Art. 37(2) of the French law of 1967.

¹³¹ Contrary to Dutch law, German law provides the following system for claims which have a suspensive condition:

- (a) The creditor whose claim at the time of initiation of the bankruptcy is subject to a suspensive condition may, with a view to compensating this claim at the time when the condition is fulfilled, require the constitution of surety to an amount equal to his own debt (Cf. Sec. 54 par. 3 KO).
- (b) It is the same when the creditor's claim and that of the bankrupt are both accompanied by a suspensive condition and the bankrupt's claim is the first to mature.
- (c) When the creditor's claim which was accompanied by a suspensive condition falls due for payment, whereas the bankrupt's claim is not yet due, the creditor may operate a set-off forthwith. There is a difference of opinion on the question of what rights the creditor will have after such set-off if the bankrupt's claim does not mature.

Precautions had to be taken to avoid frauds. As a solution midway between German and Dutch law (Art. 54 F.W.) set-off will not be allowed in the case of transfer of a claim or of a debt before declaration of bankruptcy but during the suspect period if the liquidator brings proof of the fact that the transferee knew of the cessation of payments. Paragraph 4 limits this exception solely to transfers under a private head; it therefore does not include devolution by succession and, generally, any transfer of legal universality. But it is expressly aimed at transfers of securities to order or bearer, since there was no way of being certain that discounting a bill of exchange, for example, would everywhere be treated on the same footing in case law to transfer of claim.

Articles 36 to 39

A. General

Apart from the possible application of the suspect period system, bankruptcy can have two effects on contracts and acts executed by the debtor before it occurs. It can mean either their cancellation (or termination), or a modification of their effects.

In principle, only contracts entered into *intuitu personae* (agency, partnerships) are automatically terminated by the fact of bankruptcy. For other bilateral contracts, the liquidator has very often a right of choosing whether they be continued or cancelled. If he is in favour of the contract being carried out, the co-contracting parties become, for the counterpart to be received, creditors of the general estate, whereas if the contract is cancelled, the damages which may be allowed constitute a claim in the general estate.¹³²

As it is a matter of ascertaining by whom and under what conditions current contracts may be cancelled or continued, or again whether clauses providing for cancellation in the case of bankruptcy must receive effect, the normal thing would be to submit this exclusively to the law of the bankruptcy. Those questions involve the powers of the bankruptcy authorities, in particular of the liquidator, and it will be this same law which will

¹³²

Cf. the very general provisions of Art. 38 of the French law of 1967. Compare with Secs 17 et seq. KO and 50 Vg10; Arts. 72 to 83 of the Italian bankruptcy law and 37 et seq. F.W., which also contain provisions specific to certain contracts. .../...

determine in principle the consequences of maintaining or cancelling the contract (Article 19(2)).¹³³

This is a question of ensuring the equality of creditors in accordance with the very objectives of the bankruptcy. Strictly in accordance with the principles, the nationality and domicile of the parties, the place where the act was entered into or executed, the situation of the property should not be of any significance, just as one should not have to refer to the law governing the contract, since the change effected in the rights of the co-contractors flows, not from any intrinsic conditions of the contract, but from an extraneous fact, the occurrence of the debtor's bankruptcy.¹³⁴

However, for reasons already expressed, the Committee was unable to apply these principles strictly, and had to depart from them for certain contracts which, moreover, had the advantage of presenting objective standards of connection which generally make for a concurrence of judicial and legislative jurisdiction (Cf. for the exceptions referred to, for the *vis attractiva concursus*, at Art. 17(9)).

B. Article 36

The application of the law of bankruptcy relating to the effects of bankruptcy on a contract of employment has, in principle, been left aside subject to a reservation which will be examined later, since the regulations re workers¹³⁵ and their rights in the case of bankruptcy of the employer (Cf. S. 22 KO, Art. 2119 par. 2C Italian Civil Code and Art. 40 F.W.) are very different

¹³³ The law of the bankruptcy, being understood, as has been said, to be the law of the State where the bankruptcy was initiated, including possibly its own system of private international law, may refer back to a law other than the internal law of this State, for example, to the law which governs the partnership contract, since it is for this law only to say whether the bankruptcy of a partnership or that of a partner involves its dissolution. Generally, these two laws coincide for partnerships with their seat within the EEC having regard to the criterion of competence of the court chosen.

¹³⁴ Cf. HR 5.11.1915 N.J. 1916 page 12: Art. 37 (F.W. on the cancellation of bilateral contracts in progress is not applicable in a French bankruptcy even if the contract was governed by Dutch law).

¹³⁵ The workers concerned under Art. 36 are those who, being holders of a contract to work, to hire out their services, or an employment contract are linked to an employer in a relation of legal subordination irrespective of the nature of the wage and the intervals at which is paid out (workers, employees, commercial representatives, etc.).

from one legislation to another; for example, in French law, wage-earners have a "super-privilege" applicable in the case of liquidation or legal settlement which enables them, notwithstanding the existence of any other privileged claim, to receive out of the first funds paid in the unattachable portion of the amounts due (Art. 50, 51 and 155 of the 1967 law).

In addition, the liquidator must pay them immediately, as a provision, and before the amount of the claims guaranteed by the super-privilege has been established, a sum equal to the unattachable portion of one of the wages remaining unpaid (Art. 51).

Besides, labour legislation concerns the social order of each State too much for it to be in any way impaired, even in the case of bankruptcy.

It is therefore the law applicable to the labour contract, in its provisions relating to bankruptcy (if such exist, and if not, in its provisions of ordinary law) which will determine the effects of the bankruptcy on the labour contract.

But in one case, the Convention gives a more precise indication: if the law which governs the labour contract according to the system of conflict of laws of the court of the bankruptcy is not that of a Contracting State, the law of this court, that is to say the law of the bankruptcy, will apply. This solution follows directly from the combined provisions of Articles 36 and 19(2) and is based on the consideration that the law of a non-member State cannot be considered as being a matter of public policy when it is evoked outside the territory of that State.

Apart from this case, it will therefore be the private international law of the court which will determine the law governing the labour contract. Pending Community harmonization, which is in progress, of the rules of substantive law or of conflict as a consequence of the free movement of workers in the EEC, we will confine ourselves to indicating here that we find in general recourse to the principle of autonomy or, failing this, a fairly clear preference for the law of the place where the work is carried out in relation to that of the place where the contract was concluded, i.e. to the law of the place of hiring, which recovers competence only if the work

.../...

has to be done in unspecified places or, if the main place of performance cannot be ascertained from the contract.¹³⁶

But the freedom of wage-earners and freedom of establishment and services already have repercussions on the labour contract, both in probable developments of internal law in the EEC Member States and on the outlook for the private international law of these States. For workers who are to sign on with an employer in another EEC State and for those whose employer, whilst having his centre in one State also has an establishment in another, Article 7 of Council Regulation N° 1612/68 of 15.10.1968 establishes a presumption in favour of application of the law of the country where the work is done. These workers enjoy the same protection and the same treatment as nationals in respect of all conditions of employment and work.

C. Article 37

By derogation from the law of the bankruptcy, the Committee has attached the effects of bankruptcy of a lessee or lessor of leases for real property and rents to the *lex rei sitae*¹³⁷ or more precisely to the bankruptcy provisions of this law (Cf. the detailed provisions of 19 to 21 KO and Art. 39 F.W.). Rural leases and leases of buildings rented for commercial or professional use or for dwellings are too closely linked to land law in certain countries for it to be opportune to apply a law other than that governing the situation of real estate. In this matter, as in labour contracts, legislative policy has been to grant special protection to lessors and tenants by provisions of public policy which are often very complex and litigations concerning which are heard in special courts.

¹³⁶ Cf. Batiffol, op. cit. N° 608; Simon-Depitre, "Droit du travail et conflits de lois" to the 2nd International Congress on Labour Law RCDIP 1958, p.285 and the reports of the First European Colloquium on Labour Law held in Nice in May 1964; in Bull. Ass. Juristes Europ. N° 19-20, p. 33 et seq. According to Luxembourg case law (Cass. Lux. 2.7.1959. Pas. Lux. t. XVII, p. 443), when workers are employed on the territory of the Grand Duchy the law of that country applies imperatively.

¹³⁷ Cf. to the same effect the Austro-German Convention of 1966, Art. 14 and draft The Hague Convention of 1925, Art. 6(2); Travers, op. cit. N° 11.352.

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Here, tangible or intangible property subject to entry or registration is treated on the same footing as real property, thus ensuring the unity of its legal status.

But if entry or registering has been effected in a non-member State, the law of the bankruptcy will again take over as for other leaseings of movables. This solution, already included in the previous article and in Articles 37 and 38, is explained here by the fact that, in the absence of a convention, the bankruptcy legislation of a non-member State cannot be applied by reason of its territorial nature; the Convention therefore provides for such a case by a rule which allows the law of a Contracting State to be applied constantly to the repercussions of the bankruptcy on existing legal situations.¹³⁸

As, in this respect, movables and immovables are not governed by the same system, a question may arise as to the category into which these properties may fall. In most legislations, there is now hardly any dispute, since the studies of Kahn and Bartin, that a conflict of category is in principle solved by reference to the *lex fori* when the category decides which law shall be applicable. So, at first sight, the categorizing of property according to the *lex situs* found in Article 37(4) is surprising, even though certain precedents can be adduced in support of it. In reality, the solution chosen does not really constitute an exception to the general principle recalled above if it is remembered that litigations relating to real property leases in general (Art. 16 - 1° of the General Convention of 27.9.1968) and to the effects of the bankruptcy on these contracts (Arts. 17 - 9° of the present Convention) are of the exclusive competence of the courts of the Contracting State where the property is situated. This being so, the rule could not fail to be extended equally to movables in order to avoid conflicts of category (Cf. also Art. 27 of the Convention).

¹³⁸ For a solution of the same order and for the same reasons, see draft Austro-German Convention of 27.1.1938, Art. 12.

¹³⁹ See Batiffol, *op. cit.* N° 292 et seq. and, recently, *Seine* 12.L.1966, RCDIP 1967, p. 20, note by Loussouarn.

¹⁴⁰ See in particular Lerebours-Pigeonniere, *Précis de DIP*, 6th ed. N° 256 (criticized by Loussouarn in the 8th edition of this *Précis* and in the abovementioned note) and above all Art. 12(1) of the annex to the Benelux Treaty of 1969 introducing a uniform law concerning DIP (RCDIP 1968, p. 812 and *Chronicle* by Winter, *ibid.* p. 593).

We may add, to dispel any ambiguity, that the object of the rule contained in para. 4 is limited to the provisions of Art. 37 of the Convention. In other words, it can be applied to ascertain the movable or immovable nature of a property, only as regards the effects of the bankruptcy on a hiring contract.

D. Article 38 governs only the effects of the bankruptcy on a contract of sale; for the rest, this contract remains subject to the law normally applicable to it.

Guarantees given to an unpaid seller are necessarily different when the transfer of ownership between seller and purchaser is governed differently in the Common Market countries, and when some of these guarantees follow the rules relating to transfer of ownership or are based on these.¹⁴¹

In the consensualist Belgian, French, Italian and Luxembourg legal systems, the purchaser becomes in principle the owner by consent alone (solo consensu) even before he is put in effective possession of the thing sold, while in Germany, where the law in this matter has remained closer to Roman concepts, it is necessary, according to Sec. 929 clause 1 B.G.B. (Civil Code), that the purchaser of movables has been put into possession of these and that the two parties have agreed to the transfer of ownership. In certain circumstances, there may be no handing over of the object or an arrangement may take the place of this. As far as transfer of ownership of real property is concerned, it is necessary, in compliance with Article 873(1) and Article 925(1) BGB, that seller and purchaser have agreed to the transfer of ownership and that the change in the legal position of the property should be entered in the Lands Register. The contract of sale of itself only gives rise to a right having the character of an obligation. Real delivery of the object is also necessary in Dutch law (Articles 639, 667 et seq. B.W.).

The effects of the bankruptcy of one of the parties to a contract of sale can therefore only be governed in a different manner in the laws of these countries.

¹⁴¹ Cf. The comparative study by M. Van der Gucht, *Droits de l'acheteur ou du vendeur en cas de faillite de l'un d'eux, face aux droits des créanciers du failli* (Rights of purchaser or seller in the event of the bankruptcy of one of them, in face of the rights of the creditors of the bankrupt). J. Com. Brux. 1965, p. 213 et seq.

These systems are still opposed in their general approach, since the laws of the former clearly limit the unpaid seller's prerogatives in the case of the purchaser's bankruptcy, whereas German and Dutch laws place him in a much more favourable situation. These differences are mainly apparent in relation to:

- Conditions for exercising a right of recovery (Verfolgungsrecht und reclamerecht).¹⁴²
- The invoking against the general body of creditors of the clauses dealing with reservation of ownership dealt with at Article 39.
- The privilege of a seller of movables not paid for, non-existent in German and Italian law (save for a seller of machines whose price is more than 30 000 lire), and which, in the event of the purchaser's bankruptcy, continues to exist in 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 exceptional provision in favour of suppliers of material for professional equipment).

This rapid examination gives rise to several conclusions:

The first is that the difficulties mentioned above will continue to exist as long as the unification or harmonization of the law of sale has not been achieved. The Hague Convention of 1.7.1964 (LUVI), which the six countries are preparing to ratify, has no great effect on the matter we are considering. It is limited to an international sale of corporeal movable objects.

Furthermore, and above all, the LUVI does not in principle govern the transfer of ownership.¹⁴³ It is certain that unification of law must one day be achieved between countries which have endeavoured to set up an economic union, in an area where security of the main commercial transactions - and sales - is at stake. Unification was conceivable in a bankruptcy Convention only in regard to the effects of the bankruptcy on the contract (Cf. Art. 38).

¹⁴² Cf. See 40 KO, Art. 546, 556, 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. p. 176 et seq.

¹⁴³ Cf. A. Tunc, commentary on Art. 8, p. 17.

The choice of the law applicable had to obey two imperatives: to maintain so far as possible the equality of creditors and to ensure the security of commercial relationships. To refer to the law of bankruptcy, would have created insecurity. The law of the contract, difficult to determine, and which would have varied according to the court, did not offer much more security and led to disparity of treatment for comparable situations.

The Committee was therefore led to provide (Art. 38) for the application of the law of the centre of administration for sale contracts concluded with this centre and the law of the place of establishment for contracts concluded with the different establishments. However, this was only to the extent that the centre and the establishments are situated on the territory of a Contracting State.¹⁴⁴ Otherwise, the effects of the bankruptcy will be governed by the law of the bankruptcy.

This solution has several advantages. In the first place, each co-contractor will know in advance which law will be applicable in the case of bankruptcy of one of them. It is the only equitable solution when it is a question of the bankruptcy of a business having its centre of administration outside the EEC, but establishments in more than one of the EEC countries and when the court which is seised first will have jurisdiction.

In the second place, it avoids inequalities, since the same treatment will be applied to those who have dealt with the centre of administration and those who have dealt with a particular establishment.

Finally, this law will also very often be the law applicable simultaneously to the contract and the bankruptcy, thus establishing a solid body of legislative competence. However, this could not be the case in the event of transfer of the centre of administration or establishment after the contract has been concluded: the law of the country of the former centre or establishment with which it was made will continue to govern the contract.

Application of the law of the place of establishment raises the prior question as to what is an establishment in the meaning of Article 38. This may well not have the same meaning as in Article 4, where it serves to establish the court having jurisdiction. The determining factor here is the "power of the establishment to enter into commitments with third parties";

¹⁴⁴ This solution reflects the concepts of the doctrine which chooses under different heads the simultaneous competence of the *lex loci contractus* and of the *lex fori*, or even of the latter with that of the domicile of the seller (Trochu, *op. cit.* p. 177-79). .../...

the establishment in the meaning of Article 38, could be defined as the emanation of a company installed abroad and having a person in a responsible position to conclude, in the normal process of business, contracts of the kind evoked and binding on the company.¹⁴⁵

Article 38 expressly places on the same footing as sales, for its own application as well as that of Article 39, sales on delivery or sales of things to be manufactured when the party undertaking to make delivery has to furnish the bulk of the raw materials necessary for manufacture. This solution, which is taken word for word from Article 6 of LUVI (see also Art. 1(3) of The Hague Convention of 15.4.1958 on the law applicable to the transfer of ownership), avoids the difficulties of analysing the legal nature of certain contracts (contract by an undertaking, Werklieferungsvertrag), and must be capable of being extended to all contracts incorporating the essential elements of sale or which are midway between the sale and the undertaking, such as trade or supply contracts.

E. Article 39

It is with regard to the efficacy of the clauses of reservation of ownership up to final payment of the price, included in sale contracts, that bankruptcy legislations are in radical opposition to each other. In France, Belgium and Luxembourg, such clauses, lawful in themselves, are, according to present case law, void as against the general body of creditors by reason of the principle of apparent ability to pay. Before recognizing these clauses, Italy demands a written statement bearing a definite date. In Germany and the Netherlands, reservation of ownership may be invoked against the bankruptcy.¹⁴⁶

¹⁴⁵ Compare this with the provisions of Art. 21 of the French Decree of 23.3.1967 relating to the Trade Register "... permanent establishments where commercial acts are performed as well as to factories, branches or agencies under the management of a duly appointed employee or proxy" and the definition given by Jaeger-Weber (commentary on KO, 8th Ed. see 71 note 2(a)) "a business establishment is a centre of activity having the authority to conclude directly and autonomously contracts and not a centre of activity serving only as intermediary for concluding contracts, even if it has the title of general agency, and even less a technical enterprise no matter how important it may be".

¹⁴⁶ 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 and time-payment sales of corporeal movable objects in the member countries of the Council of Europe, p. 51 et seq., particularly p. 86 et seq. .../...

The considerable development of time-payment or hire-purchase sales, where these clauses are most usual, as well as the economic advantages which certain legislations attach to the full effectiveness of reservation of ownership in the event of bankruptcy,¹⁴⁷ made it necessary that bankruptcy rules on this point be unified, the solutions of the conflict of laws being insufficient. Moreover, what law should have been chosen in this Convention? The law of the bankruptcy? the law of the contract? or the *lex rei sitae*? Case law remains uncertain on this point.¹⁴⁸

The representatives of the countries where reservation of ownership is the most usual form of guarantee and which base their credit system largely on it, considered the French, Belgian and Luxembourg solutions completely unacceptable. The protagonists of these solutions were unable to adduce decisive arguments, any more than for set-off.¹⁴⁹

This being so, the Committee decided to work out, on the basis of an intermediary legislation i.e. Italian law,¹⁵⁰ the uniform law included in Article 39 of the Convention and 6 of Annex 1.

Before examining the scheme of these Articles, it is as well to spell out very precisely their import and limits.

¹⁴⁷ Cf. J. Bastin, "Les conséquences économiques de la réserve de propriété" in "Les idées nouvelles dans le droit de la faillite", p. 333 et seq.

¹⁴⁸ Cf. for the *lex rei sitae*, Req. 19.3.1872, DP. 74 I 465 and OIG Hamburg 2.6.1965, *Rabels-Zeitschrift für ausländisches und internationales Privatrecht* 1968 p. 535; for the *lex concursus* Trib. com. Brussels 27.10.1958 j. Com. Brussels 1959, p. 81 and Trib. com. Seine 9.11.1964, *J. Agréés* 1965, 15. The Hague Convention of 15.4.1958 on the law applicable to transfer of ownership (which has only been signed by two countries) provides for application of the internal law of the country where the objects sold are situated at the time of the first claim or reference to court concerning these objects.

¹⁴⁹ Cf. Noël and Lemontey, "Aperçus sur le projet de Convention européenne relative à la faillite, aux concordats et aux procédures analogues". *Rev. trim. Dt. Europ.* 1968, p. 715-17 and *Rev. Synd.* 1969, p. 121 s.

¹⁵⁰ Cf. Art. 1524 Civil Code and 78 bankruptcy law. Also De Semo, *Diritto fallimentare*, 3rd ed. N°. 356; Ferrara, *Il fallimento*, 2nd ed. 1966, p. 310 and Mignoli, "La vendita con riserva di proprietà nel fallimento", *Rev. dirit. civ.* 1962 I, 328.

.../...

First of all we must remember that the Committee did not have in view unifying the provisions of national laws on the conditions necessary for the validity of a clause reserving ownership, but only unifying bankruptcy laws so that a reservation of ownership valid according to the law which governs the contract of sale might be invoked in bankruptcy matters. Two conditions therefore have to be met one after the other:

- The contract of sale must be valid and fulfil the requirements of the law governing its formation.¹⁵¹ Thus the imperative provisions of certain legal systems in the matters of sale by instalments or hire-purchase are fully safeguarded (see the German law of 16.5.1894 - Abzahlungsgesetz- and the Belgian law of 9 July 1957 Art. 4).
- The conditions as to form set out in Article 39(1) must have been fulfilled if the clauses of reservation of ownership, referred to in the text are to be recognized.

The authors of the Convention, although aware of the economic usefulness of such clauses, nevertheless wanted to be cautious. 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 clauses known particularly to German law-clauses providing for "prolonged" (verlängerte Eigentumsvorbehalte) or "transferred" reservation (weitergeleitete Eigentumsvorbehalte) which can be applied in the case of a transformation of the object or its resale or guarantee claims other than the price.¹⁵³ The validity of such clauses against the general body of creditors will depend on the law of the bankruptcy (Article 39(1) first clause).

¹⁵¹ However, matters could be different if the German law is applicable, for the "Einigung" which constitutes the agreement for the transfer of ownership is a contract independent of the sales contract (Kaufvertrag) and, this being so, it is possible that the "Einigung" may be valid despite the irregularity of the causal title.

¹⁵² Cf. Secs. 946 et seq. BGB; Stumpf "L'expérience allemande de la réserve de propriété" in "Idées nouvelles dans le droit de la faillite" p. 287 et seq.

.../...

The first paragraph of Article 39 envisages the bankruptcy of the purchaser. The laws of the bankruptcy to which reference is made as laws applicable will henceforth have a minimum content. Reservation of ownership proved by a simple written document before delivery of the object must be recognized as being valid as against the general body of creditors. It will therefore most frequently be contained in the contract of sale itself, it being understood that "simple document" means not only the contractual act but even any exchange of correspondence, such as a certificate, confirmation and acceptance of the order, which can be verbal, pro forma, invoice, telegram, telex. This clause must therefore be clearly worded and cannot be stipulated at the time of delivery of the object.

The text does not, however, contain the condition required by Italian law that the written document should bear a definite date prior to the initiation of the bankruptcy (Article 1542 and 2074 of the Civil Code) as this condition hardly corresponds to commercial practice. It is simply recalled that the liquidator is free to prove by any means the erroneous or fraudulent character of the document or its date.

Nor did the Committee believe that it should take up the idea - attractive in principle - of making the validity of clauses of reservation of ownership as against the general body of creditors dependent on their publication. Providing for effective publication would have been no easy matter: where would it have had to be done? At the place of the centre of administration no doubt, but what if only establishments exist within the EEC? And as publication would have to have been prior to delivery to play its part fully, it would have resulted not only in expense but in delays difficult to accept in the world of business. Once reservations of ownership are fully accepted and become current practice, it will be necessary to presume that holding merchandise and materials can in itself no longer be considered by anybody as a guarantee of solvency. Contracting States which already recognize reservations of ownership in bankruptcies have not noted the disadvantages feared in certain circles and are opposed to the creation of new formalities.

Article 6 of Annex 1 reproduces the essential provisions of Article 73(2) of the Italian bankruptcy law. In the case of sale with reservation of ownership, bankruptcy of the seller subsequent to delivery does not entitle the liquidator to elect to discontinue the contract as in the case of

.../...

bankruptcy of the purchaser. The purchaser could therefore continue his payments and acquire ownership of the property at the end of the agreed period.

Section VI - Preferential claims and secured rights

Articles 40 to 46 relate to the redoubtable problem of secured rights and preferences from the angle of a single European bankruptcy. As already pointed out in the introductory part, the basic principle which the Committee chose in the matter, is that of territoriality. It is certainly a breach in the principle of unity of the bankruptcy.

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

1. Determination of the law applicable

In theory, the legal or conventional secured rights claimed by certain creditors can be governed in the event of bankruptcy not by one but by three laws: the law which governs the obligation, the *lex rei sitae* and, finally, the law of the bankruptcy.

Legal authorities are, however, divided on the primacy to be accorded to one or other of these laws. Case law on the question of general preferences is almost non-existent. The systems proposed by the authors or contained in international conventions provide for the application either:

- of the principle of territoriality (*lex rei sitae*),¹⁵⁴ or
- of the law of the bankruptcy and of the law where the property is situated simultaneously,¹⁵⁵ but this last law would not be intended to engender or not to engender preferences, or
- of the law of the bankruptcy in respect of preferences relating to movables and of the law of situation in respect of those relating to immovables,¹⁵⁶ or

¹⁵³ 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. N° 11.425; Ponsard, op. cit. N° 47; Trochu, op. cit. p. 084 et seq.

¹⁵⁴ Despagnet, Préc. de DIP 5th ed. N° 434, Code Bustamente, Art. 420, and Ph. Kleintjes, "Het Faillissement in het international Privatrecht", Leyden 1890

¹⁵⁵ Rolin, op. cit. p. 100 et seq.; Travers, op. cit. N° 11.434,

¹⁵⁶ De Boeck, op. cit. p. 303. Benelux Treaty of 24 Nov. 1961, Art. 25, which also makes a distinction between special preferences in respect of movable property (law of the bankruptcy) and in respect of other real secured rights (law of the situation).
.../...

- of the law governing the debt for general preferences and of the law of situation of the property given in guarantee for the special preferences.¹⁵⁷
This system is only imaginable between countries whose laws on general preferences tally to a large extent, which is not the case at present for the six Common Market countries, or, finally,
- of the law of the bankruptcy for general preferences and of the law of the situation of the secured property for special preferences, this distinction being the one most generally applied or advocated.¹⁵⁸

In view of the multiplicity of the solutions and the difficulties in this matter, the Commission asked Mr Sauveplanne, Professor in the University of Utrecht, for a study. After a very complete analysis of the laws of the member countries of the Common Market, Mr. Sauveplanne came out for the taking into consideration of the distinction of principle between special preferences and general preferences.¹⁵⁹ For the first he advocated, subject to a few exceptions, the application of the law of the situation of the properties on which they bore, and where incorporeal property was concerned application of the law governing the claim; for the second - including fiscal and wage preferences - he proposed the law of the country where the bankruptcy is declared; the same laws should govern the division between creditors according to the nature of their preference. Finally, the priority as between general preferences and special preferences on a particular property should be governed by the law of the place where the property is situated or by that of the debt when the object of the preference is incorporeal property.

Even though all the delegations first expressed definite reservations as to the solution put forward by Professor Sauveplanne for general preferences, it was unanimously considered that fiscal preferences should remain

¹⁵⁷ Draft Austrio-German Convention of 27 January 1938, Art. 14 and 15.
¹⁵⁸ Draft The Hague Convention of 1925-1928, Art. 10; Frankenstein Code Art. 783 and 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, Batiffol, op. cit. Nos 513 and 542; PL de Vries, "The extra-territoriality of bankruptcy in international private law, Amsterdam 1926."
¹⁵⁹ Document of the EEC Commission N° 8838/IV/63.

territorial and that it was inadvisable, given the disparity of legislations, to submit to the law of the bankruptcy the preferences of the employees benefiting from different statutes. The Working Party nevertheless studied this matter in great detail. This examination showed that if the application of the law of the bankruptcy were adopted for general preferences and for distribution between the creditors holding such preferences, the Convention would have to provide a body of extremely complex provisions involving difficult choices, according to all the possible combinations, particularly to solve the following problems:

- the case of a preference on immovables according to the law of the bankruptcy, whereas the law of situation regards it merely as based on a movable, or vice versa;
- the problem of classifying general preferences when some are governed by local law (fiscal preferences) and others by the law of the bankruptcy (other general preferences);
- the problem of classifying general preferences (governed by the law of the bankruptcy) and special preferences (governed by the law of situation).

The Committee rapidly came to the conclusion that in this matter no solution provided by the conflict of laws was fully satisfactory and that the only way of really settling the problem would be by unification of the law of secured rights.¹⁶⁰ But the framing of a uniform law of this nature, apart from the fact that it went well beyond the Committee's terms of reference, would have involved quite unacceptable delays.

The Committee therefore concentrated on finding the least imperfect and least complex solutions possible, and thus gave de facto sanction to the statu quo of the national systems of law by deciding to submit all

¹⁶⁰ It should be pointed out that the Commission of the European Communities has just set up a working party to study the uniformization of the arrangements governing conflicts of laws, essentially in the fields of the law of obligations and of real and personal secured rights (Bulletin of the European Communities, June 1969, p. 37).

secured rights to the law of the situation or localization of the property.¹⁶¹
To do this the principle of unity of bankruptcy was to some extent departed from by the establishment of as many "sub-units" of assets and debts as there were Contracting States on whose territory existed property to be realized. It must be pointed out here that it is after realization that the liquidator, under the control of the court of the bankruptcy, will proceed to establish these sub-units purely on a book-keeping basis. Fairly detailed rules for dividing the property then became indispensable to take into account the fact that a claim could be secured in several countries for unequal amounts or by rights differing in nature and rank.

II. The operation and organization of the principle of territoriality
(lex rei sitae)

Article 40

This Article governs the "international recognition" of general preferences which do not concern any definite object but encumber a certain number of goods which may be situated on the territory of several States and which make up the debtor's estate considered as a whole and constitute a common surety for creditors. Basing itself simultaneously on the unity of the debtor's estate, the universality of the bankruptcy and the analysis of the very concept of general preference, Article 40 confers on foreign claims in respect of property situated in each Contracting State, the same preference

¹⁶¹ Economic and professional circles have most usually taken the same view in their opinion (Chamber of Commerce and Industry of Paris, Association of Registrars of the French Commercial Courts) or advocated, as an exception to the law of bankruptcy, the application of the law of the branch office dealt with (European Insurances Committee, Banking Federation of EEC). Others, such as the Standing Conference of EEC Chambers of Commerce, propose applying the solutions of Article 25 of the Benelux Convention. The Sanders draft of statutes for European limited companies also provides for the exclusive application of the law of situation (Article IX - 3 - 5).

as that attached by the law of each of these States, to analogous claims.¹⁶²
But this principle could not be general: rather does everything depend on the aim and social function of the general preference. Article 40 therefore chooses it only for civil and commercial claims, to the exclusion of those mentioned at Article 42. Belgian workers could, therefore, for example, claim against property situated in France, the general preferences of French wage-earners according to the order laid down by French law, in Germany the general preferences of German law, etc...¹⁶³

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 content 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 1968.¹⁶⁴
The opposition between Articles 40 and 42 nevertheless allows of the conclusion 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 Article 40, whereas those in public law, apart from fiscal and social security claims, are covered by Article 42. 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 40.

¹⁶² Cf. Patarin, *Dalloz de Droit international*, V° Preferences, N° 31 and Hoge Raad 15.6.1917, N.J. 1917, p. 812, where it has been admitted that, in a Dutch bankruptcy, a foreign creditor could exercise a preference under Dutch law, even though this preference had not been provided for by the foreign law governing the claim. It was a matter in this case of a special preference and the Hoge Raad applied the law of the bankruptcy and that of the situation to the property.

¹⁶³ Cf. for Belgium, Art. 20, 4 of the 1851 mortgage law; for France, Art. 47(a) and 47(b) of Book I of the Labour Code and Art. 2101, 4 and 2104, 2 of the Civil Code amended by the law of 27.11.1968; for the Federal Republic, Sec. 61, 1 KO; for Italy Art. 2778, 14 of the Civil Code; for the Netherlands, Art. 1195, 4 BW.

¹⁶⁴ Cf. Jenard, Report, p. 13.

Article 41, after having determined the law applicable to the satisfaction of general preferences, lays down rules for division and envisages the different hypothetical situations which can arise.

According to the first paragraph of Article 41 it is the law of the Contracting States where, on the date of the initiation of the bankruptcy (subject to what will be said in Article 46), the property is situated or the claims are located, which must govern the general preferences encumbering them. It is therefore necessary to apply the bankruptcy provisions of the *lex rei sitae* to determine, not only the category into which these preferences fall, but also the extent of the secured claims as to amount and time, and also their movable or immovable basis.

Article 41 says nothing on the subject of the location of claims or the situation of property which may be moved. These problems will be broached in Article 45, which contains some rules on this subject. However, Article 41 envisages the case where the liquidator could come into possession of property situated on the territory of a non-Contracting State: this property or the net proceeds of its realization will have to be included in the "sub-unit of assets" in the country where the bankruptcy was initiated.

Paragraphs 2 to 4 of Article 41 concern the modes of distribution, with a view to the satisfaction of preferential claims, of the monies resulting from the realization of properties which are situated in two or more countries and from as many "sub-units" of assets.

(1) The normal case of a claim secured by a general preference in different "sub-units" of assets.

The rule contained at paragraph 2 is that such a claim must be satisfied from each of the sub-units, not in equal parts, but in proportional shares varying with the sum remaining in each of the sub-units and not the entire assets to be realized.

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It is obvious that the proportional rule cannot be applied fully unless the assets of the whole of the sub-units concerned are sufficient for the complete satisfaction of the preference claim. If this is not the case, the sums available are to be used for the (partial) satisfaction of the claim and nothing will remain for creditors of a lower rank. It goes without saying that the creditor can claim in each sub-unit only up to the amount of his debt secured by it.

Let us take a concrete example. Suppose that a claim of 1000 francs is preferential on property in France (sub-unit A) and in the Netherlands (sub-unit B): the realization of property in France yields 500, whereas the proceeds of the property situated in the Netherlands are 2000 francs. The dividend will be made as follows:

	Sub-unit A	Sub-unit B	
Assets available for this debt according to its rank	500 F	2,000 F	
in the relationship of	1	4	= 5
Proportional division	$\frac{1,000 \times 1}{5} = 200 \text{ F}$	$\frac{1,000 \times 4}{5} = 800 \text{ F}$	

This example can be generalized by the following formula:

Let M be the amount of the claim, R the distribution of this preferential claim on property situated in three countries, and A, B and C the respective sub-units of assets available in the three countries A, B and C.

$$R = \frac{M \times A}{A + B + C} + \frac{M \times B}{A + B + C} + \frac{M \times C}{A + B + C} + \dots$$

...../....

(2) The case of a claim secured by a general preference in different sub-units for different amounts.

This case, envisaged at paragraph 3, differs from the preceding one in that one and the same claim is here preferred for different amounts according to the countries. The rule of paragraph 2 will be applied and will give rise to as many successive divisions as are necessary wholly to satisfy the preferred part of the debt, within the limits of the assets still available in each sub-unit after each division.

Let us take as an example, confining ourselves to three countries, the general preference of wage-earners which is not governed in the same way in the different EEC countries. On the assumption that a wage claim of 7,200 F, at the rate of 300 F per month, would enjoy preference for three months in France (A), six months in Belgium (B) and a year in Italy (C), the successive divisions to achieve payment of the preferred part of the claim (1 year = 3,600 F) would be the following:

	A	B	C	Total
-Assets available for this claim	7,000	1,000	2,000	= 10,000
-Preferred claim	900	1,800	3,600	3,600
-1st Division(D1)	$\frac{3,600 \times 7,000}{10,000} = 2,520$	$\frac{3,600 \times 1,000}{10,000}$	$\frac{3,600 \times 2,000}{10,000}$	
<u>D1</u>	<u>900</u> since the claim is only preferred for this amount in A	<u>360</u>	<u>720</u>	== <u>1,980*</u>
There remains to be recovered in B + C : 3,600 - 1,980 = 1,620				
-New asset	(6,100)	640	1,280	= 1,920
-2nd Division(D2)	----	$\frac{1,620 \times 640}{1,920}$	$\frac{1,620 \times 1,280}{1,920}$	
<u>D2</u>	----	<u>540</u>	<u>1,080</u>	= <u>1,620*</u>
-D1 + D2	900	+(360+540)	+(720+1,080)	= 3,600
-New assets available for other claims	6,100	+ 100	+ 200	= 6,400

.../...

(3) The case of different claims secured by general preferences not of the same rank.

If we exclude the general preferences referred to at Article 42, which have only a territorial basis, and the different general preferences of civil life, which are of little importance and will be rarely exercised, the principal conflict envisaged in Article 41(4) will hardly apply to anything but a conflict between the preference enjoyed by legal costs and that of wage-earners. The rule chosen here amounts to saying that each sub-unit will contribute to satisfying, as a matter of priority, the claim which is secured on the sub-unit concerned by the preference of the highest rank.

The following example can be suggested. Suppose two sub-units in countries A and B; claims, $x = 10$ and $y = 600$ are preferred in the two countries but with inverse rank in each of them, and there are four other claims: $a = 200$, $b = 50$, $c = 50$ and $d = 100$ which are not secured by preference except in country A but rank before claim y . Division will be as follows:

Sub-unit A		Sub-unit B	
x ranks before a + b + c + d, which are before y.		y ranks before x	
Availability	1,000	Availability	400
To satisfy claim x... 10		Partial satisfaction of claim y	400
To satisfy claims a + b + c + d	<u>400</u>		<u>400</u>
	410		
Balance available	590		
Satisfaction of the remainder of claim y	<u>200</u>	Balance	0
New balance available	390	The residue of claim y, i.e. 200 will be borne by sub-unit A.	

.../...

This example brings out the fact that it may appear not very fair to pay the whole of a privileged claim from one sub-unit only, thus, perhaps completely exhausting its assets, while a certain balance will be available in another. Any other solution, especially that of adding up the amount of the different claims before distributing in proportion to the assets available in the different sub-units, could not be chosen, since it would have resulted in a change in the very rank of the preferences.

However imperfect it may be, the rule chosen is the only one which is logical in view of the present state of disparity as regards preference and which is susceptible of improving the present situation, since it will allow the satisfaction of preferred claims out of assets situated in other countries even if they must be classified there according to their rank.

Article 42

departs from the rules contained in Articles 40 and 41 in regard to fiscal and social security preferences and, broadly, in regard to all general preferences securing claims other than civil or commercial, that is to say claims in public law. By the very reason of their social function, these must remain subject, without restriction, to the principle of territoriality, without it being possible to accept them in countries other than the one where the claim originated or where the encumbered property is situated.

For fiscal preferences on the same footing as which other debts in public law can be treated, there was hardly any question of finding another solution, since fiscal law, expressing an aspect of State sovereignty, is territorial in its very essence and 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 of administrative assistance in fiscal matters, of the "assimilation" system under which the tax administration of the State where the bankruptcy was adjudicated would act in the common interest of the tax authorities of the other States, who would consequently have preferences of the same rank as that of the fiscal administration of the

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country where bankruptcy was initiated. But, to be applicable, this system presupposes the possibility of establishing tables of concordance for all the taxes of the Contracting States enjoying a preference, which will be the task of other EEC working parties. Moreover, such a solution would constitute an important de facto extension of the general preferences of the tax administration.

The preferred fiscal claims referred to in Article 42 are not only those of States but also those of local authorities, such as provinces, départements, communes ...irrespective of the nature of these claims, be they direct or indirect taxes.

The preferences possessed by the different social security organizations and institutions, understood in the wide sense, for recovery of different contributions (social insurance, family allowances, industrial accidents) should be treated as fiscal preferences, since social security contributions can in fact be handled on the same footing as tax payments. A special mention was nevertheless required by reason of the fact that, in certain countries, like France, social security contributions are connected with the business activities of the debtor and have a commercial character. The territorial solution of Article 42 must, however, not impair the application of Article 51 of Council Regulation N° 3 on the social security of migrant workers, under which "the recovery of the subscriptions due to an institution of one of the Member States can be effected on the territory of another Member State according to the administrative procedure and with guarantees and preferences applicable to the recovery of the subscriptions due to a corresponding institution of this latter State. The application of this decision will be the subject of bilateral agreements which may also concern judicial proceedings for recovery".

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Although, therefore, Article 42 in no way changes the actual situation in international law as regards fiscal and social security preference, it does introduce a definite innovation by authorizing revenue and social security authorities to prove abroad, as simple-contract creditors, for the unsatisfied portion of their claims.¹⁶⁵ The procedure for admission will be that of the law of the bankruptcy, it being remembered, however, that disputes relating to such claims will continue to be of the competence of the courts of the State under whose authority these administrations and bodies fall (Article 17 (8) of the Convention).

Article 43

The laws of the six countries provide for special preferences affecting either certain movables, corporeal or incorporeal, or certain immovables. In five of the six legal systems, these preferences are distinct from pledge and mortgage, even if, particularly in French law, the law of pledge confers a special preference on a movable (Cf. Art. 83 of the 1967 French law). By contrast, in German law, these preferences, understood as legal rights of pledge and retention, permit the creditor to obtain a "separate settlement" (abgesonderte Befriedigung - Cf. Secs. 47 et seq. KO) which withdraws from the bankruptcy the objects affected by such rights. The creditor can therefore pay himself from the price of the object and he is bound to remit only the surplus to the liquidator.

Furthermore, in certain legal systems, the specially preferred creditors must prove their claims at the bankruptcy; certain creditors are, however, empowered to sell the object and recover their claims from the proceeds.

According to the system recommended by the majority of authors and adopted, moreover, in the majority of treaties, preferences and, in a general way, every special secured right, whether in movables or immovables, are subject to the law of their situation at the date of the opening of the bankruptcy (subject, as with Article 41, to what will be said at Article 46). The Convention does not distinguish any further in this respect between legal secured right and contractual secured right amongst which are found transfers

¹⁶⁵ This marks a progress, for it has been judged that the revenue claim of a foreign State could not even be proved. Marseilles Commercial Court, 4 June 1962. Rev. Trim. Dr. com. 1963, p. 661.

of ownership on a trust basis known to German (Sicherungsübereignung) and Dutch law (Eigendomsoverdract tot zekerheid).¹⁶⁶

Special preferences present a number of problems such as the increase, decrease or loss of preference in the event of removal of the encumbered property.¹⁶⁷ These questions have very great importance for the security of transactions, but they concern movables conflicts in preference matters as a whole and could therefore not be governed by a convention relating to bankruptcy, where they do not solely arise. It will be for the law of situation on the date of initiation of the bankruptcy to provide an answer to these questions.

A derogation from the law of situation is usually made in relation to ships, boats, aircraft, etc. It is the law of the flag and, where necessary, of the country of inscription or registration which is applied. In view of the mobility of these means of transport, it is necessary to choose a "home port" ensuring the unity of the system of real rights affecting them.

It must be recalled here that real rights relating to means of locomotion are already the subject of an agreed international system the application of which will eventually have to be combined with that of the present Convention. We refer to:

¹⁶⁶ Transfers of ownership as surety for a debt are current practice in financing operations in Germany and the Netherlands, where established possession is valid against third parties and enables purchaser creditors to escape the law of bankruptcy (Cf. sec. 43 KO). Conversely, French case law considers that an agreement, where it provides, for the benefit of the creditor, a reservation of ownership in a pledge securing a loan, contains a "commission" pact forbidden by French law which is alone applicable to real rights over movable property situated in France, even if this agreement had been concluded in the Federal Republic between two German companies (Cass. civ. 8.7.1969, J.C.P. 70 II 16.182).

¹⁶⁷ Cf. Trochu, op. cit. p. 196.

- The Brussels Convention of 10 April 1926 on the unification of certain rules in matters of maritime preference and mortgages. This Convention is to be progressively replaced by the Convention opened for signature at Brussels on 27 May 1967 for States which would become parties to the latter.¹⁶⁸

- The Geneva Convention of 19 June 1948 concerning the international recognition of rights to aircraft.

- Protocol N° 1 relating to real rights to internal waterways vessels, annexed to the Geneva Convention of 25 January 1965 concerning the registration of these vessels.

For Contracting States parties to these conventions the law of the country of situation will be not only the internal law of these States, but also the rules of these conventions incorporated in their legal system.

The right of retention in bankruptcy is found in all legislations. But 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 implementation in a great number of hypothetical cases.¹⁶⁹ The majority of authors express themselves in favour of the *lex rei sitae* because a right of retention which can be pleaded by the person holding it presents the features of a preference on the object and this is generally governed by the law of the place where the latter is situated.¹⁷⁰ Article 43(3) has taken over this concept.

Article 44

determines the law applicable for classifying secured rights among themselves irrespective of their nature. Taking into account the principle of territoriality adopted by Articles 41 and 43, this same principle should

¹⁶⁸ The same day a convention dealing with the registration of rights relating to ships building was also opened for signature.

¹⁶⁹ Cf. Art. 570 Belgian Commercial Code and Art. 63 of the 1967 French law; 49 KO.

¹⁷⁰ Cf. Diena cited by Rolin op. cit. p. 121, who shares this opinion; cf. for the contrary view Trochu, op. cit. p. 180, who recommends the *lex loci contractus*.

logically fix the rank of general preferences and other secured rights in each sub-unit of assets.

It may be stated as a general rule that special preferences on movables take precedence over general preferences. Certain general preferences, however, preponderate over special preferences.

Article 45

Under the head of general provisions relating to all secured rights, Article 45 specifies that the movable property, corporeal and incorporeal, already referred to in Article 37(2) concerning the effects of the bankruptcy on hiring contracts in regard to this property, is deemed, for the purposes of the preceding provisions, to be on the territory of the country of registration or inscription. This concerns means of transport such as ships, boats, aircrafts, overland motor vehicles, for which the rule of Article 45 supplements the provisions of Article 43(2), but also rights of industrial ownership (invention patents, drawings and models, trade marks, etc.) as well as cinematographic films.

Outside the case of registered movables, the Convention, which uses uniformly at Articles 41 and 43 the expression "law of the Contracting State where the property was situated", does not contain any provision as to the localization of claims and negotiable securities. After having reviewed the various possible solutions (application of the law of the bankruptcy or of that governing the contract), the Committee noted that this problem was not proper to bankruptcy and called for an overall solution. It consequently decided to leave it to the private international law of each Contracting State.

Article 46

This article deals with the particular hypothesis, already envisaged at Article 4, E of Annex I on the suspect period, of bankruptcy being adjudicated although other proceedings had been initially opened. In this

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case, the sub-units of assets are crystallized on the day the last proceedings, that is to say the bankruptcy (stricto sensu), or any other proceedings involving cessation of the debtor's power to deal with his property and leading to the realization of this property, begin. The Committee did not wish, when the debtor had not been deprived of his power, to impose the reconstitution of the sub-units as of the day when the initial proceedings were opened, since such a provision would have involved experts' fees and litigations which it was better to avoid. The retroactivity of the starting point of the suspect period, provided for in this case at Article 4 E of Annex I, seemed to constitute a rule sufficient to punish any possible frauds by the debtor.

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

The effects of bankruptcy on the debtor's person, varying from one legislation to another, can be of two sorts: 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. We will examine these two types of effects in succession.

Article 47

(1) Taking disabilities, disqualifications and restrictions of rights first, several distinctions must be made:

- Bankruptcy of physical persons may mean that they are prohibited from directing, managing or administering a commercial enterprise in individual or company form or from practising certain professions as well as suffering disqualifications and restrictions of rights of a political or civil nature. The laws of the six States are far from being identical on this point: in Holland, for example, disqualifications automatically cease when the bankruptcy is terminated and discharged bankrupts are not prohibited from carrying on trade. In France and Italy, where the laws are very strict as regards disqualifications and restrictions of rights, judgments pronouncing

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bankruptcy, realization of property, judicial administration or personal bankruptcy are entered on the personal record of convictions.¹⁷¹

- Directors or managers of companies adjudicated bankrupt may incur special restrictions of rights and disqualifications such as that of administering or managing any commercial enterprise.¹⁷² But these sanctions are unknown to German and Dutch law, and Italian law recognizes a limited sanction only, such as dismissal of the director or manager (Art. 146 bankruptcy law and 2393 Civil Code), so that, save for French law, company directors and managers seem to be better treated in this respect than physical persons.

The divergences between national concepts in this whole field and, above all, the present lack of adequate and effective inquiry procedures, which would result from the generalization of entry on the record of convictions or from the establishment, at European level, of a personal record for businessmen, discountenanced the inclusion in the Convention of a rule whereby an adjudication of bankruptcy in one of the Contracting States, pursuant to the Convention, would automatically entail in other States the disqualifications provided by the law of these States as though the adjudication had been made there. Already, Community directives on matters of freedom of establishment and provision of services, which encountered these same difficulties, confine themselves, if the legislation of the host country requires that the beneficiary had not been declared bankrupt, to demanding merely an affidavit by the party concerned when in the State of origin or provenance, proof that he was never adjudicated bankrupt cannot be given by production of an extract from his record of convictions or of a similar document established by a judicial or administrative authority.

¹⁷¹ It should be remembered that, according to the French terminology of the 1967 law, "realization of property" is the new name for the measures affecting a person's estate, whereas "personal bankruptcy" now denotes the whole body of civil sanctions (disqualifications and restrictions of rights) in principle independent of any measure affecting the estate, which affect either compulsorily or facultatively the physical persons named at Art. 104 of the law.

¹⁷² Cf. for the French law, Art. 10 of the decree law of 8.8.1935 and, in a more general way, Art. 54, 114, 150 and 260 of the amended law of 24.7.1966 on commercial companies, these latter referring back to Art. 105 et seq. of the 1967 law.

Thus Article 47 leaves it to each national law to determine whether and how far bankruptcy judgments pronounced in other States entail disabilities, disqualifications and restrictions of rights which result from bankruptcies pronounced in the territory of each State. It thus would not in any case be possible to attribute to foreign judgments greater effects than to national judgments.¹⁷³

(2) The laws of the five Member States also provide that the bankrupt can be imprisoned and be forbidden to move without authorization to another place during the course of the proceedings. Unanimity was not arrived at on the laying-down in the Convention of a system of mutual aid between courts which would allow of effect being given in States other than the one where the bankruptcy began to measures decreed by the bankruptcy court, either to order the bankrupt not to leave a given place of residence, or even to arrest him and return him to the country of the bankruptcy.¹⁷⁴

The objection was made in particular, that extradition was possible only in criminal cases. Moreover, the question is closely linked with the repression of infringements committed in bankruptcies. Contracting States so desiring have always the possibility of concluding an agreement between themselves in this regard. According to Articles 50 and 54, the rules relating to the recognition and enforcement of decisions will therefore apply to coercive decisions in regard to persons (see also the commentary on Article 61 and 62).

¹⁷³ Thus, in French law, Art. 7 of a decree-law of 8.8.1935 and Art. 3 of the law of 30.8.1947 dealing with the reorganization of the commercial and industrial professions, couched in identical terms, already provide that "in the event of a condemnation pronounced by a foreign court which has become "res judicata" for an infringement constituting, according to French law, one of the crimes or misdemeanours specified (respectively at Art. 6 and 1 of the decree and the law) the court of summary jurisdiction of the domicile of the individual in question shall declare, on the request of the Public Prosecutor's department, after noting the regularity and legality of the condemnation, the person concerned having been duly summoned to a hearing in chambers, that the application of the said prohibition (against his right of directing, administering, managing in any way either a public company or a public limited company or from taking up directly or by proxy, on his own account or for a third party, commercial or industrial profession) is called for.

This declaration applies to an undischarged bankrupt whose bankruptcy has been adjudicated by a foreign court when the declaratory judgment has been pronounced enforceable in France.

The request for exequatur may be made, for this purpose, only to the civil court of the bankrupt's domicile by the Public Prosecutor's office.
¹⁷⁴ see next page. .../...

Section VIII - Special provisions for certain proceedings other than bankruptcy

Article 48

constitutes one of the instances when Article 1(2) of the Convention is applied, 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 had been initiated, the possibility of invoking against preferred creditors extensions of time-limits or cancellations of debts granted the debtor.

The reasons for this are as follows: in German, Belgian and Dutch law, the "Vergleichsverfahren", the "concordat judiciaire" and the "surséance van betalen", as well as moratoriums allowed to the debtor, cannot be pleaded against preferred creditors, who retain their right of individual proceedings. It is not the same in French and Italian law:

- In the French law of judicial administration (Article 69 and 71 of the 1967 law) preferred creditors, who in any case (even when property is realized) must prove and have verified their claims (Article 40 of the 1967 law), are requested to make known within a period of three months whether they agree, in the event of the proposed scheme of composition being ratified, to accord the debtor periods for payment or cancellation and, if so, which. They are bound by the payment periods or remissions to which they have consented if the composition is ratified. But they can refuse any remission or extension of time for payment if the composition remains completely void against them. Only if they fail to reply, are they subject to the adjournments and periods fixed by the composition, although retaining the benefit of their secured rights. However, wage-earners cannot be subjected to any remissions or any extensions beyond two years.

In the case of a "preventive composition" a judgment which pronounces a provisional stay of 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 wage-earners (Article 27(2)). On the other hand, no remission is imposed.

174 Cf. Art. 467 and 482 Belgian Commercial Code; Sec. 101 KO; Art. 49 Italian bankruptcy law, 87 and 91 Dutch F.W. French law no longer has such provisions.

- In the Italian law of "Concordato preventivo" the latter is valid as against preferred creditors in so far as the extension of time for payment is concerned, but it must be possible to satisfy preferred creditors fully for the preventive composition to be authorized.

The recognition, in States other than that where the proceedings preventing bankruptcy have been opened, of the validity as against preferred creditors of extensions of time and remissions of debts having given rise to the most express reservations by delegations of countries whose law does not recognize this validity, it was necessary to do some violence to the principle of universality in this respect. Moreover, it was pointed out, any other rule would have run counter to the provisions included in regard to suspension of procedures for enforcement (Article 22) and of preferences.

There is thus no derogation in Article 48 from the principle of the universality of the preventive proceedings unless this principle has the effect of limiting the rights of preferred creditors.

CHAPTER VI - RECOGNITION AND ENFORCEMENT

Because of the basic principles of unity and universality of the bankruptcy and of the very strict rules of direct legal jurisdiction laid down by the Convention, the latter, at Title V, was able to facilitate to the maximum the recognition and enforcement of judgments. This was a necessity, for, in order to be fully effective, the bankruptcy must be not only recognized but also executed very rapidly in every place where the debtor has property and creditors.

We have already pointed out in the introductory part the reasons for the choices made by the Committee and which need merely to 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 pleaded against the recognition and execution of these judgments, abolition or simplification, according to the case of the mechanisms of enforcement which will be common to the six countries.

.../...

By virtue of Article 49, which is no more than a repetition of Article 25 of the General Convention, recognition and execution apply to any judgment irrespective of how it is called. They apply to enforcement orders (Vollstreckungsbefehl issued by a clerk of court, see 699 ZPO) and to decisions on the amount of costs of the proceedings (Kostenfestsetzungsbeschluss des Urkundsbeamten, see 104 ZPO) which, in the Federal Republic of Germany are decisions made by the clerk or the Rechtspfleger.¹⁷⁵

Section I - Recognition

Article 50

Recognition has the effect of conferring on judgments the authority which they enjoy in the Contracting State where they were handed down. The Convention accords immediate recognition to all decisions coming within the application of the Convention even if they are the subject of some mode of appeal. As a general rule judgments in bankruptcy matters or analogous proceedings are either enforceable by provision or cannot be appealed from.

Article 50, copying the corresponding drafting of Article 26 of the General Convention, lays down the principle of automatic recognition: this takes place without recourse to any prior proceedings being necessary.

Recognition is therefore automatic and does not require a court decision in the State called upon to enable the liquidator or the beneficiary of the decision to avail himself of it with any interested party, as if it were a judgment given in that State. This provision implies, as for the General Convention, the abandonment of the legal prescriptions 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 that included in numerous conventions by which foreign decisions have the authority of res judicata only if they fulfil a certain number of conditions which, moreover, are often the same, for

¹⁷⁵ Cf. also Art. 18(2) of The Hague Convention of 1.3.1954 concerning civil procedure.

granting enforcement by means of exequatur. Only the voidability proceedings referred to in Articles 55 and 63 may stand in the way of recognition.

Because of the new mechanisms thus instituted, there was no need to incorporate the provisions of paragraphs 2 and 3 of Article 26 of the General Convention, the aim of which is to have found, either under the main head or incidentally, that the foreign decision must be recognized.

Thus, by virtue of Article 50, the following especially will be recognized subject as of right to the provisions relating to advertisement: the condition of bankruptcy, the cessation of the debtor's power to deal with his property, the suspension of individual suits and enforcement procedures and the status of the liquidator. We have already pointed out the progress represented by the Convention in these matters.

The following will likewise be recognized under the terms of Article 50(2):

- Set offs ratified by a court following proceedings other than bankruptcy in the strict sense;
- Settlements before a judge which it was considered necessary to mention for the same reasons as in the General Convention (cf. the Jenard report, page 118 commentary on Art. 51);
- Enforceable titles to claims allocated to creditors who were admitted but not paid by the close of the proceedings and who therefore recover the right to institute their own proceedings (Sec. 164 KO and Sec. 85 Vg10; Art. 159 and 196 F.W.; Art. 90, 91(2) of the French law and 90 of the French decree of 1967).

It goes without saying, as recalled in Article 50, that recognition as of right in all the Contracting States may not be accorded, under this Convention to decisions:

- which do not come within the scope of the Convention, such as those handed down in actions not mentioned in Article 17, those rendered in suits not affected by the suspension of individual proceedings in conformity with the provisions of Article 21, or further decisions concerning the individual liberty of the debtor;

.../...

- for which the Convention provides that they shall produce only effects limited territorially. Such are the cases referred to at Articles 9(2) (non-traders and small entrepreneurs), 60 (a bankruptcy which is purely territorial in the event of voidability) and II(2) of the Protocol (enterprises treated on the same footing as insurance enterprises and mentioned under the national headings of this article).

Articles 51 to 53

Articles 51 and 52 seek to ascertain which of two or more judgments rendered should be recognized and consequently enforced.

These two articles correspond more especially to the two hypotheses dealt with respectively at paragraphs 1 and 2 of Article 15 concerning positive conflicts of jurisdiction; according to the case, a judgment given on a preferable basis of jurisdiction (centre - establishment, establishment - national jurisdiction) or if the different judgments are rendered on the same basis of jurisdiction (centre - centre, establishment - establishment) the one given first, whatever be its tenor, will alone be recognized. In this last hypothesis, the second paragraph of Article 52 provides a rule of order when, peradventure, the decisions have been given on the same day. This rule is modelled on Dutch law (Article 2(5) FW). True, it is arbitrary, but the Committee did not find a better one, since reference could not be made in choosing between the decisions, either to the date on which they became res judicata because of the provisional enforcement as of right which attaches to judgments initiating bankruptcy or to that of the petition (because of the fact that the Court may take up the matter ex officio).

The wording of Articles 51 and 52 is sufficiently wide to embrace all cases of conflicts of decisions. Where two or more decisions have been handed down, only the one arrived at under the rules of the Convention must be recognized.

.../...

In this way, for example:

- when the bankruptcy of one of the same debtor is first adjudicated in Germany, the country where one of his establishments is situated, then in Belgium, the country of his centre of administration, the Belgian judgment will be the only one recognized if the mechanisms of Article 15 (1 or 16) have not been observed (Articles 3, 15(1) and 51);

- when the debtor has transferred his centre from Holland (Maastricht) to France (Lille) and the Maastricht Court, seised within the 6-month period provided for at Article 6(1), refuses to adjudicate bankruptcy or merely pronounces "surséance van betaling", whereas the Lille Court, seised within the same time-limit, decrees realization of the property two days later, the Maastricht decision alone will be recognized (Articles 6, 15(2) and 52(1)). If by chance the two judgments are pronounced on the same day, preference will be given to the judgment of the Lille Court even though in Dutch Lille is called Rijssel (Art. 52(2));

- Let us suppose now that the realization of assets is pronounced against a partnership having its centre of administration in France and against a partner having his personal centre of administration in Germany (Art. 3 and 10), and that this partner some days later seeks, on his own behalf, the opening of a Vergleichsverfahren (the opposite hypothesis to that provided for at Article 13(2)). Properly speaking, this is not a question of the equal or unequal ranks of jurisdiction of the French or German courts. Nevertheless, so far as the German partner is concerned, only the French judgment will be recognized (combination of Articles 51 and 52) because the French Court had jurisdiction with regard to this partner (Article 10) and pronounced judgment first (combination of Articles 13 a contrario and 52). If, conversely, the Vergleichsverfahren of the partner had preceded the French decision concerning the partnership, the only decision recognized regarding him will be the German judgment for reasons of the same order (Articles 3, 13 and 52).

.../...

The recognition machinery instituted by Articles 51 and 52, as well as that for enforcement, has therefore the consequence that when, by virtue of the Convention, a bankruptcy judgment produces its effects in the different Contracting States, its recognition and enforcement may not be impeded, even by invoking public policy, because of the existence of a national decision which has also adjudicated bankruptcy. Similarly, a national decision cannot produce effects when a foreign decision exists which is preferable to it under the Convention.¹⁷⁶

In this case, as in every other where a conflict of decisions exists, the problem arises as to the procedure for the annulment or declaring void of a decision which may have become *res judicata*, but which must not be recognized and produce effects even in the country where it was handed down. The solution of this problem is a matter for internal legislations as Article 53 limits itself to noting the inefficacy of the decision.

By analogy with the solution provided by internal legal systems in the event of amendment or retraction of a bankruptcy decision, Article 53 specifies that acts executed by the liquidator in pursuance of an unrecognized decision, remain valid.

Section II - Enforcement of bankruptcy judgments

Article 54

For the decisions mentioned at Article 54, the enforcement machinery included in the Convention deviates greatly from that of the General Convention, which only partially influenced the Committee at Section IV. Whereas the General Convention, although providing in principle for recognition as of right of decisions in its field of application, does subject the enforcement of such decisions to an *exequatur* procedure - true, a very simple one (Art. 31 et seq.) - Art. 54 provides that recognition, which need not be noted, entails enforcement as of right.

¹⁷⁶ Subject, however, to what will be said in the commentary on Art. 73 in relation to international engagements concluded with non-Member States before the entry into force of this Convention.

The following decisions enjoy the benefit of this rule:

- those pronouncing bankruptcy or any equivalent measure;
- those relating to the course of the proceedings, to the exclusion of those affecting the individual liberty of the debtor (Cf. above, commentary on Art. 19 and 47);
- those ratifying compositions or settlements which take place in proceedings to which the Convention refers.

Section III - Proceedings to contest the bankruptcy

Articles 55 and 56

An action to contest bankruptcy differs radically from an exequatur action.¹⁷⁷ The party who seeks exequatur requests authority to enforce in the State called upon a decision given in another State. On the other hand, the action to contest is a request not "to enforce" but "to refrain from enforcing". In other words, the aim of an action to contest the bankruptcy is that the bankruptcy judgment shall cease to be recognized and to produce its effects as of right in another Contracting State (Art. 59(4)). The essential result of this difference is that the initiative for bringing an action to challenge the bankruptcy is with the person who wishes to oppose recognition and enforcement, whereas, if it is a matter of exequatur, it will be for the liquidator to act.

The Committee expressly wished that this procedure should remain exceptional. To achieve this, it confined the action of contestation solely to decisions opening bankruptcy or other analogous proceedings and reduced to the minimum the circumstances in which this action might be initiated.

(1) Limitation of decisions which may be declared void

An action to contest bankruptcy is admissible only in regard to decisions pronouncing bankruptcy or another analogous measure, to the exclusion of the other decisions referred to at Article 54. These last mentioned may only be challenged, for the purpose of stopping their effects, by resorting to modes of appeal available in the country where they were handed down. The Committee did not consider it would be justified in allowing action to contest in respect of them unless it also affects the declaration of bankruptcy itself from which these decisions flow directly.

¹⁷⁷ Cf. Weser J. Com. Belgium, 1968, IV, p. 264.

The fact that internal means of recourse are still possible against the decision adjudicating bankruptcy is not an obstacle to the admissibility of the action to challenge the bankruptcy, since this decision produces its effects as soon as it is pronounced. Nevertheless, there is nothing to prevent a court seized of a voidability action (Article 57 and X of the Protocol) from suspending its finding until the judgment opening bankruptcy has become *res judicata* and ordering that the proceeds of realization be impounded.

(2) Restriction of the circumstances in which action to challenge the bankruptcy may be instituted.

Article 56 provides only two cases in which such action may be brought: violation of the rights of the defence and infringement of public policy, and even this latter case is excluded in a certain number of instances.

Let us examine these two points:

(a) 1st case: the violation of the rights of the defence.

This is a matter of assessing the "international regularity of the procedure" followed in the country where the bankruptcy was opened.

Initially, the Committee had envisaged allowing "opposition" proceedings to be instituted only in the court of the bankruptcy, but on condition, first that the principle of compulsorily summoning the debtor be laid down by the Convention and, secondly, that an effective system be provided for service and notification abroad of judicial acts.¹⁷⁸ However, it had to recognize that it was difficult to change internal laws on such matters as the court's ex officio *saisine* in bankruptcy matters¹⁷⁹ and on the system for notifying the Public Prosecutor.¹⁸⁰

¹⁷⁸ Cf. Jenard, Report p. 81 and seq.

¹⁷⁹ Cf. however for French law, Art. 2(2) of the 1967 law and 6 of the 1967 decree; see Art. 442 of the Belgian Commercial Code; Art. 6 Italian bankruptcy law; in Dutch law court may exercise ex officio *saisine* only in exceptional cases.

¹⁸⁰ Cf. Jenard Report p. 81; In addition see, for France, the decree of 26.11.1965 dealing with rules for procedural time-limits and the service of documents and Normand Rev. cit. DIP, 1966, p. 387.

Article 56 - 1^b concerns these two cases particularly, whilst at the same time allowing its application only where there is no fault or negligence on the debtor's part. It must be the case that the debtor's ignorance of the proceedings opened prevented him from "preparing his defence" and "availing himself of any legal remedy against the judgment opening the bankruptcy". These two obstacles are cumulative, as is seen in the double conjunction "neither ... nor ...".

To limit such cases of challenge by ensuring safety and speed in transmission of judicial documents, the Committee adopted the system described in Article VII of the Protocol, which is a reproduction of 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 Hague Convention on Civil Procedure of 1 March 1954 or in agreements between Contracting States under this Convention. It corresponds, moreover, to the facility laid down in Article 10(b) of The Hague Convention of 15 November 1965 dealing with service and notification abroad of judicial and extra-judicial documents, in civil and commercial matters. Under the system provided for by the Protocol, documents can be transmitted directly by the public officers of one Contracting State to their colleagues in another Contracting State, who send them to the person to whom they are addressed or to his domicile.¹⁸¹ Just as does Article 10(b) of The Hague Convention, Article VII of the Protocol allows a Contracting State to oppose this method of transmission.

(b) Second case: Infringement of public policy

The question of public policy in voidability matters was debated at length in Committee. After discarding two possible solutions (exclusion of this ground and express provision for it by means of a general formula) the Committee considered it preferable to include a provision allowing the possibility of recourse to public policy understood in its international sense, specifying at the same time, five cases in which public policy could not be invoked.

¹⁸¹ Cf. Jenard Report p. 84.

We will mention, by way of example, a case where a decision opening bankruptcy could be judged contrary to the international public policy of a country of enforcement: that of a declaration of bankruptcy against the commercial delegation of a State with collectivist economy or a foreign trade monopoly or, again, against an office, an establishment, an agency or branch of a State body carrying on commercial activities in the event of this delegation or office being considered in the State proceeded against as a government body enjoying immunity from action by courts or from execution and not as an establishment governed by private law.

The different cases referred to in Article 56(2) where pleading violation of public policy is not permitted, have already been touched on in dealing with the articles of the Convention to which they relate, and we shall here stress only the one of Article 56(b).

Just as in the General Convention, the Committee rejected, at the stage of enforcement, control of the jurisdiction of the court which pronounced bankruptcy. As action to challenge the bankruptcy is not provided for on the grounds of lack of jurisdiction of the judge who adjudicated it, the sole ground for quashing a bankruptcy decision given by a judge without jurisdiction and preventing it from producing its effects would have been resort to public policy. However, the Committee considered, first that mutual confidence in the judicial institutions of the Contracting States is at the very basis of the Convention and, secondly, that the machinery provided for at Articles 15, 51 and 52 was such as to give a satisfactory solution in cases where several courts belonging to different States considered they had jurisdiction and expressly excluded the possibility of appealing 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 pronounced and utilize the procedural grounds or the legal remedies provided for this purpose by the legislation of this State.

.../...

Article 57 to 60

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

Such an action will constitute a new form of procedure for the majority of the Contracting States; they will therefore have to take internal measures for the better definition of this procedure on the points with which the Convention did not have to deal. However, to ensure some unity of competence, action to challenge the bankruptcy will always be instituted, in each Contracting State, before the same court (Article 57 and X of the Protocol).

According to Article 58, the procedure is one at which both parties are heard and will, according to Article X of the Protocol be an appeal procedure. The action shall be brought against the liquidator by the Public Prosecutor,¹⁸² the debtor or any other interested party, excluding the person who brought the bankruptcy proceedings. We must remember that one of the reasons why the Committee preferred the action to challenge rather than the exequatur was specifically because the bankruptcy has effect erga omnes and the only legitimate opponent to a request for exequatur would have been the debtor.¹⁸³

Article 58(2) has confined the bringing of this action to challenge within a dual time-limit: three months from the publication of the bankruptcy judgment in the Official Journal of the European Communities, or, at very latest, prior to closure of the bankruptcy, so that enforcement might not be contested at a time which would be prejudicial for all concerned.

To preclude any delaying effect of the action to challenge, Article 59 does not allow that its introduction should engender any staying of effects. However, the system provided for in this article is very flexible:

¹⁸² A reservation on this point is made at letter (1) of Annex II for the Federal Republic of Germany.

¹⁸³ Cf. Note Gavalda under Trib. Seine 22.12.1965. Rev. Crit. D.I.F. 1966, p. 491.

the court seised of such an action, and the other courts of the State of enforcement can, pending the decision of the alleged voidability, order a stay of enforcement and other measures to protect and preserve the estate, such as the impounding of monies arising from the realization.

Article 59(3) places the decision allowing or dismissing the request for voidability on the same footing as national bankruptcy decisions as to their effects on persons, advertisement and legal remedies. The solution on the two first points is identical to that which would have resulted from exequatur proceedings.¹⁸⁴ The decision on the action to challenge having only territorial effects limited to the country where the action was brought, advertisement will be as provided by the internal law of this country and not that introduced by the Convention. As far as remedies are concerned, the internal law of each Contracting State will have to determine the system applicable to the decision given by following, as far as possible, the provisions applicable in bankruptcy matters, especially as regards time-limits.

The effects of a successful challenge are twofold: they have in common that they are strictly territorial i.e. limited solely to the territory of the State where the challenge was made.

Such successful challenge is an obstacle simultaneously to both recognition and enforcement, not merely of the decision opening bankruptcy, but also of all the other decisions in Article 61 which have their necessary legal basis in this opening: decisions taken in the course of the proceedings, decisions ruling on the actions arising from the bankruptcy (Article 59(4)). In the case of a bankruptcy pronounced at Brussels, the only consequence of a successful challenge in Germany will be that the Belgian decision will cease to be recognized and enforced in that country, but will continue to produce its effects in the other four States of the Common Market so long as a voidability decision has not been handed down in each of them.

¹⁸⁴ Cf. Seine 22.12.1965 and the Gavalda note referred to above. The France-Monaco Convention of 13.9.1950 provides that legal remedies from an exequatur decision will be exercised in the forms and according to the time-limits provided for in bankruptcy matters by the law of the court seised of the request for exequatur. (Art. 3 in fine).

True, this solution may entail the disadvantage that violation of rights of the defence is assessed differently in the different Contracting States, but it would have been the same with exequatur. Acts carried out by the liquidator do not cease to be valid because they preceded the declaration of invalidity ("a judgment successfully challenged shall cease to be recognized").

- The courts of the State where voidability has been pronounced may possibly open bankruptcy or other proceedings if they have jurisdiction according to the legislation of that State (Art. 60). Such bankruptcy will have no Community effect, in the first place because the courts have no jurisdiction according to the Convention, and, secondly, because bankruptcy has already been adjudicated in another Contracting State. In this way, there would be two or more bankruptcies initiated on EEC territory, which constitutes an exception to the principle of unity. But the Committee was obliged to allow such a solution so as to avoid a legal vacuum in the State where the voidability was pronounced. It would be shocking if the debtor could, in this country, escape the consequences of his acts.

Section IV - Enforcement at certain decisions in bankruptcy matters

Articles 61 and 62

Article 61 provides that decisions other than those mentioned at Article 54, the recognition of which is likewise automatically assured by Article 50, can be enforced in a Contracting State other than the one where they were given. However, this can only be "pursuant to an order for enforcement granted there".

- The following will therefore be subject to this formality:

-decisions on actions or disputes referred to at Article 17;

-all other decisions in bankruptcy matters. This general formula was added as a precaution to avoid any legal vacuum.

Under this head it is not possible to include either the decisions already mentioned at Article 54 or those relating to the individual freedom of the debtor, the effects of which continue to be territorial in the present state of the Convention and which, moreover, are expressly excluded by the last paragraph of Article 61;

- the instruments for levying execution already referred to at the end of Article 50.

The methods of delivering the order for enforcement must be decided by each internal legislation. Article 61 confines itself to saying that this delivery shall be effected on an application to the authority designated in Article XI of the Protocol by any person who is proceeding with enforcement of the decision.

But whichever be the authority designated (judge or court registrar) and the nature of the procedure employed (procedure on application in the procedural sense of the term or a mere request, oral or written), the powers of the authority designated are limited, under Article 62, to verifying the formal correction of the documents mentioned in this Article, to the exclusion at this stage of any other control which could be exercised only when there is opposition to the enforcement.

The documents whose submission is demanded at Article 62 are the same as those mentioned in paragraph 1 Articles 46 and 47 of the General Convention.¹⁸⁵

The very delivery of the enforcement order can therefore be analyzed as an authorization to execute granted only to overcome the difficulties of a practical nature facing the officers of justice responsible for execution and third parties, or, even more exactly, as a simple confirmation by a national authority of the executory force of the foreign judgment. Even when it is couched in judicial form and emanates from a judge, the granting of the order of enforcement:

¹⁸⁵ Cf. Jenard, Report, p. 114-15

- may not give rise to the collection of any impost, registration fee (fixed or proportional) or tax (Art. 63(2) in fine, compare with Art. III of the Protocol to the General Convention). This provision does not refer to the expenses of the legal official presenting the request in any Contracting States where this would be necessary in order to seize the judge designated;
- is not, in itself, open to appeal because of the restricted role granted to the competent authority and the unilateral character of the procedure followed. Appeal under Article 63 is formulated against the judgment itself, which is couched in the enforcement form, and not against the delivery of this.

Articles 63-67

The appeal (opposition to enforcement) in Section IV is quite close to an action to challenge the bankruptcy; the preconditions for its opening will in principle also be the same in so far as they can be applied in the matter. The effects will likewise be the same¹⁸⁶ subject, however, to the relative "res judicata" nature of the voidability. By analogy with the provisions of Article 60, it must be admitted that it is possible, to reinstitute immediately and directly, if these courts can have jurisdiction, an action for a decision identical to that declared invalid.

The procedure of opposition to enforcement differs however from that of a voidability action in certain particular features:

- It is not a matter which is of the competence of only one court per State but of several (Art. 64 and XII of the Protocol), whose territorial jurisdiction is determined primarily by the domicile of the party against whom enforcement is sought; the jurisdiction of the judge of the place where the enforcement formula was delivered is only subsidiary (comp. Art. 32(2) of the General Convention),
- the time-limits within which the appeal has to be lodged are not the same. To open the period, the decision accompanied by a translation must be served after the delivery of the enforcement order. The time-limit

¹⁸⁶ The voidability of judgments pronounced on actions mentioned in Art. 17 may be declared in two ways: directly by the success of the opposition to enforcement and indirectly by the voidability of the decision to open the bankruptcy itself (Article 59(4)).

calculated in accordance with the law of the court but in such a way that the system of clear days may not be allowed, is from 14 to 28 days, beginning from the time of personal notification, according to whether the party against whom enforcement is sought is domiciled in the State concerned or not; failing personal service, the time-limit is always 28 days counting from the first act of enforcement (comp. Art. 36 of the General Convention).

- the forms of legal remedy against a judgment on opposition to enforcement are considerably less far-reaching than those which may be used against a decision given on a voidability action under Art. 55 (Art. 66). The reason for this is that decisions susceptible of being appealed against under Art. 63 are in a secondary position in relation to the decision pronouncing bankruptcy and their enforcement does not require the same guarantees when the bankruptcy decision has not been judged invalid. Moreover, the Committee took into consideration the fact that the duty of the judge hearing a voidability appeal is very limited. Article 66, the wording of which is identical to that of Article 37 in fine and 41 of the General Convention, means that not only the opposition but also the appeal is inadmissible. As there is no appeal to the Cassation Court in the Federal Republic of Germany, provision was made, in order to preserve balance between the Contracting States, that an appeal founded on a legal remedy could be formulated against the decision on opposition to enforcement.
- the appeal, as well as the time-limit for lodging it, are of a safeguarding nature (Art. 67 adopted from Art. 39 of the General Convention). The party demanding enforcement can pursue only measures to safeguard the assets, as they are provided for in the law of the State of enforcement. Article 67 therefore allows this party to initiate, in certain countries, in the Federal Republic of Germany for example, the first phase of execution of the foreign decision. Delivery of the enforcement order automatically carries the authorization to undertake these measures. The applicant does not have to establish, in States whose laws impose this condition, that the case calls for urgent action or that delay would be dangerous.

.../...

Section V - The common provisions.

Articles 68 and 69 are merely the reproduction almost word for word of the corresponding Articles 45-49 of the General Convention.

Article 68 relates to the *judicatum solvi* surety. This was also dealt with in The Hague Convention of 1 March 1954, which excepted from the payment of such surety only nationals of Contracting States having their domicile in one of these States (Art. 17). Article 68 exempts from payment of surety any party, irrespective of nationality and domicile, who, in a Contracting State, requests that a decision given in another Contracting State should be pronounced voidable.

The Committee considered that provision of such surety was not justified in the proceedings under Sections III and IV. The same must apply to the granting of an enforcement order irrespective of the type of procedure employed. On the other hand, the Committee considered that there was no need to depart from the rules of the 1954 Convention in relation to a procedure carried out in the State of origin.

Article 69

This article provides that the documents mentioned at Article 62 or produced in the course of one of the voidability procedures need not be authenticated or be subject to other formalities, i. e. in particular the marginal note provided for in The Hague Convention of 5 October 1961 abolishing the necessity for authentication of foreign public documents.

.../...

CHAPTER VII:- TRANSITIONAL PROVISIONS

Article 70

As a general rule, enforcement treaties have no retroactive effect in order "not to change a state of affairs acquired under the aegis of legal relationships other than those created between the States by the Convention. 187 Only the Benelux Treaty applies to court decisions given prior to its coming into force.

A solution as radical as that of the Benelux Treaty did not seem acceptable for the reasons set out by M. Jenard in his report. The text chosen by the Committee was therefore based on Article 54(1) of the General Convention, as well as on the rules of transitional law enacted at the time of the legislative reform of bankruptcy in French law (Art. 160 of the law of 13 July 1967).

A provision analogous to that at Article 54(2) of the General Convention and relating to decisions pronounced before the latter came into force could not be adopted. In the first place, the Convention provides wide powers granted to the liquidator armed with the certificate referred to in Article 28 and, secondly, the systems of recognition and enforcement have been simplified in consideration of the establishment of uniform laws and common rules of conflict of laws which themselves will come into force only at the same time as the Convention (Cf. Art. 72).

CHAPTER VIII - RELATIONSHIP TO OTHER INTERNATIONAL CONVENTIONS

Title VII, adapted from Title VII of the General Convention concerns relationships between the Convention and other international instruments which govern court jurisdiction, recognition and enforcement of judgments in bankruptcy matters. Its subject is:

187 Cf. Jenard Report, p. 121.

- relationships between the Convention and bilateral or trilateral treaties already in force between certain Community States (Articles 71 and 72).
- relationships between the Convention and treaties already concluded with non-Member States (Article 73).

Articles 71 and 72

Article 71 contains the list of conventions which will be abrogated by the coming into force of the EEC Convention.¹⁸⁸ Such abrogation will operate only subject to:

- the provisions of Article 71, that is to say that these conventions will continue to produce their effects in matters to which the Convention does not apply (insurance and similar undertakings, matters other than bankruptcy, composition and other analogous proceedings such as provided for in the Protocol).
- the provisions of Article 72 relating to proceedings opened before the coming into force of the EEC Convention.

Article 73

This article deals with the delicate question of the compatibility of the Convention with treaties already concluded between a Contracting State and a third State.

Here, the Committee considered that the corresponding provisions of the General Convention (Art. 57 and 58) could hardly be included, since, on the one hand, conflicts may arise equally well with treaties of direct jurisdiction as with treaties of 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 law applicable. It was consequently considered preferable to adopt a text of general scope based on Article 234(1) of the Rome Treaty.

¹⁸⁸ Reference has been made to the Benelux Treaty, although, since this has not been ratified in Luxembourg, it has not yet come into force, so as to prevent overlapping between the Convention and this Treaty in the event of its becoming effective.

Two hypothesis must be distinguished according to the nature of the Treaty concluded with non-member States.

(1) Where "simple treaties" are concerned, i.e. treaties which contain only rules of indirect jurisdiction, the Committee believes that there should not exist any conflict between the rules of jurisdiction under these Treaties and those at Title II of the Convention. At the stage of recognition and enforcement, it should be possible to recognize judgments given in non-member States in conformity with the provisions of these treaties, subject however to their not being paralysed by prior recognition accorded earlier through a decision rendered in implementation of the present Convention.

(2) "Dual treaties" comprising rules of direct jurisdiction in bankruptcy matters are four in number:

- The treaty concluded on 15.6.1869 between France and the Swiss Confederation on court jurisdiction and enforcement of judgments in civil matters, which lays down rules of direct jurisdiction for disputes between French and Swiss for the benefit of the "natural judge" of the defendant, whose exclusive jurisdiction must be observed if necessary ex officio (Art. 11), and which in bankruptcy matters ensures the unity of the bankruptcy (Art. 6 to 9).
- The Convention between France and the Principality of Monaco of 13.5.1950 on bankruptcy and the realization of assets.
- The German-Austrian treaty of 1966 and the Convention on bankruptcy, composition and suspension of payment between Belgium and Austria signed at Brussels on 16.7.1969 in so far as it should come into force before the Convention.

It should be pointed out that the last-mentioned treaties, in contrast to the Franco-Swiss treaty, apply even though the debtor or creditors may not be nationals of the Contracting States.

In dealing with these treaties, the problem must be subdivided.

.../...

At the stage of jurisdiction, a Treaty already concluded with a non-member State must prevail over the present 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 'établissement' in France and another in Germany, the French courts have no jurisdiction to pronounce bankruptcy, whereas it could be initiated in Germany by virtue of Article 4 of the EEC Convention.

As regards recognition and execution, these can only be granted in respect of a judgment given by the court of a non-member State whose exclusive jurisdiction has been established, and this without any question of which judgment was pronounced first. So, returning to our example taken from the Franco-Swiss treaty, if the German judgment is given first, the exception of res judicata cannot be pleaded against the Swiss judgment being invoked and enforced in France; if the latter has obtained the exequatur in France before the bankruptcy was pronounced in Germany, this German bankruptcy could only produce its effects in the EEC States other than France.¹⁸⁹

Bearing therefore particularly in mind the Franco-Swiss Treaty of 1869, the Committee formulated in the Joint Declaration the wish that this treaty might be suitably modified to eliminate incompatibilities existing between it and the multilateral Convention (comp. Art. 234(2) of the Rome Treaty). With regard to the conventions to be concluded with non-member States, the Convention does not contain any provisions corresponding to those of Article 59 of the General Convention, but merely a resolution in the Joint Declaration to the effect that such Conventions will be concluded only by common accord.

¹⁸⁹ It is to be observed that in relations between France and Monaco bankruptcy decisions in one of the two countries become res judicata in the other as soon as they acquire this authority in the country where they were given. The exequatur is required only for acts of enforcement (Art. 3 and 8 of the Convention of 13 September 1950).

.../...

CHAPTER IX - FINAL PROVISIONS

Articles 74, 75 and 77 to 82

These articles, which are merely a reproduction of Articles 60 to 68 of the General Convention, do not call for any special commentary.

Article 70

This article deals with the introduction into each internal system of legislation of the uniform laws referred to at Article 39 and at Annex I, in wording which is based on that most often used for such matters in international conventions comprising a uniform law.

In paragraphs 1, 3 and 4, Article 76 distinctions are made according to the uniform laws and the legislations of the different proceedings of Article 1 of the Protocol:

- All uniform laws must be incorporated into all legislations in respect of bankruptcy *stricto sensu* (Article 76(1)). The same will apply to the French law of "*règlement judiciaire*" (Article 76(3) and XIII of the Protocol).
- for proceedings other than those just mentioned, the uniform laws provided for in Articles 1 and 2 of Annex I must moreover be introduced into the Italian law of *liquidazione coatta amministrativa* (Article 76(3) and XIII).
- the uniform laws of Articles 39 of the Convention and 3 to 6 of Annex I will be introduced into legislations in respect of proceedings other than bankruptcy *stricto sensu* and the French *règlement judiciaire*, only in so far as these uniform laws can be applied (Art. 76(4)).

.../...

Two remarks must, however, be made:

Firstly, this introduction will be effected with due respect for the constitutional standards and the legislative traditions of each of the Contracting States, which will not be obliged to reproduce word for word the texts as framed at Annex I. It goes without saying that there will be need for this introduction and incorporation only in so far as the internal legislation in the strict sense (excluding therefore solutions derived purely from case law which are always subject to revision) of each State does not already conform with the different uniform laws (paragraph 2). In this sense, the introduction or the incorporation of uniform laws or the aligning on internal legislation of these laws will be total or partial. It will also be partial or adapted for States declaring their intention of making use of the reservations noted for each of them in Annex II (paragraph 5).

On the other hand, uniform laws contribute not merely an essential but a determining element for implementing the Convention (see above Art. 70). They must therefore be introduced in the sense indicated above, if they have not already been introduced as a result of or by reason of a law implementing or authorizing ratification of the Convention, at the latest on the first day of the sixth month after the lodging the last ratification instrument, the day on which, under the terms of Article 75(2), the Convention comes into force.

CHAPTER X - PROTOCOL

The *raison d'être* of the Protocol lies essentially in the flexibility which must attach to the denominations of the proceeding or to the designation of national authorities which can change in time without necessarily calling into question the machinery of the Convention. Besides, it is for this purpose that the Protocol can be changed by a mere declaration and not according to the revision procedure provided for in the case of the Convention (Article XV).

.../...

Article 1

The proceedings coming within the scope of the Convention are presently the following:

Belgium

- la faillite (bankruptcy) (law of 18 April 1851, as amended, on ordinary and criminal bankruptcies entered in Book III of the Commercial Code of the 15 September 1867, Art. 437 to 572).
- Le concordat judiciaire (judicial arrangement) (consolidated laws of 29 June 1887 and 10 August 1946).
- The suspension of payment (sursis de paiement) (law of 18 April 1851 on ordinary and criminal bankruptcies entered at Title 4 of Book III of the Commercial Code Arts. 593-614).

The Federal Republic of Germany

- The Konkurs (Bankruptcy Ordinance of 10 February 1887 in the version of 20 May 1898, as amended, abbreviated to KO).
- The gerichtliche Vergleichsverfahren (Vergleichsordnung of 26 February 1935, as amended, abbreviated to Vg10).

France

- la liquidation des biens (realization of property) and the judicial settlement (règlement judiciaire) (Law N° 67 - 563 of 13 July 1967 and decree N° 67 - 1120 of 22 December 1967 on judicial settlement, realization of property, personal and criminal bankruptcies).
- Proceedings for the provisional suspension of actions and collective settlement of debts of certain enterprises (Ordinance N° 67 - 82 of 23 September 1967 and decree N° 67 - 1255 of 31 December 1967 to facilitate the economic and financial reorganization of certain enterprises; decree N° 67 - 1254 of 31 December 1967 determining the courts empowered to conduct the proceedings instituted by the ordinance of 23 September 1967).

.../...

Italy

- fallimento (Royal decree N° 267 of 16 March, 1942, abbreviated to l.f.).
- concordato preventivo (Art. 160 et seq. of Royal decree N° 267 of 16 March 1942).
- amministrazione controllata (Arts. 187 et seq. of Royal decree N° 267 of 16 March 1942).
- liquidazione coatta amministrativa (Art. 194 et seq. of Royal decree N° 267 of 16 March 1942).

The administrative stage of this form of realization does not fall within the scope of the Convention. In this case the realization occurs for reasons other than the insolvency of the debtor. The administrative stage does not necessarily precede the judicial stage properly so called; the judicial authority may note that a state of insolvency exists without any intervention on the part of the administrative authorities. From the time when this decision is made, it entails the same effects as a judgment pronouncing bankruptcy.

Luxembourg

- la faillite (Bankruptcy) (Statute of 2 July 1870 entered at Title I of Book III of the Commercial Code of 15 September 1807, Arts. 437 to 572).
- le concordat préventif de la faillite (the composition or arrangement which wards off bankruptcy) (law of 14 April 1886 supplemented and amended by the law of 1 February 1911 and the Grand Ducal decree of 4 October 1934).
- le sursis de paiement (suspension of payment) (law of 2 July 1870 entered at Title 4 of Book III of the Commercial Code Arts. 593 to 614; Grand Ducal decree of 4 October 1934).
- the special system of realization applicable to notaries (Grand Ducal decree of 31 December 1938). This decree applies also to notaries "whose credit is undermined or when the integral execution of their obligations is jeopardized, a special system of rehabilitation (which does not come within the scope of the Convention) or of realization at the option of the Administrative Council of the rehabilitation section of the Luxembourg notariat, ex officio or at the request of the notary or a creditor.

In addition, since the enactment of a law of 21 December 1912, a notary who has ceased payments and whose credit is undermined, is treated on the same footing as a trader for the application of bankruptcy and the other proceedings. But bankruptcy can only be instituted at the request of the Administrative Council and the notary cannot ask for the benefit of other measures as long as the special system has not been denied to him. At the request of the Luxembourg delegation, the application of the special system of realization will give rise only to restricted advertisement arrangements at Community level.

In theory, Luxembourg legislation also recognizes controlled management (governed by a Grand Ducal decree of 24 May 1935) modelled on a Royal Belgian Decree of 15 October 1934 which had set up this procedure as a temporary measure; but this procedure was not chosen, having fallen completely into disuse.

The Netherlands

- faillissement (wet of 30 September 1893 of het faillissement en de surséance van betaling, Titel 1 Art. 1 - 212 abbreviated to F.W.).
- surséance van betaling (Titel 11 comprising Arts. 213 to 284, added on 7 February 1935 to the Faillissementswet of 30 September 1893).
- regeling, vervat in de wet op de vergadering van houders van schuldbrieven aan toonder (of 31 May 1934). By virtue of this law, the provisions of which are very little used, the rights of bond-holders can be modified when a body which issues bearer bonds is not in a position completely to fulfil its obligations to bond-holders (reduction of capital and interest, postponement of payment of dividends, etc.). This modification may occur on the decision of an assembly of bond-holders meeting with judicial authorization; the decision must be taken by two-thirds majority of the votes and ratified by the court.

.../...

Article II

Paragraph 1 of this Article gives the list of various national enterprises treated on the same footing as direct insurance as regards their system of realization and which, for this reason, are excluded from the scope of the Convention subject to the provisions of paragraph 2.

It applies:

(a) in the Federal Republic of Germany

- to private savings banks or private building societies;
- to reinsurance mutual societies.

(b) in France

- firstly, to enterprises for accumulating capital, or savings enterprises or those whose object is the acquisition of immovables as a means to constitute annuities. Although not called insurance operations, the operations thus covered are, however, subject to the regulations governing insurance by paras. 3, 4 and 6 of the decree-law of 14 June 1938 uniting State control of insurance enterprises of every kind and of the accumulation of capital and organizing the insurance industry;
- on the other hand, to deferred credit enterprises whose realization is effected, since the law of 24 March 1952, in the way laid down by the 1938 decree-law referred to above.

(c) in Italy

- to co-operatives or mutual societies for capital accumulation.

(d) in the Netherlands

- to Bouwkassen or building societies.

Articles III to XII

These articles do not call for special comments. It might therefore be appropriate to consult those articles of the Convention to which they refer.

.../...

Articles XIV and XV

Article XIV sets up a system of mutual information concerning the legislative reforms which have occurred or are projected in the law of bankruptcy and which are susceptible of affecting the application of the Convention, so as to permit, if necessary, the implementation of the revision provided for in Article 81 of the Convention.

If this is merely a matter of changing the national lists or headings in the Protocol, this change shall be made, in accordance with Article XV, by a declaration addressed to the officer with whom the Convention is lodged.

ANNEX I

Examples of the layout of German decisions (see pages 57 and 58 of this Report).

(a) Condemnation to restore immovable property

The defendant is condemned to:

declare himself agreed that the right of ownership over the immovable property registered in the Lands Register kept at the Amtsgericht of ... (volume ...) folio ...¹ serial number ... shall pass to ...

and that X be registered in the Lands Register as owner of the immovable property in question.

(b) Condemnation to release a mortgage entered into by the bankrupt over immovable property as security for a debt:

The defendant is condemned to:

declare that he abandons the mortgage of ... DM registered in his name in the Lands Register of the Amtsgericht of ... (volume ...) folio ...¹ section III serial number ... and to hand the mortgage deed to the plaintiff, and

to approve the cancellation in the Lands Register of the mortgage in question.

(c) Condemnation to renounce a mortgage debt constituted on an immovable property of the bankrupt.

The defendant is condemned to:

renounce the mortgage debt of DM ... registered in the Lands Register of the Amtsgericht of ... (volume ...) folio ...¹ section III serial number... and

to approve the registration in the Lands Register of the renunciation of the mortgage debt in question.

¹The above details in relation to the description of the immovable property may be subject to changes according to each particular case. For example, it should be pointed out that in the greater part of Land Baden-Württemberg, the responsibility for keeping the Lands Register does not devolve on the "Amtsgerichte". The words "of the Amtsgericht" are then superfluous. Often Lands Registers are not designated by volumes; in such a case the number of the volume should be deleted and one number only need be referred to, that is the number of the folio or the number of the "memorial". This latter designation may also be met with.

ANNEX II

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

CHAIRMAN

- | | |
|--|---|
| M. le Professeur A. Bülw
(until 31.12.1966) | Staatssekretär a.D. im Bundesministerium
der Justiz der Bundesrepublik Deutschland |
| M. J. Noël
(with effect from 1.1.1967) | Conseiller à la Cour de Cassation de France |

BELGIUM

- | | |
|---------------------------------------|--|
| M. P. Jenard | Directeur d'Administration ff. au Ministère
des Affaires Etrangères |
| M. Meuleman | Directeur général honoraire au Ministère de
la Justice |
| M. Rouserez | Magistrat délégué au Ministère de la Justice |
| M. J. Vandergucht
(beginning 1965) | Président du Tribunal de Commerce de Bruxelles |
| M. P. Coppens | Professeur à l'Université Catholique de Louvain |

GERMANY

- | | |
|--------------------------|---|
| M. A. Böhle-Stamschräder | Ministerialrat a.D. im Bundesministerium
der Justiz der Bundesrepublik Deutschland |
| M. E. KAUFMANN | Ministerialrat im Bundesministerium der
Justiz der Bundesrepublik Deutschland |

FRANCE

- | | |
|--|---|
| M. J. Noël, Chairman of
the Working Party until
31.12.1966 | Conseiller à la Cour de Cassation de
France |
| M. J. Lemontey | Magistrat, Chef de Bureau du droit euro-
péen et international au Ministère de la
Justice |
| M. L. Gadebois | Administrateur civil au Ministère de
l'Economie et des Finances |
| M. G. Castres
(until 1963) | Magistrat au Ministère de la Justice |

ITALY

- Professor L. Marmo (deceased) Magistrato addetto all'Ufficio Legislativo del Ministero di Grazia e Giustizia
- M. F. Coriasco Magistrato addetto all'Ufficio Legislativo del Ministero di Grazia e Giustizia
- M. le Professeur R. Miccio Magistrato addetto all'Ufficio Legislativo del Ministero di Grazia e Giustizia
- M. E. de Vicentiis Magistrato addetto all'Ufficio Legislativo del Ministero di Grazia e Giustizia
- M. G. Pandolfelli Magistrato addetto all'Ufficio Legislativo del Ministero di Grazia e Giustizia
- M. F. Cochetti Magistrato addetto all'Ufficio Legislativo del Ministero di Grazia e Giustizia
- M. S. Zhara Buda Magistrato addetto all'Ufficio Legislativo del Ministero di Grazia e Giustizia

LUXEMBOURG

- M. A. Huss Procureur Général d'Etat honoraire
- M. F. Goerens Conseiller à la Cour supérieure de Justice
- M. E. Mores Juge au tribunal d'arrondissement de Luxembourg

NETHERLANDS

- M. W.G. Belinfante Raadadviseur, Ministerie van Justitie
- Mme Mr. S.J.M. Van Delden-Van Belt (until 1967) Ministerie van Justitie
- Mlle L. Lagers Ministerie van Buitenlandse Zaken
- Mlle Mr. H.E. Van Muiswinkel (beginning 1967) Ministerie van Justitie
- M. E.C. Henriquez, (beginning 1969) Raadadviseur, Ministerie van Justitie

OBSERVERS

Benelux Commission for the unification of law

- M. J. Vandergucht (until early 1965) Secretary-General of this Commission
- Mme M. Weser Member of this Commission

The Hague Conference on International Private Law

M. H. H. van Hoogstraten	Secretary-General of the Conference
M. C. Droz	First Secretary of the Standing Office of the Conference

Commission of the European Economic Community

Directorate-General for the
Internal Market and
Approximation of Legislation

M. H. Arnold (beginning May 1961 until 1962)	Head of Division
M. W. Hauschild (beginning December 1962)	Head of Division
M. P. Fois (beginning December 1962 until April 1967)	Member of Division
M. E. Bremborst (beginning November 1964)	Member of Division