

**Bankruptcy and Insolvency in
European Private International Law:
towards a harmonised approach?**

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Bankruptcy and Insolvency in European Private International Law: towards a harmonised approach?

Abstract

This thesis is written from a private international law point of view and applies a conflicts analysis to cross-border insolvencies. A comparative approach is adopted. The jurisdictions chosen are Belgium and England and Wales. Belgian law was chosen because it is a good example of a radical adherence to the principles of unity and universality. In the light of this theoretical starting point a single set of proceedings is preferred and ancillary or territorial proceedings in any form are virtually impossible. English law, whilst accepting the universality principle, rejects the unity principle. This leads to a very different approach, with plenty of space for ancillary proceedings. The two legal systems are therefore highly suitable for a comparative analysis with the aim to discover whether existing national systems of private international law are capable of dealing effectively and efficiently with ever increasingly complex cross-border insolvencies.

The analysis of the two legal systems involved leads to the clear conclusion that each system has its advantages, but that nevertheless neither of them is able to deal with cross-border insolvencies on its own.

In a second stage the thesis therefore analysis transnational initiatives that could address this problem. The EU Regulation and the UNCITRAL Model Law have been chosen because the first one will enter into force in 2002 and because the latter one has a good chance of being implemented. Both initiatives come as packages and all their provisions are therefore analysed.

At the end of this analysis the clear conclusion is that national systems can no longer cover things alone. Ideally measures such as those contained in the Regulation should be adopted globally, as a starting point. Since that may not yet been possible, the slightly weaker alternative in the Model Law can be a good starting point. This is clearly an area in full evolution.

Preface

This thesis focuses straightforwardly on private international law and applies the typical private international law analysis to cross-border insolvency cases. Two consequences flow from this starting point. First, all aspects of substantive insolvency law are in as far as was reasonably possible avoided in order not to blur the picture. I am also by my own admission by no means an insolvency law expert. Secondly, the structure of the chapters is based on the typical private international law distinction between jurisdiction, choice of law and the recognition and enforcement of foreign judgments.

I have attempted to deal with the jurisdiction issue in as far as it regards the jurisdiction of the court to open bankruptcy or insolvency proceedings. Other proceedings may also arise and all national laws now also have different regime of corporate rescue. Unfortunately these other proceedings are very different in nature and especially the corporate rescue element would have raised many other issues, amongst which for example employment and social security issues figure prominently. No proper comparison would have been possible between these proceedings and there would have been a risk that the overall picture would have been blurred. Hence the slightly narrower focus. The same narrow focus has also been followed through in the choice of law and recognition parts of the thesis.

This is also a comparative piece of work. I have opted for a comparison between Belgian law and English law for a number of reasons. One reason is that I felt that on the jurisdiction point especially I needed a civil law jurisdiction on the one hand and on the other hand a common law jurisdiction, because of the difference in the traditional approach adopted by them. Secondly, Belgium is a good example of extreme strict adherence to both the principles of unity and universality. The United Kingdom has on the other hand never accepted the unity principle and this provides a nice contrast, for example in relation to ancillary proceedings.

There is also in this area a clear tendency towards more international co-operation and towards harmonisation, based on the experience that national solutions are not necessarily satisfactory. The second part of the thesis turns therefore to the international initiatives that seem destined for adoption and implementation. These initiatives are discussed in their entirety I order not to distort the overall picture, even if that means covering some point that received for reasons of space comparatively little attention in the national chapters.

The final aim of the thesis is to produce an assessment of the present situation and to provide suggestions for the way forward.

Chapter I - The Background

I. Introduction

Trade patterns in Europe have increasingly become international in nature. Apart from the opportunities associated with it, this rise in international trade also brings with it an increasingly competitive trading environment. Casualties are an inevitable side effect of this development. Such casualties may result in bankruptcies and insolvencies that stretch across borders because either the assets or the creditors are located in more than one country. Such international bankruptcy or insolvency cases present, apart from the obvious practical complicating factors, a host of legal difficulties. This is primarily so because bankruptcy and insolvency law is not yet based on a uniform international law, nor has it yet been harmonised. Bankruptcy and insolvency laws are still based on provisions of national law. And the national approaches and the detailed provisions of these various national substantive laws differ widely amongst themselves. These national provisions are also designed to deal with bankruptcy or insolvency cases that are strictly limited to one country. The international aspects of insolvency are not or almost not dealt with by the relevant Statutes. Whilst the Courts struggle to find adequate solutions to these cases, it becomes clear that international bankruptcy and insolvency law constitutes an area in which a lot of work remains to be done before the law will be able to catch up with the recent trading developments by being in a position to deal adequately and efficiently with the increasing number of international bankruptcy and insolvency cases. New national legislative initiatives are needed, as are international Conventions on a regional or even world-wide scale. The actual situation is imperfect and often based on (too) old case-law.

A detailed examination of the various national insolvency laws is not envisaged here. In the absence of uniform or even harmonised substantive provisions private international law is called upon to provide a solution. This analysis will therefore focus on the various aspects of private international law and the solution that is

provided in this way. National rules on private international law approach this system in very different or sometimes even diametrically opposed ways. Even on this point a harmonised approach seems very far away on occasions. The primary aim of this work is therefore to offer a comparative analysis of the existing national rules on private international law in this area, before moving on to the harmonisation attempts that have been put on track¹. Belgian and English law have been chosen because they are good examples of the diametrically opposed views that are around. Before turning to the national private international laws of the countries involved in this comparison it is appropriate to clarify the basic concepts that have influenced this debate so strongly.

II. Universality v. territoriality

In general terms the universality of a bankruptcy or an insolvency implies that all assets of the debtor are included in it, even if these assets are located abroad. The assets include all immovable properties and, if an insolvent company is wound up, all branch offices which did not enjoy separate legal personality and the assets

¹ The (stalled) European Union Convention on Insolvency Proceedings 1995, 35 (1996) ILM 1223, text and commentary also in I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 255-301 and Appendix II. The Istanbul Convention of the Council of Europe (5th June 1990) published in Council of Europe, *International Aspects of Bankruptcy*, Council of Europe Press (1991) I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 301-322 and Appendix III, now superseded by Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1. There have also been various older EEC drafts; for details on these drafts see J. Thieme (ed), *Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens*, Siebeck (1988); D. Beukenhorst, *Het ontwerp Europees faillissementsverdrag : het ontwerp van Verdrag inzake faillissement, akkoord en andere soortgelijke procedures van 1980*, Kluwer (1983); I. Fletcher, *Conflict of Laws and European Community Law*, North-Holland Publishing Company (1982), Chapter 6; I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 246-255; Aminoff, "The EEC draft bankruptcy convention - An exercise in harmonizing private international law", (1990) Leg. Iss. Eur. Int. 121; Daniele, "Les problèmes internationaux de la faillite : heur et malheur du projet de convention communautaire", (1987) Cahiers dr. eur. 512; Noël, "Lignes directives du projet de Convention CEE relative à la faillite", (1975) Rev. Trim. Dr. Eur. 159; Lemontey, "Perspectives d'unification du droit dans le projet de Convention CEE relative à la faillite", (1975) Rev. Trim. Dr. Eur. 172; Hunter, "The draft Bankruptcy Convention of the European Economic Communities", (1972) 21 I.C.L.Q. 682; and Weser, "Projet de convention entre les Etats de la CEE relative à la faillite", (1968) T.B.H. 150 and 264. On the UNCITRAL Model Law see UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL website (www.uncitral.org/english/texts/insolven/insolvency.htm) and UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

attached to them. It means equally that a bankruptcy or an insolvency judgment has its effects on a worldwide scale. The bankrupt has acquired this status worldwide. The unity principle means that one single court (in most cases the court of the "domicile" or place of residence of the debtor) has jurisdiction to adjudge the bankruptcy or order the winding up of the insolvent company and to deal with all legal actions related to the bankruptcy or insolvency. This theory does not accept concurrent bankruptcies or ancillary winding up procedures. Universality and unity necessarily go together.

The territoriality principle advocates a completely different solution. This means that the effects of the bankruptcy or insolvency are strictly limited to the country in which it has been adjudged. There is a separate and independent bankruptcy or insolvency procedure in each country in which the debtor has assets, resulting in a plurality of the bankruptcy or insolvency.²

II.1. The Principle of Universality

Already in the 19th century Savigny defended this approach in the eighth volume of his treatise on Roman law. The principle was originally based on the concept of the single physical person-trader and it gave the court of the domicile of that person the exclusive jurisdiction to declare that person bankrupt or to open insolvency procedures of any nature. Later the principle was expanded to include corporate bodies and the seat (or in the English common law system the place of incorporation) of these corporate bodies was taken to be their domicile for these purposes. The bankruptcy declared by this court included all the bankrupt's assets and interests, irrespective of where they were located. The obvious result of the application of this principle is that there can only be one set of bankruptcy-

2 For a detailed theoretical analysis of these principles and the arguments in favour of each of them see also Pastor Ridruejo, "La faillite en droit international privé", (1971) 133 *Recueil des Cours* 140, at Chapter II; Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 *T.P.R.* 115; Coppens and T'Kint, "Les faillites, les concordats et les privilèges. Examen de jurisprudence 1984 à 1990", (1991) *R.C.J.B.* 289, at 398-400 and F. Rigaux, *Droit International*

insolvency proceedings, only one administrator can be appointed by the court and there can only be a single pool of assets and creditors³.

The main advantage of this approach is clearly the fact that it respects the principle that all creditors are equal and that they need to be treated accordingly. This equality amongst creditors was the main objective of the legislators that adopted it as their national approach. The interests of the debtor came obviously second, but it is argued that this approach also facilitates the redress that is sought by the debtor.⁴

This main advantage and the achievement of this main objective are easily recognisable in a situation where all the assets are situated in a single country. In such a situation the creditors lose the right to act individually to recuperate their money during the proceedings. The administrator acts for them collectively. In the context of an international insolvency case the same result can only be achieved if the assets and the debts in the various countries are put in a single pool and are administered by a single administrator who is appointed by a single court in a single set of proceedings and who applies a single set of rules to the case.⁵

In addition to that it can also be argued that the universality principle has beneficial effects for the debtor. The debtor wants a solution for its situation and wants, if at all possible, to resume its normal activities as soon as possible. This is more easily achievable in a system where the debtor has to deal with one procedure. Subjecting the debtor to different procedures in different countries doubtlessly complicates its situation and bringing all these proceedings to a successful conclusion may take considerably more time, if only because there is a potential for conflicts between the various administrators and procedures.⁶

Privé - Tome II Droit positif belge, Larcier (1979), at 358-359.

3 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 617.

4 See e.g. M. Trochu, *Conflits de lois et conflits de juridictions en matière de faillite*, Sirey (1967) and Y. Loussouarn and J. Bredin, *La faillite en droit du commerce international*, Paris (1969), at 753.

5 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 373-374.

6 See Pastor Ridruejo, "La faillite en droit international privé", (1971) *Recueil des Cours* II 135, at 169.

It has also been argued that the universality principle is also in conformity with the very nature of bankruptcy and insolvency proceedings.⁷ This argument is based on two assumptions. One is that in nature bankruptcy and insolvency proceeding are a form of collective liquidation and distribution of the assets of the debtor. The second one is that the assets can be seen as a single entity that is linked to the person of the debtor. It is therefore logical that the assets are disposed of in a single procedure and that that procedure is set up by the court of the domicile of the debtor.⁸ This single procedure must have an extra-territorial effect⁹ to avoid splitting the single entity of a person's assets that the debtor has used as a guarantee towards its creditors.¹⁰

A logical consequence of this application of the universality principle is the fact that a branch or any other establishment of a company that is established abroad cannot as such be the object of separate bankruptcy or insolvency proceedings. Its assets form part of the assets of the parent company and only a set of proceedings to wind up the parent company by distributing all the assets can be envisaged. It is not possible to use the assets of the branch simply to cover the debts abroad.¹¹

It has also been suggested that the links between the universality principle and the unity of the bankruptcy or insolvency on the one hand and the personal status of the debtor on the other hand support the universality principle.¹² It is submitted that this link is outdated, especially as more and more statutory provisions create exceptions to the unity of assets. Parts of the assets of the estate of a deceased have for example in Belgian law been reserved for the spouse or for the children. More and more assets are seen as a separate concept that does not need the link with the person and his or her status.

7 See e.g. M. Trochu, *Conflits de lois et conflits de juridictions en matière de faillite*, Sirey (1967), at 19 and Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 119.

8 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 78.

9 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 374.

10 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 373.

11 See the judgment of the Commercial Court in Brussels of 28th April 1980 (*Me A. Zenner q.q. faillite S.A. Orfèvrerie Wiskemann v S.A. Orfèvrerie Wiskemann*)(1980) BRH II 417.

12 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at

There are also more practical arguments to support the application of the universality principle. It may result in a more economical, faster and efficient way of dealing with international bankruptcy and insolvency cases. It avoids discussion concerning the issue which assets should go in which national territorial bankruptcy or insolvency. It is particularly difficult for example to decide where exactly intangible assets are situated. The criterion of the place where they are found that can be used both for movable and immovable tangible assets is of little or no use in this respect. National laws use in addition to this different rules to locate a claim either in the domicile or the habitual residence of the debtor or in the domicile or the habitual residence of the creditor. A single procedure should also be faster and should cost less than multiple proceedings coupled to the fees of several administrators of the bankruptcies or insolvencies in a territorial approach. Conflicts between the various administrators, which can cause substantial delays, are also excluded if the universality principle is adhered to.¹³

II.2. Territoriality

It is arguable that the presumption that the universality principle, rather than the territoriality principle, achieves the main goal of the equal treatment of the debtors can be rebutted. This would effectively take away the main advantage and justification of the universality principle. The argument is based on the fact that it is very likely that at least some of the foreign creditors will not be aware of the single set of bankruptcy or insolvency proceedings. Rather than receive equal treatment they would effectively lose the opportunity to make their claim. Even if they are aware of the proceeding they are easily discriminated against. Their claim is dealt with by a foreign administrator, according to a foreign law and all disputes are to be brought before a foreign court. These circumstances clearly put them in a

78.

13 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 373.

disadvantageous position in comparison to the domestic creditor of the debtor.¹⁴

As was already indicated above, the argument that there is a strong link between a person and his or her single set of assets, which has in the past been used to support the application of the universality principle, has also lost most of its value. It has in this context also been argued that a single set of proceedings based on the concept of the unity of assets would prevent the scenario in which the debtor has time to let the assets in the various jurisdictions disappear before all the local territorial bankruptcy and insolvency proceedings can be started to block movement of the assets. In reality sometimes even more time is lost in the application of the universality principle to get the single judgment recognised and executed in the various other jurisdictions in which the assets of the debtor are situated. The need to go through recognition and exequatur procedures is often overlooked in this discussion, even though problems associated with these procedures may result in a similar loss of time and speed allowing the debtor the time and opportunity to dispose of certain of its assets. A territorial approach¹⁵ may prove to be more efficient and effective in certain cases.¹⁶

It can also be argued from a more practical point of view that local creditors make their decision to contract with the debtor primarily on the basis of the information they have concerning the local assets. They have a reasonable expectation that these assets will be available to guarantee their claim. This will be the case if the territorial approach is adopted, but not if the universality principle is applied.¹⁷ In practice a territorial approach will result in a bankruptcy or insolvency proceeding being opened in each state where the debtor has assets or a centre of activities. Each of these proceedings is governed by its own *lex concursus*.¹⁸

14 See Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 118-122.

15 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 617.

16 See Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 118-122.

17 See Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 122.

18 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique

A territorial approach has also as a major advantage that it avoids the extraterritorial application of national law. The latter is a particularly sensitive issue and has in many commercial circumstances given rise to friction between states and legal systems.¹⁹ Sovereign and independent national states are supposed to legislate for their own territory only and to avoid all interference of their legal system with other sovereign and independent states. A logical consequence of such an approach is that a set of bankruptcy or insolvency proceedings should restrict its scope to the assets that are situated in the territory of the state. Each state in the territory of which assets are found will then be able to decide on the basis of its own law whether or not and eventually according to which rules a separate national set of proceedings needs to be brought against the debtor. Whilst such an approach may be suitable from a theoretical point of view, the answer to the question whether or not it serves also the interests of the creditors and the debtor and of society at large is less clear. Maybe a balance needs to be struck between the sovereignty concept and the obligation of each state to defend the interests of its citizens even in their capacity of creditors or debtors. It is submitted that from a practical point of view this sovereignty point is not the strongest argument to demonstrate that the territorial approach to international bankruptcy and insolvency cases is to be preferred to the application of the universality principle.²⁰

The territorial approach can also allow the debtor in certain cases to continue part of its activity in one or more jurisdictions. This may not constitute an advantage in all circumstances though, as it may simply result in the creation of more debts before these activities result in a further situation of insolvency.²¹

(1998), at 617-618.

19 See e.g. Torremans, "Extra-territorial Application of Competition Law in the Aftermath of Case C-327/91", (1996) 21 *European Law Review* 280.

20 See Geinger, "Het faillissement en het concordaat in de internationale context", (1982) 19 *T.P.R.* 115, at 118-122.

21 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 78.

National creditors benefit also in the territorial system. They can exercise their claim on all assets in the jurisdiction irrespective of the existence of a situation of insolvency and proceedings abroad. This situation obviously makes protectionist behaviour and practices more likely at the same time.²²

III. Bankruptcy Jurisdiction and the Brussels Convention

The wording of the Brussels Convention could give rise to some doubt as to whether the Convention could somehow provide a harmonised set of rules in international bankruptcy and insolvency cases. Such a set of rules would obviously replace at least in part the national rules that will be analysed in the next part of this work. A preliminary issue which needs to be addressed therefore is the applicability of the Brussels Convention.²³ Most problems of jurisdiction are solved by that Convention. Such is not the case for bankruptcy issues. Article 1 Paragraph 2 No. 2 of the Convention excludes bankruptcy from the scope of the Convention. This provision was interpreted by the Court of Justice of the European Communities in the *Gourdain v Nadler* case.²⁴

In this case the issue before the Court was whether a French judgment that ordered the manager of a company which had been adjudged bankrupt in France to pay a certain amount to the syndic²⁵ was a judgment in civil and commercial matters or a bankruptcy judgment and as such excluded from the scope of the Convention. Advocate-General Reischl expressed the opinion that Article 1 Paragraph 2 No. 2 was drafted with all procedures and actions originating out of or linked with the

22 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 78.

23 1968 EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1978) O.J. L 304/77, as modified by the Lugano EEC - EFTA Convention (1988) O.J. L 391/9 and the EEC San Sebastian Convention (1989) O.J. L 285/1. A consolidated version of the text can be found at [1998] OJ C27/1. In a latest development the Convention has been replaced by Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1, which will enter into force on 1st March 2002.

24 Case 133/78 *Gourdain v Nadler* (1979) ECR 733 and (1979) R.C.D.I.P. 657.

25 In England the insolvent company would have been wound up.

bankruptcy proceedings in mind if such procedures or actions cannot exist without the existence of the bankruptcy and follow directly from it. This category of actions includes not just actions that are exclusively available under the provisions of the insolvency law, but also actions that are equally available in non-insolvency cases, but that are modified in such a strong way that the modified action is only applicable to that type of cases. The Court followed the Advocate-General and ruled that the French judgment was a bankruptcy judgment, as the action which led to it was exclusively based on the French bankruptcy provisions.²⁶ The Court argued that the provision in French law that created the possibility in certain circumstances to raise a claim against the directors of the bankrupt company in their personal capacity was based exclusively on the provisions of the law on insolvency. Without reliance on the latter provisions the action could not have been brought. This judgment confirms that, as was stated above, the Convention is not applicable to insolvency cases, but gives a restrictive interpretation to this exception.²⁷ In an earlier case a first instance decision of a Belgian commercial court only seemed to require that there was a link (of any nature) between the action and insolvency law.²⁸ If the Court of Justice had followed that interpretation the scope of the exception would have become much wider and many more cases would have been excluded from the scope of the Brussels Convention. Fortunately the Court of Justice did not adopt this interpretation and required that the action should be based exclusively on the bankruptcy proceedings instead of focussing on the existence of a link between the action and insolvency law. The Belgian decision would not have been out of line with the Court of Justice's decision though, because the facts of the case showed that all elements that were required to solve the case were based on the provisions of insolvency law.²⁹ The same criterion was used to decide that an action disputing the validity of a payment which the debtor had made to one of the creditors in the "suspected"

26 Case 133/78 *Gourdain v Nadler* (1979) ECR 733 and (1979) R.C.D.I.P. 657; see R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985) at 141-143; compare Tribunal de Commerce Verviers (Belgium), 14th July 1977, (1977-1978) Jur. Liège 278 (this court only required "a" link between the action and the insolvency law).

27 See F. Rigaux and M. Fallon, *Droit international privé - Tome II Droit positif belge*, Larcier (2nd ed, 1993), at 174.

28 Tribunal de Commerce Verviers (Belgium), 14th July 1977, (1977-1978) Jur. Liège 278.

29 Tribunal de Commerce Verviers (Belgium), 14th July 1977, (1977-1978) Jur. Liège 278.

period just before the bankruptcy fell within the scope of the exception. Clearly such a claim was based exclusively on the provisions of the law on insolvency and all elements to solve the case were found in insolvency law.³⁰ This requirement should be adhered to strictly, as is shown by a recent English case in which Rimer J. ruled that although the action raised issues which had arisen in the course of, and in connection with the determination of the rights in, the defendant's liquidation, those issues did not derive directly from it and hence the exclusion did not apply.³¹ That case was concerned with option agreements and their effects. Even though one of the parties had become insolvent, the interpretation of the option agreements did not depend entirely on the provisions of the insolvency law.

Two other points concerning the Brussels Convention need clarification. First, the terminology of the Convention has a Continental origin, as the Convention was drafted before the United Kingdom joined the European Community. This implies that the word bankruptcy is not used with the meaning it has under English insolvency law. So, it is important to remember that the bankruptcy exclusion of the Convention covers under English law "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangement and analogous proceedings".³²

Secondly, Article 16(2) of the Convention gives exclusive jurisdiction to the courts of the State in which a company has its "seat" in proceeding concerning the dissolution of that company. Read in conjunction with Article 1 Paragraph 2 No. 2, this provisions only affects the winding up of solvent companies, it does not mean that the Convention could be applied to any insolvency cases.³³

In conclusion, the Brussels Convention does not deal with the real key issues in relation to cross-border insolvency cases and leaves these to the national laws of the

30 Tribunal de Commerce Tournai (Belgium), 24th November 1977, RJDC D-Series I-1.2.-B.5.

31 *UBS AG (Formerly Swiss Bank Corp) v OMNI Holding AG (in liquidation)*, [2000] 1 W.L.R. 916, [2000] 1 All E.R. (Comm) 42 (Ch. D).

32 Civil Jurisdiction and Judgment Act 1982, Sch. 1, Article 1(2).

33 (1978) O.J. L 304/77 and see also P. Smart, *Cross-Border Insolvency*, Butterworths (1991), at 70.

Member-States and to further harmonisation initiatives.

Chapter II - Bankruptcy and Insolvency in Belgian Private International Law

We will first examine the relevant provisions under Belgian Private International Law. The Belgian system is a good example of a system that is based entirely on the principle of universality and unity.³⁴ Belgian law has implemented that principle in a radical and unwavering way and it provides therefore a good insight into the consequences of such an approach.

The main part of the discussion will focus on jurisdictional issues. Afterwards choice of law issues will be discussed. In a final stage the issue of the recognition and the execution in Belgium of foreign bankruptcy and insolvency judgments will be discussed.

I. Jurisdiction in international bankruptcy cases

Under Belgian substantive law³⁵ only a trader or a company can be adjudged bankrupt³⁶. Bankruptcy is clearly exclusively linked to the deployment of commercial activities. The term insolvency is not used in relation to the proceedings themselves. Insolvency is defined as the *de facto* situation in which the debtor is no longer able to pay its debts and has stopped doing so in a lasting way.³⁷ The fact that the debtor must have become insolvent is a precondition for any bankruptcy proceedings. These

34 See e.g. F. Rigaux and M. Fallon, *Droit international privé - Tome II Droit positif belge*, Larcier (2nd ed, 1993), at 492. See also Cour de Cassation (Supreme Court), 26th September 1991, *Association Intercommunale pour l'aménagement et l'expansion économique du Brabant Wallon (I.B.W.) C.V. v Siemens N.V.*, (1992) T.B.H. 360 and Cour de Cassation, 6th August 1852, [1853] Pas. I. 146.

35 Faillissementswet (Bankruptcy law), 8th August 1997, (1997) Belgisch Staatsblad 28562. This law entered into force on 1st January 1998 and it replaced the old bankruptcy law of 18th April 1851 (The Bankruptcy Statute of 18th April 1851 had been incorporated into the Commercial Code as Articles 437 – 572, Book III Title I.).

36 Article 2.

37 Ibidem.

proceedings are seen as a way out of the situation in which the debtor can no longer meet its normal commercial obligations and act as a normal part of the commercial fabric. Confusingly enough most of the Belgian bankruptcy cases would be insolvency cases in English law.

The Belgian system relies heavily on the principles of universality and unity, aspects of the territorial view are rarely found.³⁸ Not only did the Belgian Courts make it very clear that Belgian bankruptcy law is based on the principles of universality and equality, they went substantially further and these principles were even made part of the Belgian private international public policy. The same conclusion was reached in relation to the principle of equality amongst creditors, which is seen as the cornerstone of the law in this area and as the main objective that is successfully achieved through the application of the principle of universality and unity of the bankruptcy.³⁹ As a starting point this indicates a heavy reliance on issues of principle. That reliance influences the Belgian position on international bankruptcy jurisdiction substantially. The practical consequence of all this is that the Belgian rules on jurisdiction are there to determine which court will have jurisdiction to deal with the single bankruptcy case with a global scope. Obviously in a system of strict universality and unity of the bankruptcy only one court will have such jurisdiction.⁴⁰

As most other countries have a solution in which elements of universality and unity are combined with certain elements of the territorial view, or even a solution which relies almost entirely on the territorial view, the Belgian example seems to be ideally suited for a practical analysis of the advantages and disadvantages of proposed solutions which are strongly influenced by the universality and unity principles. The advantages and disadvantages were described above in a theoretical context. This

38 Van Houtte, "Compétence internationale et déclaration de faillite - Note under Court of Appeal Brussels, 14th June 1978", (1979) T.B.H. 421 and G. Van Hecke and K. Lenaerts, *Internationaal Privaatrecht*, Story (2nd ed, 1989), at 366.

39 Hof van Cassatie (the Belgian Supreme Court), 26th September 1991, (1992) T.B.H. 360 and Rechtbank van Koophandel (Commercial Court) Brussels, 18th June 1965, (1965) T.B.H. 94 and (1968) T.B.H. 161, see also Vander Elst "Observations - Note under Commercial court Brussels", 18th June 1965" (1968) T.B.H. 168 at 170.

40 See Lenaerts "Kroniek van het Internationaal Privaatrecht (1980-1985)" (1986-1987) R.W. 1857-1908, 1937-1964 and 2001-2018 at 2011.

chapter will show how they are applied in practice.

Belgian law contains no statutory provision that determines which court will have exclusive jurisdiction over an international bankruptcy. There is no statutory private international law provision to that extent, but this is hardly surprising, as the vast majority of Belgian rules on private international law has remained un-codified. It is clear though that the principle of universality and unity of the bankruptcy applies both to domestic and international cases, because it is seen very strongly as a point of overriding principle. When devising the rule for international bankruptcy jurisdiction the courts have therefore turned their attention to the approach taken by the national legislator to domestic cases. The question before the courts was to determine which connecting factor had been used to link a domestic bankruptcy case to the jurisdiction of one of the commercial courts and whether that factor was also suitable at an international level. The Code of Civil Procedure deals with the matter on a national level. Its Article 631 Paragraph 1 gave bankruptcy-jurisdiction to the commercial court of the domicile of the debtor, before that provision was amended by Article 115 of the new Bankruptcy Act 1997. The impact of that amendment is disputed. We will therefore deal with the old text of the Code of Civil Procedure first. Under the old law the domicile which is taken into account is the domicile at the moment on which the debtor stopped paying his debts.⁴¹ That moment is identified by the commercial court. The concept of domicile needs some further clarification though. It is clearly not to be understood in the same way as the concept of domicile in English law or in the Anglo-Saxon systems in general. In common law language the Belgian idea of domicile is more akin to the concept of habitual residence. Under Belgian law every physical person is necessarily registered on the civil register of one local authority. This registration, which can be moved from one local authority to the other, is supposed to coincide with the place where the person lives and has his or her habitual residence. Every person is for legal purposes domiciled in the place where he or she is registered and this form of domicile is the

⁴¹ Article 437 of the Commercial Code establishes the requirement that a debtor must have stopped paying his debts before he can be adjudged bankrupt, the moment on which he did so is ultimately determined by the commercial court which takes the bankruptcy-jurisdiction.

normal standard connecting factor for the purposes of jurisdiction. For companies the situation is even easier. As soon as they are formed they need to be registered with the commercial court of the area where they have their seat. As the latter is necessarily defined in the legal document that created the company no doubt can remain and a link between a company and a single commercial court is always established. That commercial court will also have exclusive bankruptcy jurisdiction over that company at domestic level. The choice of the criterion of the domicile is not a random choice. The universality principle requires that for each bankruptcy there is a single connecting factor, leading to a single court and a single set of proceedings. The presence of assets as a criterion could lead to more than one court having jurisdiction and a similar result could be reached with the criteria of place of residence or establishment. Belgian law necessarily establishes a single domicile and a single place of registration in the registers. Domicile is therefore the only criterion that is really suitable for use as a connecting factor in bankruptcy jurisdiction cases.

When dealing with international bankruptcy jurisdiction cases the courts transposed these provisions to and applied them at international level.⁴² The Belgian commercial courts will only take bankruptcy jurisdiction if the debtor was domiciled in Belgium when he stopped paying his debts.⁴³ This rule is applied to every debtor; no distinction is made at this stage between a trader and a company. An essential point is the definition that is given to the term domicile. First the domicile of a trader will be examined.

42 See F. Rigaux and M. Fallon, *Droit international privé - Tome II Droit positif belge*, Larcier (2nd ed, 1993), at 492 and I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 621.

43 Hof van Cassatie, 6th August 1852, (1853) Pas. I. 146 (a contrario) and Hof van Cassatie, 30th September 1976, (1977) J.T. 57 and (1976-1977) R.W. 1455; see also Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 376, F. Rigaux and M. Fallon, *Droit international privé - Tome II Droit positif belge*, Larcier (2nd ed, 1993), at 493, R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 439 and Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 90.

1.1. The domicile of a trader

This issue gave rise to a debate to which several authors contributed. Van Houtte⁴⁴ suggested to take the place of business of the trader into account. In his opinion the following argument supports his suggestion. The trader will keep his books at his place of business and will exercise his commercial activity there. This means that most of the assets and creditors are also to be found there. Geinger⁴⁵ seems to suggest that the centre of the trader's commercial activities should determine his domicile. Fettweis⁴⁶ saw no reason to give any special definition to the term domicile, in his opinion it does not matter whether it is the domicile of a trader or the domicile of any other person.

The courts gave the impression that the domicile of a trader would be given a definition similar to the one which had been suggested by Van Houtte. The Court of Appeal in Antwerp expressly founded its jurisdiction on the fact that the place of business of a trader was situated within its territorial jurisdiction. They concluded that the Antwerp courts were the courts of the domicile of that trader.⁴⁷ In the case before the court the debtor lived in Holland, but he ran a business in Antwerp. The Court pointed out that under Dutch law the domicile of the debtor was situated in Holland, because Dutch law defined the domicile as the place where the person lived or had his main residence. The court declined to follow this example and argued that the domicile of a trader should be defined under Belgian law as the place where the debtor has his main or principal place of business. Van Houtte applauded this decision and argued that because the debtor had been declared bankrupt as a trader or as a result of his trading activities this rule gave jurisdiction to the court with the closest link with the bankruptcy and he saw the fact that it is likely that most of the assets will be located at the place of business as a factor that will facilitate the execution of the bankruptcy because there would be less need to have the bankruptcy

44 Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 376-377.

45 Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 125-126.

46 Fettweis, "La compétence territoriale en matière de faillite", (1977) J.T. at 265-266.

47 Hof van Beroep te Antwerpen, 13th January 1977, (1977) T.B.H. 485, see also Van Houtte, "Note

judgment recognised and executed in a foreign jurisdiction. Whilst this seemed to be the true in this case, it can be doubted whether the latter argument will necessarily be valid in all cases. A debtor may have virtually no assets left, for whatever reason, at his place of business, whilst possessing rather a lot of assets at his foreign place of (private) residence. However, this discussion has now become purely academic and the definition adopted by this decision of the Court of Appeal in Antwerp is no longer valid. The Hof van Cassatie ruled on 2nd February 1978 that Article 631 of the Procedural Code should be read and interpreted with Article 36 of the same code in mind.⁴⁸ Article 36 gives the following definition of domicile. The domicile of a person is the place (town or village) where that person is registered in the register of inhabitants held by the city council.⁴⁹ Such a domicile is the only ground on which a Belgian court can ground its jurisdiction over the bankruptcy of a trader according to the judgment of the supreme court.⁵⁰ The court's judgment boils in fact down to the argument that there is no difference between the domicile of a normal person and that of a trader-physical person. Several authors have criticised this judgment and have urged the court to reconsider its position.⁵¹ Whilst they recognise the logic of the decision at a theoretical level, these authors argue that the solution is a second best solution in practice. In their view there is a link between the business and the bankruptcy and the link with the place where the trader has his private residence is irrelevant in this respect. They emphasise the similarities between the trader and the company as trading entities. As will be seen later, the courts have somewhat surprisingly accepted that for companies the real place of business should play an important role, sometimes at the expense of the formal place of registration. A similar system for physical persons would have produced more desirable effects according to these authors, but the supreme court seemed to remain deaf for their criticism. There was even evidence of a tendency of the lower courts to abandon all

under Court of Appeal Antwerp, 13th January 1977", (1977) T.B.H. 489.

48 Hof van Cassatie, 2nd February 1978, (1977-1978) R.W. 2651.

49 Every Belgian citizen and every foreigner living in Belgium is under a legal obligation to register with a city council, normally with the city council of his or her main place of residence (main residence to be taken as defined in the same way as under English law)

50 See also the judgment of the supreme court of 11th May 1978, Hof van Cassatie - Cour de Cassation, (1978) Arr. Cass. 1066.

51 See e.g. Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372 and Geinger, "Het faillissement en het concordaat in de internationale context", (1982) 19 T.P.R. 115.

alternative approaches and to accept in fact the definition given by the supreme court.⁵² The Court of Appeal in Ghent decided that the Belgian court did not have bankruptcy jurisdiction over a trader domiciled in the Netherlands who also had a place of business in Belgium. The facts in this case were very similar to those in the case that came earlier before the court of appeal in Antwerp, apart from the fact that the trader also seemed to have a principal place of residence that coincided with his private residence in the Netherlands in the case that came before the court of appeal in Ghent. The court of appeal in Ghent reached the opposite conclusion in comparison with the decision of the court of appeal in Antwerp and decided to apply the definition of the supreme court. The court also refers explicitly to the judgment of the supreme court to motivate its decision.⁵³

The application of this definition creates a number of problems. A trader can have his or her domicile and place of business at a different place. The commercial court of his or her domicile is in this case not the court of the place where the assets and creditors are situated. The problem only becomes worse when the trader has his or her domicile in Belgium (e.g. for tax reasons) but his place of business across the border. It is clear that the Belgian commercial court is not the *forum conveniens* for such a bankruptcy, but the court has to take jurisdiction. The opposite situation gives rise to an even more delicate problem. No Belgian court has jurisdiction if a trader has a place of business in Belgium, but no domicile. As long as that trader has a domicile or residence abroad (if the latter is the case he should not have a place of residence in Belgium), it seemed that he could never be adjudged bankrupt by a Belgian Court.⁵⁴ At least in relation to this latter problem the Supreme Court has now replaced its dogmatic approach by a pragmatic one. In 1996 the Court accepted that the commercial court of the principal place of business (in Belgium) of a trader domiciled abroad will have bankruptcy jurisdiction in respect of that trader. But the acceptance of this more pragmatic view is restricted to this exceptional scenario and the broader change advocated by the literature and certain decisions of the lower

52 See e.g. Hof van Beroep (Court of Appeal) Gent, 14th July 1983, (1983-1984) R.W. 1356.

53 Ibidem.

54 Such a case did go before the Hof van Cassatie as early as 1852, Hof van Cassatie, 6th August

courts and the courts of appeal was not accepted.⁵⁵

1.2. One exceptional type of trader

The rigid domicile rule and its rigid interpretation are only abandoned in one other specific type of case. The courts are unwilling to accept that a trader could de facto never be declared bankrupt because his or her domicile cannot be defined. For these exceptional cases an alternative connecting factor which will ensure that there will be a single court with bankruptcy jurisdiction has been established.

This approach has been approved by the Supreme Court (Hof van Cassatie) in a landmark judgment in 1976 in a case called *Gouda, also known as Levy v Mr Linon and others (administrators curators of the bankruptcy)*.⁵⁶ This case dealt with the bankruptcy of an Italian trader and his six companies. Only the situation of the trader himself is of interest for our present purposes. The particularity of the situation was that the debtor had at the time when he stopped paying his debts, which under Belgian law means that he has become insolvent and that he can therefore be declared bankrupt, no domicile in Belgium. He also did not have a (known) domicile abroad. The domicile criterion had therefore become unworkable. The lower courts had established though that the Italian debtor was habitually resident in Brussels and that he deployed his commercial activities in Brussels. They had accepted this as a sufficient ground to declare themselves competent in terms of jurisdiction over the debtor to declare him bankrupt and to deal with the bankruptcies of his companies. The Supreme Court approved this approach and ruled that when a debtor, who has a place of business and a place of residence in Belgium, has no known domicile either in Belgium or in any other country when he stops paying his debts, is to be declared bankrupt the commercial court that has territorial jurisdiction over his place of

1852, (1853) Pas. I. 146.

⁵⁵ Cour de Cassation, 3rd december 1996, [1997] T.B.H. 526; I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 621 and Claeys, "De bevoegdheidsregels voor de internationale faillietverklaring naar huidig en toekomstig recht", [1997] T.B.H. 501.

habitual residence has jurisdiction to adjudge the bankruptcy of that trader.⁵⁷ In cases where the domicile of the trader cannot be established domicile is replaced as a connecting factor by the place where the debtor is habitually resident at the time when he or she stops paying his or her debts.

Three points need to be added. First, although in this case the place of business and the place of residence of the debtor were situated in the same town, the wording of the judgment of the Hof van Cassatie makes it clear that the domicile is replaced by the place of residence and that the judgment would have been the same if the place of business had been located outside the territorial jurisdiction of the court which had jurisdiction over the place of residence.⁵⁸ The judgment does indeed refer specifically to the place where the debtor is habitually resident as the sole connecting factor after having established that in the case at issue the Italian debtor was habitually resident and deployed his commercial activities in Brussels. The nationality criterion is not even considered and in the absence of a domicile the court clearly prefers the habitual residence criterion as a connecting factor.

Secondly, one commentator has suggested that the application of the alternative connecting factor is subject to one additional requirement. Rigaux argued⁵⁹ that the exception applies only to a trader which is a foreign national. It is submitted that this should not be seen as an additional requirement, even if in theory the alternative connecting factor will only apply to foreign nationals. The reason for this situation is found in provisions of Belgian administrative law according to which every Belgian citizen is registered when he or she is born and thus acquires a domicile at that time. Such registration can only be deleted when a certificate of a new registration is produced (Belgian citizens abroad register with their embassy), which means that a Belgian citizen always has a domicile, at least in theory. From this point of view only the bankruptcy of a foreign national who did not register a domicile in Belgium, in a clear breach of Belgian administrative law, can trigger the application of the

⁵⁶ Hof van Cassatie, 30th September 1976, (1977) J.T. 57 and (1976-1977) R.W. 1455.

⁵⁷ Ibidem.

⁵⁸ Ibidem.

alternative rule on jurisdiction.

Thirdly, the fact that this judgment was handed down sixteen months before the 1978 judgment that confirmed that in normal cases the strict domicile criterion based on articles 36 and 631 of the Code of Civil Procedure applies, does not mean that this judgment has been overruled or doubted. The debtor had indeed argued that the application of these articles necessarily excluded the possibility that the jurisdiction of the Commercial Court in Brussels could be based on the fact that he had his habitual residence in Brussels, whilst not having a domicile in Belgium. The Supreme Court ruled that it was not necessary to decide the issue of the interpretation of the concept of domicile to decide the case. Nevertheless, the court indicated that even if the strict interpretation based on the combination of articles 36 and 631 of the Code of Civil Procedure were to be adopted the outcome of the case would have been the same. It can therefore safely be concluded that the alternative rule which uses the habitual residence of the debtor as an alternative connecting factor for the purposes of jurisdiction in exceptional circumstances in which the domicile of the debtor cannot be established stands. The court clearly established the principle that there must be a single court that has jurisdiction to declare the trader-debtor bankrupt if the circumstances require this. Normally this is the court of the (single) domicile of the debtor, be it in Belgium or abroad. The exceptional circumstances in which no domicile can be established should not lead to the debtor escaping all jurisdiction though and in that case the court of the debtor's habitual residence has jurisdiction. The latter is a matter of fact and a place of habitual residence will always be available. The wording of the judgment makes it also clear that the courts will treat the place of residence that is most commonly used by the debtor as his or her habitual residence, without imposing further requirements.⁶⁰

59 F. Rigaux, *Droit International Privé - Tome II Droit positif belge*, Larcier (1979), at 359.

1.3 An evaluation of the Belgian approach

As shown above, the solution which was adopted in Belgium is unsatisfactory. It cannot be accepted that no court has jurisdiction in certain bankruptcy cases as this could leave certain fraudulent practices without sanction and leave bona fide creditors unprotected. Nevertheless, this may well be the case in practice. The Belgian approach seems to exclude this possibility in theory. Normally there will be a domicile and in the exceptional case where there is no domicile the alternative criterion of the habitual residence of the debtor will overcome the problem. That approach is subject to one major prerequisite though. The court of the foreign domicile does not necessarily adopt the same domicile based approach, because it does not apply Belgian law and its own law may differ on that point. Nevertheless, that is exactly the prerequisite of the Belgian approach. The court of the foreign domicile must be prepared to take jurisdiction over the debtor and to declare his or her universal bankruptcy that wants to be applied extraterritorially. The system breaks down in practice if the foreign court will only declare a local bankruptcy or if the foreign court cannot take jurisdiction at all. In the former case there will be no possibility of declaring the bankruptcy of the debtor's operation in Belgium, whilst in the latter case no court will have bankruptcy jurisdiction over the debtor. Both situations are unacceptable, but in a (limited) number of cases they are the obvious and unavoidable consequence of the Belgian approach. The 1996 judgment of the Supreme Court has reduced the risk by allowing for jurisdiction to be taken on the basis of the principal place of business if the trader is domiciled abroad, but that still leaves those cases where the trader's principal place of business is not located in Belgium.⁶¹

Additionally, the main advantage of a universalist solution is that a single court will deal with the bankruptcy/insolvency of a trader in a single set of proceedings. Such a solution requires a sharp and precise definition of the criterion on which jurisdiction

60 Hof van Cassatie, 30th September 1976, (1977) J.T. 57 and (1976-1977) R.W. 1455.

61 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 621.

is taken, so that it is clear to all interested parties which court will have exclusive jurisdiction. Although very precisely defined under Belgian law that criterion cannot be the administrative domicile of the debtor. This domicile can be entirely unconnected to his activities as a trader, in which case the court of the domicile is not a *forum conveniens*. It is indeed equally required that the court which eventually takes jurisdiction is a *forum conveniens* and as practical business circumstances can result in very different bankruptcy/insolvency cases that implies the adoption of a flexible jurisdiction criterion. It is suggested that the domicile of a trader should be replaced by the place where the trader exercises his main commercial activities.⁶² This criterion can be made more precise by adding the presumption to it that if the debtor has more than one place of business, it will be presumed that he or she has as his or her main place of business the place of business located in the jurisdiction in which the main assets of the debtor are equally found. This stresses the importance for the creditors of the availability of the assets.

The new bankruptcy law that came into force on 1st January 1998 has amended Article 631 of the Code of Civil Procedure. The new text contains different language on two points. First, the timing for the determination of the jurisdiction of the court - changes. The jurisdiction of the court will in future be determined at the time when the trader applied to the court to be declared bankrupt or at the time when the application was brought before the court in those cases where the trader is not the person making the application. This change is to be approved of, because the new criterion is easier to determine at the early stages of the procedure than the time at which the debtor stopped paying his or her debts⁶³. Secondly, the Article now refers to the "principal place of business" of the trader, rather than to the domicile. Rather surprisingly this change and the changes to Article 631 of the Code of Civil Procedure in general attracted little or no attention during the debates in Parliament. Some commentators have concluded on that basis that Parliament did not intend to

⁶² It is recognized that the proposed criterion is somewhat vaguer, but it seems the only fair criterion if the court does not have a discretion to stay the proceedings or to refuse to take jurisdiction.

⁶³ See De Wulf and Wautelet, "Aspecten van internationaal privaatrecht", in H. Braeckmans, E. Dirix and E. Wymeersch, *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer Rechtswetenschappen België (1998), 131, at 147.

change the case law of the Supreme Court that linked the domicile concept in Article 631 of the Code of Civil Procedure to the definition contained in Article 36 of the same code. In their view the new law was not intended to change the situation⁶⁴. It is submitted that this view is untenable⁶⁵. The wording of the new Article 631 no longer refers to the concept of domicile. It is therefore no longer possible to argue that the new concept of principal place of business means in practice domicile and should therefore be interpreted according to Article 36. The link between the two articles simply no longer exists and the old case law of the supreme court therefore no longer applies. It is therefore submitted that the new wording of Article 631 of the Code of Civil Procedure is clear and can only be seen as an acceptance of the criticism made above of the old rule. From 1st January 1998 onwards the domicile of a trader is no longer the criterion to determine Belgian internal bankruptcy jurisdiction. The court that had bankruptcy jurisdiction is from that moment onwards the court of the place where the trader-physical person has his or her principal place of business.⁶⁶ This rule will continue to be used as a basis of the determination of the international bankruptcy jurisdiction of the Belgian courts and these courts will have international bankruptcy jurisdiction over a trader-physical person if the latter had his or her principal place of business in Belgium.

1.4. The domicile of a company

The connecting factor that is used under Belgian law for the international bankruptcy of companies was also the domicile according to Article 631 of the Code of Civil Procedure until its amendment by Article 115 of the Bankruptcy Act 1997 came into force on 1st January 1998. The concept of the domicile of a company was defined as the seat of the company. That criterion of seat has now replaced the domicile

⁶⁴ Ibidem.

⁶⁵ It may be the case that although the book was published in 1998 the authors wrote it at an earlier date and worked on the basis of the draft version of the new law. The first draft did indeed still refer to the domicile of the trader. See Claeys, "De bevoegdheidsregels voor de internationale faillietverklaring naar huidig en toekomstig recht", [1997] T.B.H. 501 at 510.

⁶⁶ I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 621.

criterion in the new Article 631 of the Code of Civil Procedure. Under the provisions of Belgian Company law every Belgian Company has a set of "Statutes". These "Statutes" form a set of rules that regulate the internal organisation and the operation of the company and that is drafted by the partners/original shareholders. They bear a lot of similarities to the memorandum and articles of incorporation of a company under English law. Under Belgian law they are drafted as a part of the process by which the company is established. The partners/original shareholders are under a legal obligation to include in these rules a provision on the place of the "statutory" seat (which corresponds from a legal point of view more or less with the registered office of an English company) of the company, but they are free to choose that place. Clearly, the domicile of the company for the purposes of the private international rules on the international bankruptcy of a company always was the place where the company has its seat, even before the act effectively imposed this interpretation. However, difficulties arise from the fact that the company is free to choose its seat. Fictive seats located abroad to escape the jurisdiction of the Belgian courts, whilst also complicating the life of the tax authorities, cannot be ruled out. The courts have therefore distinguished the "statutory" seat of the company from the real seat of the company.

In the context of international bankruptcy cases the courts have always held that the domicile of a company corresponds with the place where the company has its real seat.⁶⁷ In the absence of a clear definition of the concept of seat in the new law it is expected that this will remain unchanged. The real seat is determined as the place of the seat of the company where the main commercial activities take place, the place of the exploitation-seat of the company.⁶⁸ If this criterion leads to several seats, the

67 See e.g. Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 126, Lenaerts, "Kroniek van het Internationaal Privaatrecht (1980-1985)" (1986-1987) R.W. 1857-1908, 1937-1964 and 2001-2018, at 2012 and Rechtbank van Koophandel Brussel, 4th November 1981, (1982) T.B.H. 472, Rechtbank van Koophandel Brussel, 15th February 1983, (1984) Rev. Prat. Soc. 295 and Rechtbank van Koophandel Brussel, 17th August 1983, (1984) Rev. Prat. Soc. 296. The supreme court confirmed this view once more in 1993, see Hof van Cassatie, 26th February 1993, (1993) Arr. Cas. 22, (1993) Pas. I-219, (1992-1993) R.W. 1377 and (1993) T.B.H. 128.

68 See e.g. Rechtbank van Koophandel Gent (Commercial Court Ghent), 11th December 1987, *V.O.F. Gebroeders E. en A. Parisi and others v W. Moens, J. Mertens and M. Gyde (in their*

seat where the administration of the company is located is preferred.⁶⁹ Normally the real seat and the "statutory" seat (registered office) are located at the same place. The courts normally presume that the place indicated in the "statutes" as the "statutory" seat corresponds with the place of the real seat.⁷⁰

Only when evidence that the "statutory" seat is fictive and that the real exploitation-administration seat is located at a different place is presented will the courts of the latter place have jurisdiction.⁷¹ Several applications of this rule have been made. The commercial court in Brussels took jurisdiction to adjudge bankrupt a Luxembourg company. The court ruled that the only link the company had with Luxembourg was formed by its "statutory" seat and the fact that the "statutes were drafted according to the Luxembourg company law". On the other hand the company had its administration and its only place of business in Brussels, the only currency used was the Belgian Franc and the majority of partners and directors were domiciled and resident in Belgium.⁷² The same court relied on the latter argument and the fact that the management of the company took place only in Brussels to adjudge a company with a foreign "statutory" seat bankrupt in another case.⁷³ The commercial court in Ghent also disregarded the fact that a company had been registered abroad in the light of evidence of the fact that the real centre of the company's activities was located in Belgium.⁷⁴ A more recent example is presented by the joint bankruptcy of a Luxembourg holding company and the Liechtenstein Anstalt which owned all its shares. The court ruled that it had jurisdiction because the two companies did not have any property abroad and had their only commercial activity in Belgium.⁷⁵ A last

capacity as curators), (1988) T.R.V. 376.

69 Ibidem and see Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 377.

70 Tribunal de Commerce de Tournai, 21st February 1953, (1954) T.B.H. 38.

71 Hof van Cassatie (Supreme Court), 2nd December 1996, (1997) T.B.H. 526, confirming Hof van Beroep Brussel (Court of Appeal Brussels), 21st September 1995, (1995) J.T. 719 and (1996) R.P.S. 122.

72 Rechtbank van Koophandel Brussel, 22nd May 1948, (1948) T.B.H. 205.

73 Rechtbank van Koophandel Brussel, 10th November 1958, (1959) J.T. 296 and Hof van Beroep Brussel (Court of Appeal Brussels), 15th January 1993, (1995) J.L.M.B. 904.

74 Rechtbank van Koophandel Gent (Commercial Court Ghent), 11th December 1987, *V.O.F. Gebroeders E. en A. Parisi and others v W. Moens, J. Mertens and M. Gyde (in their capacity as curators)*, (1988) T.R.V. 376.

75 Rechtbank van Koophandel Brussel, 4th November 1981, (1982) T.B.H. 472, see also Erauw, De Foer, Bouckaert and Ryon, "Overzicht van Rechtspraak (1965-1984) - Internationaal Privaatrecht"

example is found in the Air Zaïre case that went all the way to the supreme court. The commercial court in Brussels had opened the bankruptcy of Air Zaïre.⁷⁶ The court argued that the real seat of Air Zaïre was located in Brussels. The company had been created in Zaïre, as it then was, now the Democratic Republic of Congo, in 1978 with a statutory seat in the capital Kinshasa and with branches in Brussels, Paris and London. The court relied on the following facts to rule that the statutory seat was no longer the real seat and that the latter had been transferred to Belgium. The seat in Brussels had effectively become the place where the company deployed most of its commercial activities. The letterhead of the company mentioned "Air Zaïre, Avenue Louise, Brussels". The company no longer owned any aircraft and simply sold tickets on other airlines that flew from airports in the Benelux to Kinshasa from its offices in Brussels. All other branches in Europe had been closed down. All the company's property and its bank accounts were located in Brussels. And finally, the company was managed from Brussels and there was no proof of any personnel being employed in Zaïre, any board meetings in Zaïre or of any influence originating in Zaïre on the management of the company. The judgment of the commercial court was confirmed, first on appeal⁷⁷ and later by the supreme court⁷⁸.

The bottom line of the Belgian approach to companies is that its main aim is to give bankruptcy jurisdiction to the court of the place where the company exercises its principal commercial activity.⁷⁹ The approach to companies and the way in which their domicile is defined is much more flexible than the approach originally taken to physical persons and their domicile. The emphasis on the commercial activity of the company is clearly more appropriate.

(1984) T.P.R. 1329 at 1496-1497 (their conclusion "taxhavens are not welcome in Belgium" is not entirely correct, it does not apply to "off shore" companies based in taxhavens (see *infra*)).

76 Rechtbank van Koophandel Brussel (Commercial Court Brussels), 12th June 1995, (1996) Rev. Prat. Soc. 122.

77 Hof van Beroep Brussel (Court of Appeal Brussels), 21st September 1995, (1996) Rev. Prat. Soc. 125.

78 Hof van Cassatie (Supreme Court), 2nd December 1996, *Air Zaire and Kikunda Ombala v Lemaitre and Hanssens-Ensch*, (1997) T.B.H. 526

79 See Hof van Beroep Gent (Court of Appeal Ghent), 16th November 1959, (1959-1960) R.W. 1994.

1.5. A place of business

The real seat criterion for international bankruptcy jurisdiction in relation to companies fits in very well with the principle of the unity and universality of the bankruptcy. It is relatively straightforward to define the single (real) seat of a company and on that basis the rule will lead to a single court having jurisdiction to declare the single worldwide bankruptcy of a company. This rule works well in relation to the worldwide activities of any company that has its seat in Belgium. That includes also fully-fledged Belgian subsidiaries of foreign companies. These subsidiaries are to be treated as a separate Belgian company for these purposes if they form a separate legal entity with a separate legal personality. The latter requirements are often not met though by the Belgian operation of a foreign company. Many of them simply have a place of business or a branch without separate legal personality in Belgium. From a company law point of view the latter form part of the foreign company and from a theoretical point of view it should not be possible for a Belgian court to open the bankruptcy of the Belgian operation, because the unity and the universality principle would not be upheld in such a case. It should rather be up to the court of the foreign place where the company as a whole has its real seat to declare the bankruptcy of the whole company, including the Belgian operation.

This theoretical approach has been put into practice by the Belgian courts. And they have once more disregarded the issue of whether or not the foreign courts are in a position to co-operate. The bare fact that a foreign company has its place of business in Belgium was not accepted as sufficient ground for the jurisdiction of a Belgian court, even if the Belgian place of business displays all signs of insolvency⁸⁰. This is illustrated clearly by a judgment of the court of appeal in Brussels.⁸¹ The Commer-

80 See e.g. *Rechtbank van Koophandel Luik* (Commercial Court Liège), 25th October 1993, (1994) T.B.H. 904.

81 *Hof van Beroep Brussel* (Court of Appeal, Brussels), 14th June 1978, (1979) T.B.H. 419 and *Van Houtte "Compétence internationale et déclaration de faillite - Note under Court of Appeal Brussels, 14th June 1978"* (1979) T.B.H. 421.

cial Court in Nivelles had declared the Californian company Meridian Enterprises Inc. bankrupt and that court had taken jurisdiction on the basis that the company had a place of business in Belgium. The court of appeal reversed that decision. It was held that the Belgian courts did not have jurisdiction to declare the company bankrupt since no evidence had been produced to show that the "statutory" seat was fictive and because a Belgian place of business, without its own legal personality, does not on its own constitute a real seat.⁸²

That decision is particularly important because in the case at issue there were aggravating facts that could have urged the court to allow the lower court to use the place of business of the Californian company as a ground on which to base its bankruptcy jurisdiction. The court in Nivelles was already dealing with the bankruptcy of a Belgian company and it had been alleged that the Belgian place of business of the Californian company and that Belgian company had in practice operated as a single entity and that some of the assets that had disappeared towards or were located at the place of business of the Californian company should be used to cover the debts of the Belgian company. If the place of business had been a Belgian company the courts would have declared a second bankruptcy. Nevertheless they decided in this case not to depart from the strict rule that a place of business is not sufficient as a basis on which the bankruptcy of the company (or of the Belgian operation on its own) can be declared. Some commentators have argued for a more flexible approach on this point.⁸³ Such an approach would allow an exception along the lines of what would happen if a Belgian company rather than a place of business of a foreign company was involved. Such an exception would meet the practical needs of the creditors, but the courts have refused to accept this suggestion because it involved a departure from the strict application of the principle of the unity and the universality of the bankruptcy.⁸⁴

⁸² Ibidem and see also the first instance decision of the Handelsrechtbank Brussel (Commercial Court, Brussels), 26th November 1973, (1974) J.T. 156.

⁸³ Van Houtte, "Compétence internationale et déclaration de faillite" (1979) T.B.H. II-421.

1.6. Off-shore companies and the legal personality of branches

A difficult problem is raised by "off shore" companies. These companies are often not allowed to have any activities in the country of their "statutory" seat. The fact that an "off shore" company is created does not constitute conclusive evidence demonstrating the fictive character of a company, if the company law of the foreign country allows such companies and if the provisions of that company law have been respected.⁸⁵ The Sodipom Europe case illustrates this clearly. The Commercial Court in Brussels accepted that the Liechtenstein company Sodipom Europe had its "statutory" seat in Liechtenstein, whilst conducting all its commercial activities through its Belgian branch. But because no other evidence was produced to prove that the real seat of a Liechtenstein "off shore" company was located in Belgium the commercial court in Brussels ruled that it had no jurisdiction. The court only observed that the company had a Belgian branch office without legal personality.⁸⁶ As such this was not sufficient for the Belgian courts to exercise bankruptcy jurisdiction over the company and the court observed that any decision that would result in a separate Belgian bankruptcy for the branch office would be an unacceptable breach of the principle of the unity and universality of the bankruptcy.⁸⁷

The latter observation of the commercial court in Brussels is founded on two other essential principles of the attitude towards jurisdiction in company bankruptcy cases displayed by the Belgian courts.

A company which has its real seat abroad can never be adjudged bankrupt by a Belgian court⁸⁸, the existence of commercial activities in Belgium and of a branch office without legal personality does not influence this rigid rule. This rule implies as well that a Belgian branch office without legal personality of a foreign company can

⁸⁴ Ibidem.

⁸⁵ Rechtbank van Koophandel Brussel, 24th May 1989, (1989) J.T. 682 and (1990) T.B.H. 851.

⁸⁶ Ibidem and Coppens and T'Kint "Les faillites, les concordats et les privilèges. Examen de jurisprudence 1984 à 1990" (1991) R.C.J.B. 289 at 400.

⁸⁷ Ibidem.

⁸⁸ R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 440.

never be adjudged bankrupt by a Belgian court. The Belgian courts simply do not have bankruptcy jurisdiction in such cases.⁸⁹

This principle is strongly related to the universality and unity theory. The company and its branch offices without legal personality are seen as one legal unit and for each legal unit there is one bankruptcy and one court with bankruptcy jurisdiction.⁹⁰

The second principle is that when a Belgian company has branch offices without legal personality abroad, or simply assets abroad, the bankruptcy of the company in Belgium is equally the bankruptcy of its foreign parts. The Belgian court has bankruptcy jurisdiction concerning the foreign part, which means that they are included in the bankruptcy of the company itself.⁹¹ The Belgian courts will under no condition accept a separate bankruptcy of a foreign branch, secondary bankruptcies and the ancillary winding up of a company are techniques that do not exist under the traditional approach adopted by Belgian law.

This principle was applied by the commercial court in Brussels in the *Wiskemann*-case. This company had a branch office in France. The "curator"⁹² wanted to use the assets of the branch office for the payment of the debts of the French creditors of the branch office, because both branches had de facto deployed a different type of activity and they had operated as separate entities. The judgment of the court prohibits this. For the Court the Belgian company and its French branch office form one single bankruptcy, with one single set of assets and one group of creditors. It is irrelevant to determine whether an asset or a debt was originally related to the Belgian

89 Rechtbank van Koophandel Brussel, 24th May 1989, (1989) J.T. 682 and (1990) T.B.H. 851, Rechtbank van Koophandel Brussel, 26th November 1973, (1974) J.T. 156 and (1975) T.B.H. 355, Tribunal de Commerce Liège, 3rd February 1975, (1974-1975) Jur. Liège 181, Rechtbank van Koophandel Brussel, 15th November 1976, (1977) T.B.H. 714 and see also Erauw, De Foer, Bouckaert and Ryon, "Overzicht van Rechtspraak (1965-1984) - Internationaal Privaatrecht" (1984) T.P.R. 1329, at 1498-1499.

90 Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 91.

91 Hof van Beroep te Brussel, 16th February 1984, (1984) Rev. Prat. Not. 192, see also Erauw, De Foer, Bouckaert and Ryon, "Overzicht van Rechtspraak (1965-1984) - Internationaal Privaatrecht" (1984) T.P.R. 1329, at 1497 and 1499.

92 In French "curateur", more or less the equivalent of the English trustee of the bankruptcy of a private person.

company or to its branch office.⁹³

1.7. Jurisdiction in cases which are related to the bankruptcy

In national bankruptcy cases the court that has jurisdiction to adjudge the bankruptcy also has jurisdiction to deal with all actions that are based on the bankruptcy judgment and on the provisions of the insolvency law.⁹⁴ In principle this rule is also valid for international bankruptcies.⁹⁵ A clear example of such an action is the action to overturn the bankruptcy decision of the Belgian court that purports to have extraterritorial application.

Problems arise though when an action is brought to expand the bankruptcy of the company to the physical person or persons that are the owner or owners of the company. In domestic cases this is an action that falls within the exclusive jurisdiction of the court that declared the bankruptcy of the company. In international cases there may be a conflict between the clear link with the bankruptcy of the company and the fact that the physical person or persons involved are domiciled abroad. The Court of Appeal in Liège has held that in such a case the domicile of the physical person prevails. It was held that the action to expand the bankruptcy retains its independent character and is not entirely based on the bankruptcy of the company. The court of appeal felt therefore bound to apply the criterion of the domicile of the trader as a connecting factor for its jurisdiction in the action to expand the bankruptcy. In the case at issue the trader was domiciled abroad and the court declined to take jurisdiction to expand the bankruptcy to the trader. From a theoretical perspective this approach must be correct, but in practice it produces undesirable side effects for the creditors. A clear example of these effects is found in a case where the company had been operating in Belgium and where the owner of the company had made sure

93 Rechtbank van Koophandel Brussel, 24th May 1989, (1989) J.T. 682 and (1990) T.B.H. 851.

94 R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 440, Hof van Beroep te Brussel, 3rd November 1975, (1976) Pas. II. 123 and Rechtbank van Koophandel Brussel, 23rd April 1975, (1975) J.T. 589.

95 For bankruptcies of traders as well as for those of companies.

that he was registered in the civil register of Monte Carlo as having his main place of residence over there.⁹⁶ This meant that he was no longer domiciled in Belgium and that the Belgian court had no jurisdiction to expand the bankruptcy of the company to its owner, despite the dubious circumstances surrounding the case. This kind of procedure to expand the bankruptcy is normally brought in cases where the owner has clearly mixed his or her personal activity with that of the company. Would it not be more advisable in these circumstances to respect the de facto unity between the activity of the physical person and that of the company, rather than to separate the two in the name of the universality and unity principle because there should only one court to deal with the single bankruptcy of the trader, that of his or her domicile?⁹⁷

1.8. The value of the real seat criterion

It is submitted that the real seat criterion meets the requirements of precision and flexibility, as it grants in fact bankruptcy/insolvency jurisdiction to the court of the place where the main place of business is located. No court will however be able to deal with the bankruptcy/insolvency of a Belgian branch without legal personality. The problem created by the fact that the main place of business is located outside the jurisdiction remains unsolved.

The Belgian approach is clearly not perfect. It is nevertheless important to see which positive elements can be retained in a future harmonised system and which guidelines can be derived from its analysis. The most important advantage of a solution based on the principles of universality and unity is that one court will have exclusive bankruptcy/insolvency jurisdiction. This guarantees economies of time and money and a fair treatment for all creditors.

⁹⁶ Cour d'Appel Liège (Court of Appeal Liège), 3rd June 1983, (1983) Jur. Liège 561.

⁹⁷ See also Lenaerts, "Kroniek van het Internationaal Privaatrecht (1980-1985)", (1986-1987) R.W. 2001, at 2012.

This requires grounds of jurisdiction which are precise but allow at the same time flexibility too; precise because they should leave no doubt as to which court will have jurisdiction, flexible because that court should be a *forum conveniens* in all circumstances and this involves very different factual situations.

The balancing of precision and flexibility should also result in a criterion which can be applied to all cases. The danger of a rigid application of the principles of universality and unity is indeed that no court in the jurisdiction will have jurisdiction to deal with certain types of bankruptcy/insolvency. This is clearly unacceptable.

The number of the latter cases will inevitably be lower in a European context, but it is suggested that this problem cannot be avoided without endangering the principle of one court for each bankruptcy/insolvency. Here a deviation from the universality and unity principles is probably required. A secondary ground of jurisdiction is indeed required should no court inside the European jurisdiction have jurisdiction.

Specific problems arise due to the fact that most neighbouring countries have either adopted the territoriality principle or have adopted a significantly different implementation of the universality and unity principles. These differences of approach lead to many practical problems, especially in the relationship between Belgium and its most important trading partners. The practical needs of business required a harmonised approach to international bankruptcy cases. Belgium has therefore concluded bilateral conventions on jurisdiction in international bankruptcy cases with France⁹⁸, the Netherlands⁹⁹ and Austria¹⁰⁰.

The provisions that are contained in these special conventions apply in cases that come within their scope¹⁰¹ and in those cases they replace the normal Belgian rules

98 The Belgian-French Convention of 8th July 1899, [1900] B.S. 30-31 July 1900.

99 The Belgian-Dutch Convention of 28th March 1925, [1929] B.S. 27th July 1929.

100 The Belgian-Austrian Convention of 16th July 1969 (as modified by the Additional Agreement of 13th June 1973) [1975] B.S. 24th July 1975.

101 The Convention of 2nd May 1934 between the United Kingdom and Belgium, the "Convention for the reciprocal enforcement of judgments", [1936] B.S. 27th November 1936 only deals with recognition and execution and contains no jurisdiction provisions. The Convention applies to those

that were analysed above. Each of these conventions will now be analysed in turn.

1.9. The Belgian-French Convention

In the Belgian-French Convention the issue of jurisdiction in international bankruptcy cases is dealt with in Article 8. The Convention takes the Belgian universality and unity principles as a starting point. As a result Article 8 grants jurisdiction for the whole bankruptcy to a single court, either a French court or a Belgian court.¹⁰² All bankruptcy cases concerning an individual trader or a company fall within the scope of Article 8¹⁰³, but only if their nationality is either French or Belgian.¹⁰⁴ This means that two restrictions are placed on the scope of application of the Convention. The first restriction is found in the use of the term trader. Only those physical persons that are traders can be declared bankrupt. This first restriction is perfectly acceptable, because it corresponds to the existing restriction in Belgian domestic bankruptcy law. The second restriction is contained in the requirement that the trader or company should be of Belgian or French nationality. Whilst perfectly understandable in the nationality dominated private international law environment of the end of the 19th century, there is no justification for the fact that the convention treats for example a Dutch trader who has his domicile in Belgium and assets in France in a different way than the same trader who is a Belgian or French national. It is submitted that the additional nationality requirement should be deleted, as it serves no useful purpose. Slightly different rules apply to the international bankruptcy of a trader and that of a company.

areas that fall outside the scope of the Brussels Convention 1968, but its provisions on bankruptcy and insolvency are rather disappointing. Article 4 paragraph 3(c) simply refers the matter to the private international law of the country in which recognition is sought.

102 R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 357.

103 Article 8 paragraph 1 of the Belgian-French Convention of 8th July 1899 and R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 357.

104 Article 8 paragraph 1 of the Belgian-French Convention of 8th July 1899 and R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 361.

The court of the domicile of the trader is granted exclusive jurisdiction to deal with his bankruptcy.¹⁰⁵ The Convention, which is not accompanied by a report, gives no definition of domicile. The issue was never argued before the courts, but most authors nevertheless suggest that a court should use its own national interpretation of domicile. The Belgian courts would determine the domicile as indicated above, but in France a different definition has been given. The French courts have ruled that the domicile of a trader is located at his place of business, the place where he exercises his commercial activity.¹⁰⁶ This is exactly the definition that has been rejected in Belgium and this difference in interpretation could create problems in those cases where the trader had his or her place of business in one country and his or her domicile in the other country. The recent Belgian move towards the criterion of the principal place of business should also produce its effects here and iron out the problem.¹⁰⁷

Previously, such a situation could create conflicts of jurisdiction. An example of a positive conflict of jurisdiction would be presented by the bankruptcy case of a Belgian trader who was registered with the Belgian frontier village where he lived with his family (his Belgian domicile), but had his place of business across the border in France (his French domicile). He could be adjudged bankrupt in both countries, whilst one of the main aims of the convention was exactly to avoid such case and to apply the universality and unity principle by having a single bankruptcy. On the other hand no court would have jurisdiction to adjudge the same trader bankrupt if he or she and his or her family lived in France whilst he or she had his or her place of business in Belgium. A negative conflict of jurisdiction would therefore also be - possible.¹⁰⁸

105 Article 8 paragraph 1 of the Belgian-French Convention of 8th July 1899.

106 Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 137 and Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 87.

107 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 623.

108 Ibidem.

But even then all conflicts of jurisdiction would disappear if the Belgian courts were to accept the French domicile definition for cases that fall within the scope of the Convention. This autonomous interpretation of the word domicile is supported by the argument that when the Convention was drafted, the same (French) domicile definition was silently accepted by both legal systems. It is submitted that the Convention and its interpretation cannot unilaterally be changed almost a century later by the introduction of a different domicile definition, in Belgium, as a consequence of the adoption of a new national Code of Procedure.¹⁰⁹ In a remarkable judgment the Court of Appeal in Liège seems to have accepted these arguments and a harmonised definition of the term domicile was used in that case. This attempt to come to a harmonised approach even before the introduction of the new Belgian Bankruptcy Act in 1997 strengthens the view that a harmonised interpretation is possible in the new scenario¹¹⁰.

The court of the real seat of a company has exclusive bankruptcy jurisdiction.¹¹¹ The Convention contains no further definition of the real seat of a company. Nevertheless, no problems have arisen on this point. This is mainly so because the solution that is provided by the provisions of the Convention is roughly the same as the one that is provided by the provisions of the Belgian bankruptcy law. There is also no clash with the traditional French approach in this area. The courts have in practice applied the concept of the real seat of the company.¹¹² The stronger Belgian reliance on the statutory seat in contrast with the pragmatic French seat-principal place of business approach has in practice never given rise to real problems, as they seem in practice often to be located in the same place.¹¹³ Even the unfortunate attitude towards the bankruptcy of "the master of the business" (the trader behind the

109 Lenaerts, "Kroniek van het Internationaal Privaatrecht (1980-1985)" (1986-1987) R.W. 1857-1908, 1937-1964 and 2001-2018, at 2013-2014 and Kohl, "Note under Court of Appeal Liège, 3rd June 1983" [1983] Jur. Liège 561.

110 Cour d'Appel de Liège (Court of Appeal Liège), 3rd June 1983, [1983] Jur. Liège 561.

111 See French Cour de Cassation, 21st July 1987, (1988) D. 169 and the annotation by Remery.

112 Hof van Beroep Gent (Court of Appeal Ghent), 9th December 1993, (1993-1994) R.W. 1430 and Rechtbank van Koophandel Antwerpen (Commercial Court Antwerp), 24th January 1994, (1994-1995) R.W. 130.

113 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 623.

veil of the company) is adopted in cases that come within the scope of the Convention.¹¹⁴

The Convention also deals with the case of a Belgian or French debtor who has no domicile either in France or in Belgium.¹¹⁵ The solution which is given to such cases constitutes an important derogation of the unity principle. Indeed, when such debtor has a place of business in one of the two countries, the Convention grants bankruptcy jurisdiction to the court which has territorial jurisdiction over the place where the debtor has his place of business. The Convention stipulates however that that court "can" take jurisdiction. The court is under no obligation to take jurisdiction. Belgian courts may still feel reluctant to use this provision, which conflicts with the principle of unity, as it still seems to go marginally further by simply requiring "a" place of business than the 1996 Cour de Cassation case that allows them to rely on the "principal" place of business criterion in case that fall outside the scope of the Convention. But these provisions allow for example the French courts to open a (secondary) local bankruptcy of a Belgian trader who is domiciled in a third country. This has traditionally always been possible under French bankruptcy law.¹¹⁶ It is generally accepted that the place of business that is required for this provision cannot be the trader's main place of business. If that were the case this special provision would become meaningless because the French court already has jurisdiction by means of the application of the main rule of Article 8. But it has to be "a" place of business where some form of commercial activity is conducted.¹¹⁷ The mere presence of assets is, as such, insufficient.¹¹⁸

114 Article 8 paragraph 1 of the Belgian-French Convention of 8th July 1899 and R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 358-360.

115 Article 8 paragraph 1 of the Belgian-French Convention of 8th July 1899.

116 M. Trochu, *Conflits de lois et conflits de juridictions en matière de faillite*, Sirey (1967), at 41-43; Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 136; Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 86-87 and R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard), Bruylant (1985), at 360-361.

117 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 624.

118 R. Vander Elst and M. Weser, *Droit International Privé belge II*, (by M. Weser and P. Jénard),

The convention does not deal specifically with actions that are based on the bankruptcy or claims that are based on the provisions of bankruptcy law. The court of appeal in Mons nevertheless held that Article 8 and the principle of unity that is reflected in it should also be applied in those cases. The commercial court in Tournai had declined to take jurisdiction in a case in which the French syndic of a French bankruptcy had tried to bring a claim in Belgium to obtain payment of certain invoices by a sales agent of the bankrupt company. The court of appeal refused to overturn the judgment and argued that the French court that had declared the bankruptcy was the only court before which the claim could be heard. The court specifically based its judgment on Article 8 paragraph 1 of the convention.¹¹⁹

1.10. The Belgian-Dutch Convention

The provisions of the Convention between Belgium and the Netherlands are similar to those contained in the Convention concluded between Belgium and France.¹²⁰ The starting point of the convention is also here found in the principles of universality and unity of the international bankruptcy. Fortunately the application of this Convention does not depend on the nationality of the debtor. It is not required that the debtor is either Belgian or Dutch for the bankruptcy to come within the scope of the Convention.¹²¹ The second prerequisite is not abolished though. Only bankruptcies of traders and companies fall within the scope of the Convention. Physical persons that are not at the same time traders can, also under the provisions of this Convention, not be declared bankrupt. Slightly different provisions apply to traders and companies respectively.

Bruylant (1985), at 360-361.

119 Cour d'Appel de Mons (Court of Appeal Mons), 24th December 1984, (1985) T.B.H. 774.

120 See I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 624.

121 Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 139 and Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 89.

Article 20 paragraph 1 of the Convention grants exclusive bankruptcy jurisdiction to the court of the domicile of the trader.¹²² The Convention does not give a definition of the word domicile. The Dutch definition of domicile refers to the main place of residence of the trader. This means that a conflict of jurisdiction is only possible if the trader has registered in Belgium, which gives him a Belgian domicile, whilst effectively having his or her main place of residence the Netherlands.¹²³ The Convention attempts to avoid this type of conflict in as far as possible. Paragraph 3 of Article 20 gives in this situation jurisdiction to the court to which the case was presented first. Any other court can only start hearing the case when and if the first court ruled that it has no jurisdiction.¹²⁴ This is the standard *lis alibi pendens* rule.

The discussion concerning the interpretation of the word domicile and its definition in the context of the Convention has reached the courts that dealt with cases that came within the scope of the Belgian-Dutch Convention.¹²⁵ Some decisions stick to the national Belgian definition of domicile, even if the case falls within the scope of the Convention.¹²⁶ But the arguments in favour of an autonomous interpretation¹²⁷ convinced the Antwerp Court of Appeal.¹²⁸ Before the court was the case of a Dutch trader, with his traditional Belgian style domicile in the Netherlands and the centre of his commercial activities in Belgium. The court confirmed the first instance judgment and took jurisdiction. In its judgment the court defined the domicile of the trader as the place where he had located the centre of his commercial activities.¹²⁹

122 The Belgian-Dutch Convention of 28th March 1925, [1929] B.S. 27th July 1929.

123 Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 88.

124 Article 20 paragraph 3 of the Convention, applied in *Hof van Beroep Gent* (Court of Appeal Ghent), 24th June 1960, [1960-1961] R.W. 180.

125 See above for the similar debate in the context of the provisions of the Belgian-French convention.

126 *Hof van Beroep te Antwerpen* (Court of Appeal Antwerp), 13th January 1977, [1977] T.B.H. 485 and *Hof van Beroep te Gent* (Court of Appeal Ghent), 14th July 1983, [1983-1984] R.W. 1356.

127 As discussed above in the paragraph concerning the similar debate about the Belgian French Convention.

128 *Hof van Beroep Antwerpen* (Court of Appeal Antwerp), 30th November 1982, [1983-1984] R.W. 32, see also Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 88.

129 See also *Hof van Beroep Antwerpen* (Court of Appeal Antwerp), 13th January 1977, (1977) T.B.H. 485 and the annotations by Van Houtte (1977) T.B.H. 489.

The court stressed that any other interpretation would leave the creditors unprotected. The court specifically argued that the introduction of a new concept of domicile in the Belgian Code of Civil Procedure couldn't have altered the definition of the concept of domicile in the Convention. The case was subsequently brought before the Supreme Court.

The main part of the Antwerp decision was upheld. In cases within the scope of the Belgian-Dutch Convention a Belgian court has therefore jurisdiction if a trader has only his main place of business in Belgium.¹³⁰ Outside the scope of the Convention the Belgian Supreme Court would only make the same move twelve years later.

A similar approach has been taken to bankruptcy jurisdiction in relation to companies. The main rule is that jurisdiction is granted to the court of the real seat of the company.¹³¹ The Belgian judge can rely on the existing interpretation of this concept under Belgian law, but the Dutch judge is confronted with a completely unknown concept. Dutch company law only defines and works with the concepts of the legal seat and the "statutory" seat.¹³² This could lead to a conflict if a company has its real seat in Belgium, whilst having its legal seat in the Netherlands. Such conflicts are however excluded by Article 20 paragraph 3 of the Convention. As indicated above concerning the trader bankruptcy jurisdiction,¹³³ this Article tries to make sure that only one court effectively takes jurisdiction.

Paragraph 2 of Article 20 grants bankruptcy jurisdiction to the court of the place of business in Belgium or the Netherlands of a trader without domicile in one of the

130 Hof van Cassatie (Supreme Court), 6th September 1984, [1986] T.B.H. 402, see also Lenaerts, "Kroniek van het Internationaal Privaatrecht (1980-1985)" (1986-1987) R.W. 1857-1908, 1937-1964 and 2001-2018, at 2013.

131 See Hof van Beroep Gent (Court of Appeal Ghent), 15th February 1991, *B.V. J. Wittebols v P. Van Mallegheem (in his capacity as curator of the Belgian company Bekla)*, (1990) T.B.H. 418.

132 Article 20 paragraph 1 of the Convention and see Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 88-89.

133 See above for the discussion of Article 20 paragraph 3 of the Belgian-Dutch Convention and the application of that provision in the judgment of the court of appeal in Ghent, Hof van Beroep Gent, 24th June 1960, (1960-1961) R.W. 180.

two countries.¹³⁴ This is a clear departure from the principles of universality and unity, which only seem to apply within the borders of the two countries. In practice this solution is to be welcomed though. The trader could have his or her domicile in a country that applies the territoriality principle. In such a case this provision avoids a negative conflict of jurisdiction. It also safeguards the rights of the creditors who will now have the possibility to pursue a bankruptcy claim in all circumstances.

1.1.1. The Belgian-Austrian Convention

The most recent Convention is the Belgian-Austrian Convention.¹³⁵ This Convention, which respects in principle the principles of universality and unity, has the same scope of application as the Belgian-Dutch Convention. The bankruptcies of traders and companies come within its scope, without prerequisites concerning their nationality.¹³⁶

As far as traders are concerned the Convention grants exclusive international bankruptcy jurisdiction to the court of the place where the trader has located the management of his or her commercial activities.¹³⁷ Most Belgian commentators have equated this to the principal place of business concept as soon as that became the norm in certain circumstances in Belgium.¹³⁸ The criterion for company bankruptcy jurisdiction is that of the seat of the company.¹³⁹ Neither of these concepts received any further definition and there are as yet no reported cases in which these concepts were applied. The trader criterion is new for both countries and it is to be hoped that

134 See also above concerning the analysis of the identical provision of the Belgian-French Convention, and see also Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 139 and Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 89.

135 The Belgian-Austrian Convention of 16th July 1969 (as modified by the Additional Agreement of 13th June 1973) [1975] B.S. 24th July 1975, see Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 140-141 and Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 89-90.

136 Article 1 paragraph 1 of the Convention.

137 Article 2 paragraph 1 of the Convention.

138 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 625.

an autonomous interpretation which is identical in the two countries can be developed. It is on the other hand almost certain that the unqualified seat criterion, will create problems of interpretation. It is not clear which seat was meant, the real seat, the "statutory" seat or even a third concept of seat.¹⁴⁰ A Protocol to the Convention which was concluded on 13th June 1973 specifies that the Convention will not apply to the bankruptcy of insurance companies.

Paragraph 2 of Article 2 of the Convention applies to cases that fall outside the scope of paragraph 1, because no place of management or seat respectively is located in either country. It grants bankruptcy jurisdiction to the court of the place of business of a trader and forms an exception to the unity principle. This provision is similar to the one discussed above in relation to the convention between Belgium and the Netherlands and is to be welcomed for the same practical reasons.

The Convention also contains a provision which is identical to Article 20 paragraph 3 of the Belgian-Dutch Convention.¹⁴¹ The court before which the case is brought first is the only court which effectively hears the case. Any other court can only hear the case if the first court rules that it has no jurisdiction. Problems of *lis alibi pendens* are thus precluded.

This Convention is the only one to deal explicitly with actions that arise directly from the bankruptcy. Jurisdiction for these actions is granted to the court that has bankruptcy jurisdiction according to Article 2 of the Convention.¹⁴²

139 Article 2 paragraph 1 of the Convention.

140 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 89.

141 Article 2 paragraph 3 of the Convention.

142 Article 3 of the Convention.

L12 Exclusivity and public policy

A last point which has to be stressed concerning Belgian bankruptcy jurisdiction is that such jurisdiction is always an exclusive jurisdiction and that the provisions on jurisdiction are part of the Belgian private international public order. These provisions cannot be departed from. This point is worth repeating, because it is valid for the normal Belgian bankruptcy jurisdiction rules as well as for the provisions of each of the three Conventions described above.¹⁴³

L13. The Bankruptcy Act 1997: towards a European approach

The Belgian Parliament decided to implement a major part of the EU Insolvency Proceedings Convention 1995 in new Bankruptcy Act 1997. Article 3 of the act therefore introduces the concept of the secondary bankruptcy into Belgian Law. This is a major departure from the strict universalist approach adopted by Belgium up to now and it anticipates the entry into force of the Convention. As we will see later, the Convention never entered into force, but was eventually replaced by the EU Council Regulation (EC) 1346/2000 on Insolvency Proceedings on 29th May 2000¹⁴⁴. As the Regulation mirrors the provisions of the Convention the change is irrelevant for the purposes of the discussion concerning Belgian law.

In a sense the early introduction of this principle comes as a surprise since Belgium was extremely reluctant to agree to this aspect of the 1995 Convention. Once the decision had been taken though not to follow the United Kingdom in turning down

143 See Van Houtte, "Internationaal faillissementsrecht", [1978] T.B.H. 372, at 375; Vander Elst, "Observations - Note under Commercial Court Brussels, 18th June 1965", [1968] T.B.H. 168, at 170 and Rechtbank van Koophandel Brussel (Commercial Court Brussels), 28th April 1980, [1980] T.B.H. 417.

144 [2000] OJ L160/1.

the proposed Convention the early introduction was decided upon in order not to oblige Belgian creditors to wait for the main proceedings to be opened. As the new system is radically different the Belgian Bankruptcy Act needed to be amended prior to the Convention entering into force.¹⁴⁵

Both paragraphs of Article 3 deal with the same kind of debtor. The debtor must have its main centre of interests in another Member State, whilst also possessing an establishment or branch in Belgium. That presence of that establishment in Belgium will give the Belgian courts jurisdiction to declare the bankruptcy of the debtor. The bankruptcy will only affect the assets of the debtor that are located in Belgium.

Article 3 specifically excludes insurance companies, banks, stock brokers and investment banks and institutions that have their main centre of interest in another Member State from its scope.

Normally such a bankruptcy will be a territorial insolvency proceeding, according to the provisions of the EU Insolvency Proceedings Treaty and the provisions of the Convention that govern this type of proceedings are specifically declared applicable.¹⁴⁶

The situation changes in those cases where an insolvency proceeding has been opened against the debtor in the Member State where the debtor has its main centre of interests. In that scenario the bankruptcy in Belgium will be a secondary insolvency procedure, according to the provisions of the EU Insolvency Proceedings Treaty and the provisions of the Convention that govern this type of proceedings are specifically declared applicable.¹⁴⁷ It will be the only case in which Belgian proceedings will potentially be opened against a non-trader.¹⁴⁸

¹⁴⁵ See I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 628.

¹⁴⁶ Bankruptcy Act 1997, Article 3 Paragraph 1.

¹⁴⁷ Bankruptcy Act 1997, Article 3 Paragraph 2.

¹⁴⁸ I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique

It is important to note though that Article 3 is not yet in force. Article 150 of the Bankruptcy Act 1997 stipulates that Article 3 will enter into force on the day on which the EU Insolvency Proceedings Convention 1995 itself will enter into force. In the light of what will be discussed later it is unlikely that this will ever happen and there will also be no need for it now that the new European measure is self-executing. Be that as it may, the desirability of the introduction of the concept of the secondary bankruptcy in the 1997 Act could also be doubted. This would indeed not have been the only change that would have been needed to be implemented if the Convention had entered into force. Maybe the incorporation of Article 3 in the 1997 Act was primarily symbolic in nature. It showed that Belgium was willing to move forward towards a harmonised solution and that it was willing to abandon its strict adherence to the principles of unity and universality in order to achieve this aim, after initially having shown strong reluctance to agree to the harmonised EU approach.

II. Choice of law in international bankruptcy cases

II.1. The applicable law

The core of a bankruptcy is the procedure instituted and guided by the court. The aim of that procedure is to seize the assets of the debtor in a collective procedure and to distribute them amongst the creditor. In doing so the procedure also respects the principle of equality of the creditors. It seems logical to derive from the link between bankruptcy and judicial procedures that the law of the court that deals with the bankruptcy will also be the law applicable to the bankruptcy. The law of the forum will therefore be the *lex concursus* and will apply to the bankruptcy. The court will apply its own bankruptcy law to each international bankruptcy that will come before

it.

This choice of law rule is implied in many cases. It was spelled out by the courts in the *Wiskeman* case. In that case the Commercial Court in Brussels was confronted with a request from the curator-administrator of the Wiskeman bankruptcy to exclude the assets of the French branch from the Belgian bankruptcy and to put the French and Belgian assets in two separate pools that would be distributed amongst the local creditors according to the bankruptcy law of the place where the assets were situated. The request was motivated by the fact that the two branches had deployed entirely separate activities. French law would therefore apply to the distribution of the assets that were situated in France amongst the creditors whose claim related to the activities of the French branch. The court declined the request and ruled that the universality principle required a single bankruptcy and a single pool of assets to be distributed according to the provisions of Belgian bankruptcy law. The original bankruptcy had been declared by the court in Brussels and Belgian law, the law of the forum, was therefore the applicable law or *lex concursus*.¹⁴⁹ The judgment was subsequently appealed, but the court of appeal in Brussels confirmed the first instance decision.¹⁵⁰ Therefore the law applicable to the bankruptcy, the *lex concursus*, is the law of the forum.¹⁵¹

II.2. The scope of the bankruptcy category

The applicability of the law of the forum is rather straightforward. The determination of the exact scope of the category of issues to which the *lex concursus* applies is less straightforward and it is to this point that we now turn.¹⁵²

149 *A. Zenner (in his capacity of curator-administrator of the bankruptcy of SA Wiskemann) v SA Orfèvrerie Wiskemann*, Tribunal de Commerce de Bruxelles (Commercial Court Brussels), 28th April 1980, (1980) T.B.H II-417.

150 *Cour d'Appel Bruxelles* (Court of Appeal Brussels), 16th February 1984, (1984) Rev. Not. B. 192.

151 See also *Rechtbank van Koophandel Brussel* (Commercial Court Brussels), 26th November 1991, (1992) T.B.H. 1077.

152 G. Van Hecke and K. Lenaerts, *Internationaal Privaatrecht*, Story (2nd ed, 1989), at 368-369.

The lex concursus wants to be applied both to the procedural and the substantive aspects of the international bankruptcy.¹⁵³ These two aspects are closely connected and it is obvious that the same law applies, especially because the procedural aspects are normally in any case governed by the law of the forum.¹⁵⁴

The substantive aspects of international bankruptcy cases include both the formal requirements that apply to bankruptcy proceedings and the material requirements. That means that the lex concursus will decide who can be declared bankrupt. Can only companies or traders be declared bankrupt or can this procedure also be applied to any physical person? And the lex concursus will also decide which requirements must be met by the debtor before the debtor can be declared bankrupt. This also includes rules on the burden of proof and on the issue which persons can initiate the bankruptcy proceedings. The lex concursus will also decide before which court such procedures are to be brought. Once the procedure has been started the whole format, timing and conclusion of the proceedings are also covered by the lex concursus.¹⁵⁵ The lex concursus will also determine the consequences of the bankruptcy and the ways to stop or reverse the bankruptcy. For example, the lex fori will be applied to decide whether an order of discharge exists and which requirements will have to be met before such an order can be delivered. The consequences of such an order, for example the issue whether or not the creditor will in future still be able to exercise a claim over any future assets of the debtor, are also determined by the provisions of the lex concursus.¹⁵⁶ Other examples include the issue whether or not and if so to what extent the bankruptcy will place a restriction on the capacity of the debtor to undertake certain activities.

153 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 633.

154 Ibidem.

155 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 391-392 and Pastor Ridruejo, "La faillite en droit international privé", (1971) 133 Recueil des Cours 140, at 193-200.

156 See Pastor Ridruejo, "La faillite en droit international privé", (1971) 133 Recueil des Cours 140, at 216.

The appointment of an administrator, liquidator or curator for the international bankruptcy and the powers of such a person are also governed by the *lex concursus*.¹⁵⁷ This must be seen in combination with the extraterritorial application of the bankruptcy in the universality approach. It is relatively easy to understand that the *lex concursus* will determine which preliminary and protecting measures the administrator or curator can take to preserve the assets of the debtor for the creditors, but it is slightly more complicated to add that this also covers the assets which are situated abroad. The provisions of the *lex concursus* will therefore also determine whether or not and in which way the administrator can sell assets, both those found domestically and those found abroad. This rule applies irrespective of whether or not the assets are sold abroad or not.¹⁵⁸

The provisions of the *lex concursus* will also be used to determine the date from which the bankruptcy becomes effective and to determine under which conditions certain transaction that were undertaken by the debtor shortly before the bankruptcy can be undone.¹⁵⁹

Two issues create specific problems. The first issue is that of mortgages and other forms of securities that are given to secure the preferential treatment of the beneficiary in comparison to other creditors of the debtor. The second issue is that of the retention of title.

Mortgages and securities are based on contractual obligations. This means that the *lex contractus* may have a role to play in addition to the role played by the *lex concursus*. Non-contractual obligations can give rise to similar problems. The debtor may have obligations that arise from the law of tort or, if the private person is a physical person, he or she may also have maintenance obligations. In general terms, account must be taken of the *lex obligationis*. Additionally, there is also a role for the *lex rei sitae*, the law of the place where the movable or immovable property is

157 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 391-392 and Pastor Ridruejo, "La faillite en droit international privé", (1971) 133 Recueil des Cours 140, at 200-202.

158 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 392.

situated. The interaction between these three laws is liable to create problems.¹⁶⁰

The first role of the *lex obligationis* is to determine whether or not a valid obligation has been created. In a second stage the provisions of the same *lex obligationis* will decide whether or not the obligation gives rise to preferential treatment for the creditor and if so to which extent.¹⁶¹ For example, the law that is applicable to the mortgage contract (the *lex obligationis* is here the *lex contractus*) will determine whether the mortgage contract created a valid obligation and whether or not the creditor will be entitled to preferential treatment in relation to the mortgaged property of the debtor. In practice that preferential treatment normally means that the creditor will be entitled to satisfy its claim on the property first before any other creditor can exercise any claim over it.

The *lex rei sitae* plays its role at the time when the creditor exercises its right. The *lex rei sitae* is then the law of the place where the property is situated at that time. The provisions of this law will determine whether or not the preferential entitlement granted by the *lex obligationis* is acceptable and the specific way in which it can be recognised.¹⁶² This covers issues such as the type of property or goods that can be affected, whether or not registration or any other form of publicity is required and the order and size of the security that is given to the creditor.¹⁶³

But the final stage involves a return to the *lex concursus*. Any form of preferential treatment that is created by the *lex obligationis* and that can in principle be exercised according to the provisions of the *lex rei sitae* must be tested under the provisions of the *lex concursus*. This test will determine whether or not it can be taken into account during the bankruptcy proceedings.¹⁶⁴ The Belgian courts have supported this cumulative application of the various laws despite their admission that

159 Ibidem.

160 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 633.

161 See Lenaerts, "Kroniek van het Internationaal Privaatrecht (1980-1985)" (1986-1987) R.W. 1857-1908, 1937-1964 and 2001-2018, at 2015.

162 Ibidem.

163 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 393.

164 See e.g. Hof van Beroep Gent (Court of Appeal Ghent), 15th February 1991, [1991] T.B.H. 418.

especially the application of the *lex rei sitae* can in practice harm the universal effect of the bankruptcy.¹⁶⁵ In many cases relatively speaking few problems arise when this complex system unfolds itself. In these cases the *lex concursus* is also the *lex rei sitae*. In other words the property is situated in the very country where the bankruptcy proceedings are started. In all other circumstances the system can only work if one additional prerequisite is fulfilled. That prerequisite is the recognition of the bankruptcy proceedings by the law of the country in which the goods or property affected is situated (the *lex rei sitae*). The system breaks down whenever that prerequisite is not met. Often this is due to the fact that mandatory rules/public policy rules of the recognising state have not been observed if the latter state has also put in place the rules on preferential treatment.¹⁶⁶ In the latter case the bankruptcy will not include the goods or property affected and the creditor will have to bring a separate claim abroad on the basis of the provisions of the *lex obligationis*.¹⁶⁷ Additional problems are raised by the fact that in many cases the three laws involved contain different forms of preferential treatment, often with very different modalities.

The interaction between the three laws involved is illustrated clearly by a judgment of the Commercial Court in Brussels.¹⁶⁸ This case concerned a claim by the curator of a Belgian company that had been declared bankrupt in Belgium. The company had a branch in France and a French "syndic" had collected money owed by certain French debtors of the company to safeguard the preferential rights under French law of the employees of the French branch. These special rights concerned the payment of wages to the employees. The Belgian curator claimed that the French "syndic" was obliged to transfer this amount of money to him. The court ruled that this kind of special preferential right was created by French law, the *lex obligationis*. The right existed and entitled the employees to preferential treatment. The debts involved were

165 Hof van Beroep Brussel (Court of Appeal Brussels), 16th February 1984, (1984) R. Not. B. 193.

166 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 634.

167 See Lenaerts, "Kroniek van het Internationaal Privaatrecht (1980-1985)" (1986-1987) R.W. 1857-1908, 1937-1964 and 2001-2018, at 2016 and compare Rechtbank van Koophandel Brussel (Commercial Court Brussels), 20th June 1983, (1985) T.B.H. 46.

168 Rechtbank van Koophandel Brussel (Commercial Court Brussels), 20th June 1983, (1985) T.B.H. 46.

situated in France, at the place of domicile of the debtors. French law was therefore the *lex rei sitae*. The modalities of the recognition of the right did therefore not create any problems. The real issue in this case was the effect of the *lex concursus*. Because the bankruptcy had been declared in Belgium Belgian law applied as the *lex concursus*. Belgian law had therefore to be used to determine whether the preferential treatment of the employees could be given effect in Belgium in the context of the bankruptcy and to determine which restrictions, if any, applied to the exercise of the right. The court ruled that the principle of unity and universality in Belgian law meant that the money had to be paid to the Belgian curator. All assets had to be put in one pool and the curator was the only person to administer that pool of assets. At that stage the curator undertook to respect the special rights created under French law. This should not be seen as an application of French law though. Belgian law contains provisions that form the equivalent of the French provisions and the application of the *lex concursus* therefore allowed the application of the preferential right of the employees to these sums of money. It should also be noted that the prerequisite was met in this case because the French *lex rei sitae* recognised the effect of the Belgian *lex concursus* on the basis of the provisions of a treaty concluded between the two countries on 8th July 1899.¹⁶⁹ Another example presents no link with any of the conventions which Belgium has concluded with neighbouring countries. The court of appeal in Brussels allowed a Swiss creditor to rely on a security which guaranteed preferential treatment under the foreign applicable law on the basis that it was recognised under Belgian law as the law of the place where the goods were located and that it was effective under Belgian law as the *lex concursus* that was applicable to the bankruptcy of the Belgian company that had granted the security.¹⁷⁰

A judgment of the court of appeal in Antwerp is equally clear. A Belgian company had pledged a bank account it had opened in the Netherlands to the Dutch State and an Amsterdam institution for the administration of its Dutch social security obligations. The court applied Dutch law as the *lex contractus* to determine the

¹⁶⁹ Article 8 paragraphs 1 and 2 of the Treaty.

validity of the contract by means of which the now bankrupt debtor had pledged the money in the account. As the account was located in the Netherlands Dutch law was also applied as the *lex rei sitae* to check its effect against third parties. The Belgian *lex concursus* had no objections against the pledge, because its provisions no longer allowed the curator to undo the act.¹⁷¹ The court then went on to examine a second security, but unfortunately at that stage the court *de facto* applied the wrong laws.

Not all judgments are as clear though. Some of them do not make it clear whether or not the court applied all three stages of the test. The court of Appeal in Mons applied Belgian law to determine whether the claim of a French creditor of a company that had been declared bankrupt in Belgium took preference over other claims. The court did not explain in its judgment why it applied Belgian law and the law applicable to the obligation was not identified.¹⁷² The first stage of the test was equally skipped by the commercial court in Ghent in the *Coudeville* case.¹⁷³ The court did not check whether the *lex obligationis*, probably French law in this case, had effectively created a preferential right for the French sales representative of a Belgian bankrupt company to have his wages and redundancy compensation paid. The court referred immediately to Belgian law as the *lex rei sitae* before moving on to the *lex concursus*, also Belgian law in this case. French law was only used to determine whether the sales representative should be treated as an employee for the purposes of Belgian law.¹⁷⁴

An isolated decision of the court of appeal in Brussels seems to distinguish between securities that affect the assets of the debtor generally, to which the court applied the *lex concursus*, and specific securities that grant privileges in relation to specific assets, to which the court applied the *lex rei sitae*.¹⁷⁵ The distinction between the two types of security needs to be made. Such an approach derives from the fact that

170 Cour d'appel de Bruxelles (Court of Appeal Brussels), 15th June 1993, (1995) J.L.M.B. 904.

171 Hof van Beroep Antwerpen (Court of Appeal Antwerp), 3rd May 1988, (1991) T.B.H. 141.

172 Cour d'Appel de Mons (Court of Appeal Mons), 30th September 1981, (1981) Pas. II-136.

173 *Coudeville v Van Dorme and Van den Daele (in their capacity as curators)*, Rechtbank van Koophandel Gent (Commercial Court Ghent), 8th January 1982, (1984) T.B.H. 35.

174 See the annotations under the judgment by Van Houtte (1984) T.B.H. 37, at 38.

175 Hof van Beroep Brussel (Court of Appeal Brussels), 16th February 1984, (1984) Rev. dr. b. 192.

general securities affect all the assets and that as a universalist principle there should be one pool of assets to which a single law, i.e. the *lex concursus*, should be applied. Any other solution would create a separate pool of assets, for example those located in one country, to which a separate regime would apply. This is not acceptable and therefore the *lex concursus* should apply to all securities that affect the assets of the debtor generally. In practice this will however often not produce a smoother solution, as it will produce problems at the recognition stage due to the clash with the public policy/mandatory rules of the law of the country that institutes the security.¹⁷⁶

The standard cumulative application of the *lex obligationis*, the *lex rei sitae* and the *lex concursus* results in a rather heavy system. It is not surprising to see therefore that two of the treaties which Belgium has concluded in this area provide for a simplified solution. The treaty with the Netherlands and the treaty with Austria contain similar provisions. Article 23, paragraphs one and two of the treaty between Belgium and the Netherlands and Article 8, paragraphs one and two of the treaty between Belgium and Austria provide that the law of the country in which the bankruptcy has been declared, the *lex concursus*, will apply to any privileges on the movable property of the debtor. These articles also provide that mortgages and other securities in relation to immovable property are governed by the law of the place where the property is situated, the *lex rei sitae*.¹⁷⁷

Contractual clauses through which the vendor retains the property title to the goods that have been sold to the debtor until the price has been paid in its entirety create similar problems.¹⁷⁸ The standard type of clause gives the vendor the right to reclaim the goods if the price is not paid. However, Belgian substantive law does not allow the vendor to exercise this right in case of bankruptcy. The situation is slightly more complicated in the case of an international bankruptcy. It is in such cases up to

176 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 633-634. This debate also raises vital comparative issues in relation to the concept of the floating charge that is used in England and Wales and to which we will return at a later stage.

177 See also Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 96.

178 See Van Houtte, "Eigendomsvoorbehoud en transnationaal faillissement (annotation under *Rechtbank van Koophandel Gent* (Commercial Court Ghent), 8th January 1982", (1982) *T.B.H.* 417.

the *lex contractus* to determine the moment on which the title to the property is transferred and whether or not the parties to the contract can delay the transfer of title. In other words, the *lex contractus* determines whether the retention of title in the contract is valid. The *lex contractus* determines the rights and obligations between the parties, but it is clearly envisaged that such a retention of title could also be enforced against third parties. This effect *erga omnes* is governed by the *lex rei sitae*. It is indeed rather obvious that any property right in the goods is governed by the law of the place where the goods are situated. The third stage of the test aims to determine whether the retention of title can remain effective in a bankruptcy case. In other words, whether the retention of title will in such a case be effective against all other creditors. This last stage is governed by the *lex concursus*.¹⁷⁹ It is indeed a matter that is most closely related to the bankruptcy. The applicability of the *lex concursus* has also been confirmed by Article 23 paragraph one of the treaty between Belgium and the Netherlands.¹⁸⁰ The three laws apply cumulatively¹⁸¹, but this cumulative application is often not applied clearly by the courts, due to the fact that in many cases the *lex rei sitae* is also the *lex concursus*.¹⁸² That overlap was present in a case that came before the court of appeal in Antwerp. A German bank had given credit to the German subsidiary of the Belgian company that had subsequently been declared bankrupt. The contract contained a "Sicherungsübereignungsvertrag" between the German bank and the Belgian company. The bank was given the security--title in all the vehicles owned by the Belgian company. The court of appeal had to decide whether the clause applied in the circumstances of the bankruptcy. In a first

179 See Cour d'Appel de Mons (Court of Appeal Mons), 24th December 1984, [1985] T.B.H. 775 and compare French Cour de Cassation, 8th January 1991, [1991] D. 276. On the issue of the retention of title see generally: Rechtbank van Koophandel Brussel (Commercial Court Brussels), 27th October 1958, (1959) Jur. comm. Bruxelles 81; Rechtbank van Koophandel Kortrijk (Commercial Court Kortrijk), 25th June 1964, (1964-1965) R.W. 271; Rechtbank van Koophandel Gent (Commercial Court Ghent), 8th January 1982, (1982) J.C.B. 417; Rechtbank van Koophandel Gent (Commercial Court Ghent), 8th January 1982, (1984) Rev. dr. comm. belge 35; Rechtbank van Koophandel Brussel (Commercial Court Brussels), 22nd March 1988, (1989) T.B.H. 631; Hof van Beroep Antwerpen (Court of Appeal Antwerp), 20th November 1984, (1986) Rev. dr. comm. belge 787; Hof van Beroep Brussel (Court of Appeal Brussels), 27th March 1963, (1963) Pas. II-226.

180 Belgian-Dutch Treaty on Jurisdiction and the Execution of Judgments 1925.

181 See Rechtbank van Koophandel Brugge (Commercial Court Bruges), 19th September 1995, (1997-1998) R.W. 131.

182 See Rechtbank van Koophandel Brussel (Commercial Court Brussels), *P. Danhier (in his capacity as curator) v Aristrain GmbH*, 22nd March 1988, (1989) T.B.H. 631 and Gérard, "L'opposabilité de la clause de réserve de propriété en cas de faillite internationale", (1989) T.B.H. 635.

stage the court examined whether the clause had been created validly between the parties and whether the clause was valid. The court applied German law, as the law of the contract to this issue. In a second stage the effect against third parties was examined. This issue was governed by Belgian law, because the vehicles were situated in Belgium. In a final stage the court determined whether the Belgian universality principle as part of the *lex concursus* allowed that effect was given to the clause once the Belgian debtor had been declared bankrupt.¹⁸³ The cumulative application of the three laws is less clearly discernible in the decision of the commercial court in Ghent in the *Richter v Aerts (curator)* case. The plaintiff had concluded a "hire contract with a purchase option" with the plaintiff for two wastepresses and containers. The contract provided that the bankruptcy of the debtor would allow the plaintiff to retake possession of the goods. The court ruled that the real nature of the contract was a sale with retention of title in the goods. The court applied the *lex contractus*, Dutch law in this case, to the issue whether or not the retention of title - clause in the contract was valid. Belgian law, as the *lex rei sitae*, was then applied to determine whether the retention of title was effective against third parties. Belgian law was also the *lex concursus*, but the court did not clearly distinguish between the second and the third stage of the test. The court nevertheless reached the appropriate conclusion when it ruled that the retention of title clause was valid between the parties according to the Dutch applicable law, but that the clause had under Belgian law no effect against third parties in the circumstances of the bankruptcy of the debtor.¹⁸⁴

The issue of the value of the retention of property clauses in Belgian private international law has long been influenced by the debate concerning these clauses in Belgian domestic law. The latter did not recognise that these clauses could create preferences for one creditor in relation to the other creditors of the debtor, because the law does not allow the creation of rights to preferential treatment that are not

¹⁸³ Hof van Beroep Antwerpen (Court of Appeal Antwerp), 20th November 1984, (1986) T.B.H. 787.

¹⁸⁴ Rechtbank van Koophandel Gent (Commercial Court Ghent), *Richter v Aerts (curator)*, 8th January 1982, (1982) T.B.H. 417.

instituted by law.¹⁸⁵ This rule could be seen as a rule of Belgian international public policy and it would as such deny any effect to retention of title clauses in as far as the creditors of the debtor are concerned. This rule applies only in cases of bankruptcy though. The normal rule is the combined application of the *lex contractus* and the *lex rei sitae*. The clause can therefore have effects in the absence of a bankruptcy situation. The *lex concursus* will only interfere in bankruptcy situations, which includes the so-called "dubious" period. The curator can undo any act in that period immediately preceding the bankruptcy that went against the interest of the creditors of the debtor. This includes retention of title clauses, which have either been concluded or implemented during that period.¹⁸⁶

The new Bankruptcy Act 1997 has changed the situation. Article 101 states clearly that the new bankruptcy law no longer affects the effect of the retention of title clauses and the owner of any property will in future be able to reclaim any goods in the possession of the debtor. This is a radical change in Belgian bankruptcy law. However, the act also imposes a series of requirements that need to be met by any retention of title clause¹⁸⁷. First, the retention of title clause must have been concluded in writing before the goods have been delivered.¹⁸⁸ It is sufficient that the clause appears in writing on a document supplied by the creditor. The debtor can accept the clause explicitly or implicitly.¹⁸⁹ The creditor has the burden of proof on this point. It is also important to note that the new regime only applies to clauses that have been concluded after 1st January 1998.¹⁹⁰ Secondly, the goods must still be in the possession of the debtor-purchaser. They must be found there "in natura", in their original format. They should not have been linked to immovable property or they

185 Hof van Cassatie (Supreme Court), 9th February 1933, (1933) Pas. I-103.

186 Rechtbank van Koophandel Brussel (Commercial Court Brussels), 22nd March 1988, (1989) T.B.H. 631; see also Rechtbank van Koophandel Luik (Commercial Court Liège), 25th November 1988, (1990) T.B.H. 809.

187 See A. Cuypers, *De Invloed van de nieuwe wetten betreffende het gerechtelijk akkoord en het faillissement op de kredieten en de kredietzekerheden*, Kluwer Rechtswetenschappen België (1998), at 88-98.

188 Bankruptcy Act 1997, Article 101.

189 See Dirix, "Eigendomsvoorbehoud", (1997-1998) R.W. 487, at nr. 18 et seq.

190 Bankruptcy Act 1997, Article 150.

should not have been linked to other movable goods.¹⁹¹ Thirdly, the creditor must invoke the clause before the curator formally terminates the verification of all the claims.¹⁹² The curator retains the right to reject the request for the return of the goods though, even in those cases where all these requirements are met. The curator can opt to pay the purchase price (excluding interest payments and penalties) if it is judged to be in the interest of all the creditors¹⁹³, for example because the curator needs the goods because he wants to continue the commercial activities of the bankrupt company until a buyer has been found.

This change in the Bankruptcy Act also has important implications in the area of private international law. In future Belgian law as the *lex concursus* will no longer rule out that effect be given to retention of title clauses that meet the requirements outlined above.

III. Recognition and execution of international bankruptcy judgments

Recognition and execution of judgments refers in most normal circumstances to the recognition and the execution of foreign judgments. This is also the case in relation to international bankruptcy judgments, but there is also a second aspect. The universality and unity principle in Belgian bankruptcy law inevitably leads to the expectation that a Belgian bankruptcy judgment will have extraterritorial effects. In turn that means that there is an expectation that the Belgian bankruptcy judgment will be recognised and enforced abroad. It is to this latter aspect that we will now turn first.

III.1. Recognition and execution of Belgian bankruptcy judgments abroad

¹⁹¹ Bankruptcy Act 1997, Article 101.

¹⁹² Ibidem.

¹⁹³ Bankruptcy Act 1997, Article 108.

The extraterritorial effect of Belgian international bankruptcy judgments is merely the aim of the Belgian judgments. Foreign courts are by no means bound by it. The Belgian curator is instructed by the Belgian court to act abroad as well as at home. He or she will not normally experience many problems abroad as long as the activities are restricted to normal acts of management and preservation of assets. Any other acts, such as selling assets, will only be unproblematic if the foreign system is also based on the principle of universality and unity of the bankruptcy. But, in the latter case the formal step of applying to the foreign courts to have the Belgian international bankruptcy judgment recognised and to allow its execution will also be necessary. The conditions for this recognition and execution procedure are laid down in the domestic legislation of each country. Some countries require that certain procedural rules were observed during the bankruptcy procedure in Belgium, whilst other countries reserve the right to re-open the case and to re-examine the substantial part of the bankruptcy proceedings. Those countries that have accepted the territoriality principle are normally much more reluctant to recognise and enforce foreign bankruptcy proceedings. It is likely that they will prefer to start their own domestic bankruptcy proceedings on the basis of the presence in their country of assets or of a branch office.¹⁹⁴

Belgium has concluded several treaties with neighbouring countries in an attempt to ease the problems that are raised by the purported extraterritorial scope of Belgian international bankruptcy and insolvency judgments and the need for recognition and enforcement abroad of these judgments to achieve this aim.

The first of these treaties is the treaty with France. Article 8 paragraph 2 of that treaty deals with the recognition and execution of Belgian bankruptcy judgments in France and vice versa. The text of the article recognises that a bankruptcy that has been declared in one country will have effects in the other country. The curator of the bankruptcy will have all necessary powers in the other country to safeguard or

194 See Geinger, "Het faillissement en het concordat in de internationale context", (1982) 19 T.P.R. 115, at 129-130 and Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77, at 100.

manage the assets of the debtor. He or she can act in court to exercise any claim which the debtor may have or he may represent the bankruptcy in any proceedings. The text of the article contains a single restriction of the powers of the curator. The curator can only perform any acts of execution if the bankruptcy judgment has been given the *exequatur* by the foreign court. The effect of this restriction is not always very clear in practice. It is beyond doubt that the curator can stop the debtor from managing its assets and can take over the management of the assets without resorting to the *exequatur* procedure. The same applies to the continuation of the debtor's business, and to attempts to collect the debtor's claims from third parties. Any forced sale of assets against the will of the debtor or any straightforward sale of the business may require an *exequatur* though and the Belgian curator would be well advised to seek the *exequatur* whenever there could be a dispute concerning any of his or her acts or powers, due to the vagueness of the treaty.¹⁹⁵

The text of the treaty with the Netherlands provides more guidance for the Belgian curator who needs to act in the Netherlands. Article 21 of the treaty recognises that an international bankruptcy judgment that has been given by a court of competent jurisdiction in either country will have effect in the other country too. The curator of the bankruptcy will have all necessary powers in the other country to safeguard or manage the assets of the debtor. He or she can act in court to exercise any claim which the debtor may have or he may represent the bankruptcy in any proceedings. The curator is specifically mandated to sell the goods and assets of the debtor. The text of the article contains a single restriction of the powers of the curator. The curator can only sell the immovable property of the debtor or perform any acts of execution if the bankruptcy judgment has been given the *exequatur* by the foreign court. The effect of this restriction is much clearer than that of the equivalent provision in the treaty with France. The scope of the restriction is much clearer. Forced execution measures seem to be restricted in practice to those cases where the debtor physically resists the attempts of the curator to take over the management of the business and the assets. Immovable property can be sold by the curator with the

195 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 385.

authorisation of the (Dutch) court that opened the bankruptcy proceedings if such a sale does not involve a public auction, according to a judgment of the commercial court in Tongeren¹⁹⁶ which seems to suggest that sale of immovable property under the convention equals sale at auction rather than consensual sale, because the convention puts it at the same level as acts of forced execution. However, the appointment of a (Belgian) notary to sell the property at auction ("publicly" in Belgian legal terms) is a procedural matter and is governed by the law of the forum. It is disputed whether or not the Dutch bankruptcy judge could apply Belgian law in this respect or whether the Dutch curator needed to make an application before the Belgian courts. It is respectfully submitted that the latter interpretation is more in line with the wording of the convention and with the general principles of private international law and is therefore to be preferred. The judgment of the commercial court in Tongeren, which was reported in very brief terms, must therefore be wrong in so far as it reaches the opposite conclusion.

The treaty with Austria is even more specific on this point. Articles 4 and 11 of this treaty contain detailed rules dealing with the recognition and exequatur of international bankruptcy judgments that have been handed down by the courts of the other country. The Belgian curator is given all powers to perform acts of management and preservation of the assets and the business. The curator is also empowered to act in court on behalf of the debtor or the bankruptcy and he or she can sell all movable and immovable assets of the debtor. The commercial court in Vienna will eventually order measures that are necessary to sell immovable property in Austria. The exequatur of the Austrian courts is only required for any measures of forced execution against the will of the bankrupt debtor.¹⁹⁷

III.2. Recognition and execution of foreign bankruptcy judgments in Belgium

196 Rechtbank van Koophandel Tongeren (Commercial Court Tongeren), 8th May 1996, (1997) T. Not. 241.

197 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) Jura Falconis 77,

One could have assumed that a country that adheres to the universality and unity of an international bankruptcy principle and that gives extraterritorial effect to its own international bankruptcy judgments would automatically give extraterritorial effects to any foreign bankruptcy judgment. Nothing is less true though. Foreign bankruptcy judgments are also subject to the general requirements for the recognition of foreign judgments that are contained in Article 570 of the Belgian code of civil procedure. The court will examine whether or not these requirements are met by the foreign judgment. Foreign bankruptcy judgments are recognised "de plano", i.e. they do not need an exequatur.¹⁹⁸ The latter procedure, which obliges the judge to look at the substantive issues, is only required in those cases where forced execution of the judgment is required.¹⁹⁹

In addition to that, one finds that the Belgian courts stick very closely to the general rule that the foreign judgment will only be given the effect that the foreign court intended it to have when it rendered the judgment. This rule is also applied to the territorial scope of the judgment. The Belgian courts will therefore only give effect through the recognition procedure to those foreign bankruptcy judgments that were intended to have extraterritorial effects.²⁰⁰ Those bankruptcy judgments that were handed down by courts in legal systems that adhere to the strict territoriality of the bankruptcy will not be given effect in Belgium, despite Belgium's strong preference for the universality and unity principle. The Cour de Cassation explicitly laid down this rule in 1991 when the supreme court ruled that even though the principles of universality and unity formed part of Belgian international public policy the foreign court needed to have the intention to render a bankruptcy judgment that would have had extraterritorial effects. In that case a Danish judgment failed to meet that test,

at 101.

198 See Colle, "Problemen van internationaal faillissementsrecht in een Belgisch en rechtsvergelijkend perspectief", (1993) 30 T.P.R. 473, at 490 et seq.

199 See the conclusion of Proc. Gen. Ganshof van der Meersch for the judgment of the supreme court (Hof van Cassatie) of 29th March 1973, (1973) Pas. I-735.

200 Cour de Cassation (Supreme Court), 26th September 1991, *Association Intercommunale pour l'aménagement et l'expansion économique du Brabant Wallon (I.B.W.) C.V. v Siemens N.V.*, (1992) T.B.H. 360. See also Hof van Beroep Luik (Court of Appeal Liège), 7th February 1959, (1960) Pas. II-77 and Rechtbank van Koophandel Brussel (Commercial Court Brussels), 18th June 1965, (1968) T.B.H. 161.

because Danish law observed the principle of the territoriality of the bankruptcy. The Danish bankruptcy judgment was therefore denied any effect in Belgium.²⁰¹

A foreign bankruptcy judgment that purports to have extraterritorial effects and universal application will not automatically allow the foreign curator or administrator of the bankruptcy to act in Belgium though. The foreign bankruptcy proceedings must also be acceptable in the eyes of the Belgian legal system. This refers to basic principles though and not all details need necessarily be identical.²⁰² It is perfectly possible for a Belgian court to recognise a foreign bankruptcy even if the debtor that was declared bankrupt was a physical person that could not be qualified as being a trader. Such a person could not be declared bankrupt under the provisions of the Belgian bankruptcy law, but the foreign judgment will nevertheless be recognised. Principles of Belgian international public policy are far more relevant. These include the principle of equality between all creditors of the debtor.²⁰³ A clear example of such a case is found in a judgment of the commercial court in Brussels²⁰⁴ in which the court declined to recognise a German bankruptcy judgment. At that time German law allowed a territorially limited and partial bankruptcy to the advantage of the German creditors. Foreign creditors could be excluded from this procedure. In the case at issue the bankruptcy of a German company with its main place of business in Germany had been declared. The court argued that the Belgian creditors would potentially not be allowed to exercise their claims in relation to assets that were situated in Germany and that belonged to a debtor that had been declared bankrupt in Germany and that the recognition of the German judgment would unduly give the German creditors rights in relation to assets that were situated

201 Cour de Cassation (Supreme Court), 26th September 1991, *Association Intercommunale pour l'aménagement et l'expansion économique du Brabant Wallon (I.B.W.) C.V. v Siemens N.V.*, (1992) T.B.H. 360, see also I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 645.

202 Hof van Beroep Gent (Court of Appeal Ghent), 29th October 1962, (1962) R.W. 1825.

203 Cour de Cassation (Supreme Court), 26th September 1991, *Association Intercommunale pour l'aménagement et l'expansion économique du Brabant Wallon (I.B.W.) C.V. v Siemens N.V.*, (1992) T.B.H. 360. See also Rechtbank van Koophandel Brussel (Commercial Court Brussels), 20th June 1975, *E Kreschmer (in his capacity as curator of the German company Superthan Kg Feig & Co) v S.A. C.I.E.T.*, (1976) T.B.H. 629.

204 Rechtbank van Koophandel Brussel (Commercial Court Brussels), 20th June 1975, *E Kreschmer (in his capacity as curator of the German company Superthan Kg Feig & Co) v S.A. C.I.E.T.*, (1976)

in Belgium. The German bankruptcy judgment was refused recognition despite the fact that the German court intended the bankruptcy to be universal in nature and intended to give extraterritorial effects to the judgment. The judgment of the commercial court would have been acceptable if the German judgment would indeed have used the option available under German law to discriminate against foreign creditors.²⁰⁵ In practice this had not been the case and it is therefore respectfully submitted that the judgment given by the commercial court is wrong. The German judgment and its recognition in Belgium would not have created consequences in Belgium that would have amounted to a breach of Belgian international public policy. The creditors would de facto have been treated equally. It was not up to the Belgian court to analyse German bankruptcy law in theory.²⁰⁶

Belgian international public policy does also include the universality and unity principle. This argument was used to deny recognition and any effect in Belgium to a Luxembourg judgment the execution of which would clash with a Belgian bankruptcy judgment. The court argued that the Belgian judgment should have universal effect and that the Luxembourg judgment, which would normally have been recognised, should be denied recognition because it would obstruct the full application of the universality principle. As such the foreign judgment clashed with Belgian public policy.²⁰⁷

The foreign court that gave the bankruptcy judgment must also have respected the right of the defence and of all creditors to be represented and it must have been a court of competent jurisdiction. The latter point became very clear in a recent judgment that denied recognition to a French bankruptcy judgment on the basis that

T.B.H. 629.

205 See also *Rechtbank van Koophandel Brussel* (Commercial Court Brussels), 18th June 1965, *Linon (in his capacity as curator) v Vereinsbank Hamburg*, (1968) T.B.H. 161, at 166. In this case the Belgian court refused to recognise a German judgment that had allowed the German bank to exercise its claim against the German creditor of the Belgian bankrupt company.

206 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 389-390.

207 *Rechtbank van Koophandel Brussel* (Commercial Court Brussels), 8th November 1989, *A. Zenner (in his capacity as curator of S.A. Crédithold) v Y. Dumon and M. Lévy-Morelle (in their capacity as curators of S.A. C.C.F. and G. Stein (in his capacity as curator of the Luxembourg holding company S.A. Holding Crédithold))*, (1990) T.B.H. 854.

the court in Paris should not have taken jurisdiction to declare a company that had its seat in Marseille bankrupt. The court in Antwerp did not recognise the bankruptcy and refused to lift the existing Belgian "saisi conservatoire" because the only ground on which this could have been done was the recognition of the extra-territorial effect of the French bankruptcy judgment.²⁰⁸ Any measures that impose certain forms of publicity must also have been observed.

The foreign curator or administrator of the bankruptcy whose competence has been recognised by a Belgian court can take all measures that are necessary to preserve and manage the goods and assets of the bankrupt debtor in Belgium. He or she can bring actions against the debtor's debtors and he can conclude agreements and settlements with the creditors. The curator or administrator also has the right to appear before the courts.²⁰⁹ Acts of forced execution are subject to the exequatur procedure though. This has been held to mean that the curator needs to apply to the court for the exequatur to be given to the foreign bankruptcy judgment before he can obtain a "saisi exécutoire" to seize and sell certain goods.²¹⁰ The exequatur involves a special procedure before the court of first instance and this procedure is also required for the sale by the foreign curator or administrator of immovable property in Belgium.²¹¹

The recognition of a foreign bankruptcy judgment that purports to have extraterritorial and universal effects has always been possible in Belgian law. The principle has been established as early as 1852 by the Belgian supreme court, although arguably for entirely the wrong personal status linked reasons.²¹²

208 *Beslagrechter Antwerpen (Seizure Judge)*, 24th January 1994, *Thetis Shipping Corporation PTE Ltd v N.V. Sasse & Co*, (1996) T.R.V. 516.

209 *Rechtbank van Koophandel Brussel (Commercial Court Brussels)*, 8th November 1989, *A. Zenner (in his capacity as curator of S.A. Crédithold) v Y. Dumon and M. Lévy-Morelle (in their capacity as curators of S.A. C.C.F. and G. Stein (in his capacity as curator of the Luxembourg holding company S.A. Holding Crédithold))*, (1990) T.B.H. 854, at 857.

210 *Hof van Beroep Brussel (Court of Appeal Brussels)*, 26th Januari 1938, (1950) *Rev. Dr. Comp.* 138.

211 Van Houtte argues that the recognition of the judgment should be sufficient for the sale of immovable property and that the notary who should sell the property can be appointed by the court at that stage, Van Houtte, "Internationaal faillissementsrecht", (1978) *TBH II* 372, at 390-391.

212 *Cour de Cassation (Supreme Court)*, 6th August 1852, (1853) *Pas. I*-155.

These general rules for the recognition of foreign international bankruptcy judgments apply in relation to judgments of most foreign courts. Special treaty provisions exist for bankruptcy judgments that have been handed down by the Austrian, French and Dutch courts²¹³. The three treaties involved apply the principle of reciprocity and the rules that were described for the recognition of Belgian bankruptcy judgments in these three countries apply also to the recognition of these foreign judgments in Belgium.²¹⁴

The first of these treaties is the treaty with France. Article 8 paragraph 2 of that treaty deals with the recognition and execution of bankruptcy judgments. The text of the article recognises that a bankruptcy that has been declared in one country will have effects in the other country, if the bankruptcy has been declared by the court that had bankruptcy jurisdiction.²¹⁵ The latter point is illustrated clearly by a judgment in which the commercial court in Ghent refused to recognise a French bankruptcy judgment that declared the personal bankruptcy of the manager of a French bankrupt company, because although the company had its seat in France the manager was domiciled in Belgium. Only the Belgian court had bankruptcy jurisdiction in relation to the manager on the basis of the latter fact.²¹⁶ The curator of the bankruptcy will have all necessary powers in the other country to safeguard or manage the assets of the debtor. He or she can act in court to exercise any claim which the debtor may have or he may represent the bankruptcy in any proceedings. The text of the article contains a single restriction of the powers of the curator. The curator can only perform any acts of execution if the bankruptcy judgment has been given the exequatur by the foreign court. The effect of this restriction is not always very clear in practice. It is beyond doubt that the curator can stop the debtor from

213 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 639.

214 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 103 and Van Houtte, "Internationaal faillissementsrecht", (1978) *TBH II* 372, at 388-389.

215 The fact that the wrong court in France had taken bankruptcy jurisdiction was a ground to refuse the recognition of the judgment, see *Beslagrechter Antwerpen* (Seizure Judge), 24th January 1994, *Thetis Shipping Corporation PTE Ltd v N.V. Sasse & Co*, (1996) *T.R.V.* 516.

216 *Rechtbank van Eerste Aanleg Gent* (Court of First Instance Ghent), 1st February 1996, (1997)

managing its assets and can take over the management of the assets without resorting to the *exequatur* procedure. The same applies to the continuation of the debtor's business, and to attempts to collect the debtor's claims from third parties. Any forced sale of assets against the will of the debtor or any straightforward sale of the business may require an *exequatur* though and the French curator would be well advised to seek the *exequatur* whenever there could be a dispute concerning any of his or her acts or powers, due to the vagueness of the treaty.²¹⁷

The text of the treaty with the Netherlands provides more guidance for the Dutch curator who needs to act in Belgium. Article 21 of the treaty recognises that an international bankruptcy judgment that has been given by a court of competent jurisdiction in any of the countries will have effects in the other country too. The curator of the bankruptcy will have all necessary powers in the other country to safeguard or manage the assets of the debtor. He or she can act in court to exercise any claim which the debtor may have or he may represent the bankruptcy in any proceedings. The curator is specifically mandated to sell the goods and assets of the debtor. The *lex concursus* takes in this respect priority over the *lex rei sitae*.²¹⁸ The text of the article contains a single restriction of the powers of the curator. The curator can only sell the immovable property of the debtor or perform any acts of execution if the bankruptcy judgment has been given the *exequatur* by the foreign court. The effect of this restriction is much clearer than that of the equivalent provision in the treaty with France. The scope of the restriction is much clearer. Forced execution measures seem to be restricted in practice to those cases where the debtor physically resists the attempts of the curator to take over the management of the business and the assets. - The Dutch bankruptcy judgment will be given the same effects in Belgium than in the Netherlands according to paragraph one of Article 21. This includes the possibility to undo act of the debtor during the "suspected" period immediately before the bankruptcy.²¹⁹

T.B.B.R. 343.

217 See Van Houtte, "Internationaal faillissementsrecht", (1978) TBH II 372, at 385.

218 *Rechtbank van Koophandel Tongeren* (Commercial Court Tongeren), 8th May 1996, (1997) T. Not. 241 and (1996-1997) R.W. 861.

219 *Hof van Beroep Gent* (Court of Appeal Ghent), 15th February 1991, (1991) T.B.H. 418.

The treaty with Austria is even more specific on this point. Articles 4 and 11 of this treaty contain detailed rules dealing with the recognition and exequatur of international bankruptcy judgment that have been handed down by the courts of the other country. The Austrian curator is given all powers to perform acts of management and preservation of the assets and the business. The curator is also empowered to act in court on behalf of the debtor or the bankruptcy and he or she can sell all movable and immovable assets of the debtor.²²⁰ The commercial court in Brussels will eventually order measures that are necessary to sell immovable property in Belgium, such as the appointment of a notary to execute the sale. The exequatur of the Belgian courts is only required for any measures of forced execution against the will of the bankrupt debtor.²²¹

220 See I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridiques Belgique (1998), at 639.

221 See Huysmans, "Het faillissement in internationaal privaatrecht", (1989-1990) *Jura Falconis* 77, at 101.

Chapter III - Bankruptcy and Insolvency in English Private International Law

I. English International Insolvency Jurisdiction

1.1. Introduction

In order to allow for an adequate comparison with Belgian Insolvency Law, two aspects of English Insolvency Law need further analysis. Unlike Belgian law English law has traditionally distinguished between two cases of insolvency, i.e. the bankruptcy of private individuals and corporate insolvency. The Insolvency Act 1986 brings both of them under one roof for the first time, but without harmonising the substantive provisions. Our analysis will therefore be divided in two main parts. Of course, the provisions on bankruptcy should be analysed in a first stage. But as only private person-debtors can be adjudged bankrupt, the provisions on corporate insolvency and the winding up of companies are equally important and need attention in a second stage. One helpful point that applies to both stages is that all English provisions on jurisdiction apply to national as well as international insolvency cases, as their wording makes clear. The Insolvency Act 1986 will therefore be the starting point of our analysis.

1.2 Bankruptcy jurisdiction

The bankruptcy provisions of the Insolvency Act 1986 constantly refer to the concept of the debtor in relation to bankruptcy. For the purposes of private international law the Act is less forthcoming though with a definition of the concept. Only a debtor can be adjudged bankrupt, but who is that debtor? What can be said though is that the debtor can only present a bankruptcy petition on the basis of the fact that he is unable to pay

his debts and satisfy his liabilities²²². From a private international law point of view one can add that unsatisfied liabilities and debts that English law recognises must be involved on the one hand and that any action by the creditors to whom these debts are allegedly owed requires necessarily a recognition of the rights of these creditors to invoke these liabilities and debts in the eyes of English law. Creditors can only be allowed to present a bankruptcy petition if they are amongst the persons to whom the unsatisfied debts and liabilities are owed by the debtor²²³. This process may obviously involve a series of incidental questions, for example in relation to the law applicable to any contract from which a liability allegedly arises.

The presence of a debtor is as such no ground though for the English court to take bankruptcy jurisdiction in respect of such a debtor. English courts will only be allowed to exercise that bankruptcy jurisdiction in those cases where additionally the nexus between the debtor and this country is sufficiently substantial to satisfy traditional English notions as to the appropriate limits of the exercise of jurisdiction²²⁴. It is to the latter point that we will now have to turn our attention.

A first important point is the fact that the provisions of the Insolvency Act 1986 make a distinction between cases in which the bankruptcy petition was presented by the debtor or his creditor(s) on the one hand and all other cases on the other hand.²²⁵ The first set of cases will need further detailed analysis, but the second set of cases hardly seems to create problems in relation to private international law. That second set of cases is essentially concerned with the scenario where the debtor is already bound by a voluntary arrangement proposed by him and the bankruptcy petition is being presented by the supervisor of that arrangement or any other person on the basis of the fact that the debtor defaults under the arrangement. It is easy to see why the English court will have jurisdiction in such a scenario, as the debtor has already

222 S. 272 Insolvency Act 1986.

223 S. 267 Insolvency Act 1986.

224 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 25.

225 S. 264 Insolvency Act 1986, see also P. North and J. Fawcett, *Cheshire and North, Private International Law*, Butterworths (12th ed, 1992), at 905-906 and L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1165 (Vol. II).

submitted to the jurisdiction of the court by proposing the voluntary arrangement.²²⁶ That arrangement is a voluntary arrangement proposed by the debtor and approved under Part VIII of the Insolvency Act 1986 and the ‘any other person’ involved is in practice any person who is bound by such an arrangement.²²⁷

Section 265(1) of the Insolvency Act 1986 deals with the jurisdiction issue in case the bankruptcy petition is presented by either the debtor or his creditors²²⁸. Four criteria are laid down in it: domicile of the debtor, presence of the debtor, ordinary residence or place of residence of the debtor and the carrying on of business, either by the debtor himself, by a firm or partnership or by an agent or manager on behalf of the individual, firm or partnership. The presence of one ground of jurisdiction will be sufficient. We will now deal with these grounds for jurisdiction in turn.

1.2.1. Domicile of the debtor

The bare fact that the debtor has a domicile in England and Wales on the day on which the petition is presented, which is the date at which the proceedings start, is sufficient to confer bankruptcy jurisdiction on the English courts.²²⁹ In this context domicile has the meaning ascribed to it at common law²³⁰, because there is no reason to apply the EC-law inspired definition of the Civil Jurisdiction and Judgments Act 1982 to a strictly national insolvency provision. It should be noted that before an English court the domicile of a person is always governed by English law.²³¹ The principle governing

226 S. 276 Insolvency Act 1986 and see I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 27 and L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1165 (Vol. II).

227 S. 264(1)(c) Insolvency Act 1986 and P. North and J. Fawcett, *Cheshire and North, Private International Law*, Butterworths (12th ed, 1992), at 906; Furthermore a petition can follow a criminal bankruptcy order, see S. 264(1)(d) Insolvency Act 1986.

228 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1164, rule 160 (Vol. II).

229 S. 265(1)(a) Insolvency Act 1986, see also P. North and J. Fawcett, *Cheshire and North, Private International Law*, Butterworths (12th ed, 1992), at 905.

230 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1166 (Vol. II).

231 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 37.

the issue is that at birth everyone is given a domicile of origin and that such domicile continues until a subsequent domicile of choice is acquired.²³²

The domicile of origin of a child corresponds to the domicile of its father, or of its mother in case the child is illegitimate or posthumous. Every person can only have one domicile of origin, once acquired at the time of birth the domicile of origin can never be changed.²³³ The existence of an English domicile of origin should be established by means of specific evidence before the Court.²³⁴

A person of full age can acquire a domicile of choice by residing in a country with the intention of staying there permanently. Scarman J. once formulated the test as follows: "A domicile of choice is acquired only if it be affirmatively shown that the *propositus* is resident within a territory subject to a distinct legal system with the intention, formed independently of external pressures, of residing there indefinitely."²³⁵ The residence requirement is easily fulfilled, even one single day of residence is sufficient, but it is extremely difficult to meet the intention requirement. Two cases are reported in which the establishment of a domicile of choice was not accepted because there was no affirmative evidence of the relevant intention although in both cases there was evidence of a period of principal residence of over thirty years.²³⁶ Furthermore, a conditional intention cannot be accepted if the condition is "a reasonably anticipated contingency"²³⁷, but it does meet the intention requirement if it is but a vague possibility²³⁸. It is clear that a strong presumption exists in favour of the continuation of the domicile of origin.

232 Ibidem at 30.

233 See *Re Duleep Singh* (1890) 6 T.L.R. 385 and Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 31-33.

234 Cf. *Re Barne* (1886) 16 Q.B.D. 522, at 524.

235 *Re Fuld's Estate (No. 3)* [1968] P. 675, at 684.

236 *Winans v. Attorney-General* [1904] AC 287 and *Ramsay v. Liverpool Royal Infirmary* [1930] AC 588.

237 *Re Fuld's Estate (No. 3)* [1968] P. 675, at 684 and *IRC v. Bullock* [1976] 1 WLR 1178.

238 *Re Furse* [1980] 3 All ER 838.

An additional problem arises when a domicile of choice has to be established in a situation of multiple residence. In *Plummer v IRC*²³⁹ Hoffmann J. seems to add an additional requirement in those circumstances when he stated that "a person who retains a residence in his domicile of origin can acquire a domicile of choice in a new country only if the residence established in that country is his chief residence".²⁴⁰ It is submitted that *Plummer v IRC* should not be followed and that the additional chief residence requirement does not exist.²⁴¹ This suggestion is based on earlier House of Lords multiple residence authorities. In *Aikman v Aikman* the House of Lords relied on the residence-intention test and put forward no additional requirements although it was demonstrated that this was a case of multiple (English and Scottish) residence.²⁴²

Once acquired, a domicile of choice supersedes the domicile of origin. Such domicile of choice will only cease when both the residence and the intention have been given up. In such a case the original domicile of origin is revived, unless a new domicile of choice is fully established.²⁴³

The burden of proof rests upon the petitioner²⁴⁴. He has to demonstrate that the debtor has his domicile in England and Wales. This often implies extensive research in the debtor's past and in the debtor's present circumstances. Together with the fact that intentions are extremely hard to prove and the fact that in several cases a paternal English domicile of origin does not imply any real link or functional association with England (and/or its economy), this forms the grounds on which the use of domicile as a criterion for bankruptcy jurisdiction can be criticised.²⁴⁵

239 *Plummer v. IRC* [1988] 1 WLR 292 and [1988] 1 All ER 97.

240 *Plummer v. IRC* [1988] 1 All ER 97, at 104.

241 See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 36.

242 *Aikman v. Aikman* (1861) 4 L.T. 374, see also *Maxwell v. M'Clure* (1960) 2 L.T. 65 and *Steiner v. IRC* [1973] S.T.C. 547 (C.A.).

243 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 36.

244 *Re Mitchell, ex parte Cunningham* (1884) 13 QBD 418 (CA) and *Re Barne* (1886) 16 QBD 522 (CA, explaining the former).

245 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 32-33 and Ph. Smart,

1.2.2. Presence of the debtor in the jurisdiction

A creditor or the debtor may present a bankruptcy petition if the debtor is personally present in England and Wales on the day on which the petition is presented, without there being a need to show anything else.²⁴⁶ This means that international bankruptcy jurisdiction may be conferred upon an English Court just because of the personal presence of the debtor, without any need to demonstrate a more articulated link between the debtor and the English legal system. This ground for jurisdiction was introduced by the Insolvency Act 1986 and was applied for the first time in *Re Thulin*, where the debtor was a Swedish national who resided in Belgium and who clearly was no English domiciliary either²⁴⁷. Voluntary presence in the jurisdiction was sufficient. As such this could provoke injustice²⁴⁸, but reference should be made to the discretion of the Court to decline the exercise of such jurisdiction.²⁴⁹

1.2.3. A debtor ordinarily resident or with a place of residence in the jurisdiction

A further ground on which international bankruptcy jurisdiction is conferred upon an English Court is the ordinarily resident criterion. Such jurisdiction exists if at any time in the three year period which ends with the day on which the bankruptcy petition is presented, the debtor has been ordinarily resident in England and Wales.²⁵⁰ The words ordinarily resident are given their ordinary and natural meaning²⁵¹. This is no technical legal issue, but a question of fact and degree. This appears clearly from

Cross-Border Insolvency, Butterworths (2nd ed, 1998), at 30 and at 37-38.

246 S. 265(1)(b) Insolvency Act 1986. One has to be careful though because no service on the debtor is required. The petitioner petitions the court, but will have to show that the debtor is present in the jurisdiction on that day. Similarly a debtor who presents a petition through a representative will have to show that he is present in the jurisdiction on the relevant day if the court's jurisdiction is to be based solely on this provision.

247 *Re Thulin* [1995] 1 WLR 165.

248 P. North and J. Fawcett, *Cheshire and North, Private International Law*, Butterworths (12th ed, 1992), at 905, L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1166 (Vol. II) and Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 38-39.

249 S. 266(3) Insolvency Act 1986, see *infra*.

250 S. 265(1)(c)(i) Insolvency Act 1986.

251 *Nessa v. Chief Adjudication Officer* [1999] 4 All ER 677 and [1999] 1 WLR 1937.

Shah v Barnet London Borough Council, the leading authority on ordinary residence. "‘Ordinarily resident’" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of long or short duration."²⁵² The use of the word ‘ordinarily’ adds a qualitative aspect to the concept of residence and is often seen as a synonym for ‘habitual’ in the sense of habitual residence. Another House of Lords dictum therefore refers to ordinary residence as “connot[ing] residence in a place with some degree of continuity and apart from accidental or temporary absences”²⁵³. A third House of Lords case²⁵⁴ did not require there to be a fixed or a single address for this criterion to be satisfied. Most recently the House of Lords held that ordinary residence required not only that a person was here voluntarily and for settled purposes, but that additionally residence during an appreciable period of time was required to satisfy the ‘ordinary’ criterion. No fixed period was established though and the House held that all relevant factors needed to be taken into account on a case by case basis²⁵⁵.

So, ‘ordinarily resident’ simply refers to the place or country where a debtor normally lives and such residence can clearly be acquired by a temporary stay in England and Wales.²⁵⁶ It is not required that the residence requirement is satisfied for the whole of the three years, it is only required that the residence existed at any time during that three year period.²⁵⁷

Ordinary residence is clearly established when the debtor spends most of his time in England and Wales. It is not necessary to demonstrate any intention to stay permanently.²⁵⁸ Fortunately there is enough case-law on the issue of temporary

252 *Shah v. Barnet London Borough Council* [1983] 2 AC 309, at 343 per Lord Scarman.

253 *Levene v. I.R.C.* [1928] AC 217, at 225 per Lord Cave.

254 *I.R.C. v. Lysaght* [1928] AC 234; see also the bankruptcy cases *Re Norris* (1888) 4 TLR 452, 5 Morr. 111 and *Re Bright* (1901) 18 TLR 37 (CA).

255 *Nessa v. Chief Adjudication Officer* [1999] 4 All ER 677 and [1999] 1 WLR 1937.

256 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 39-40.

257 See P. North and J. Fawcett, *Cheshire and North, Private International Law*, Butterworths (12th ed, 1992), at 905-906 and L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1166 (Vol. II).

258 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 40-42.

presence in England and Wales²⁵⁹ to derive practical guidelines from it.

When a debtor stays in England and Wales for a period of four to five months for purposes of health, family, business or employment, this is an important element in proving that he is ordinarily resident in England and Wales. This rule is derived from the fact that in *Re Bright*²⁶⁰ ordinary residence was accepted upon evidence of an eight months stay to conduct litigation and on the fact that in *Re a Debtor (1898)*²⁶¹ a five months stay in a hotel and a boarding house for the same reason was equally held to be sufficient. Similar tax law cases²⁶² concern stays of four to five months for family, medical and business reasons.

Stays of similar duration are not accepted as sufficient evidence of ordinary residence if no particular purpose²⁶³ motivates them²⁶⁴, unless the visits to England and Wales show a regular pattern over a prolonged period.

Ordinary residence was held to be established as well when visits of less than four months showed a regular pattern, extended over a period of several years, evidence of a settled purpose being available.²⁶⁵ This implies evidently that every debtor can be ordinary resident in several countries at the same time.²⁶⁶

A difficult problem is presented by periods of prolonged absence from England and Wales. In principle the three year period²⁶⁷ runs from the day the debtor leaves England. His intention to return does not exercise any influence. But, the period does not run when the debtor leaves with the intention only to be away for a short period. In

259 See in detail Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 40-42.

260 *Re Bright* (1903) 19 T.L.R. 203.

261 *Re a Debtor (1898)* (1898) 14 T.L.R. 569.

262 *Levene v. IRC* [1928] AC 217 and *Miseages v. IRC* (1957) 37 T.C. 493, at 502.

263 Cf. the "settled purpose" required by *Shah v. Barnet London Borough Council* [1983] 2 AC 309.

264 *Re Erskine* (1893) 10 T.L.R. 32.

265 *IRC v. Lysaght* [1928] AC 234, which was a tax case in which the taxpayer's numerous business trips to England made him spend three months a year in England.

266 See *Re Norris* (1888) 4 T.L.R. 452.

267 S. 265(1)(c)(i) Insolvency Act 1986.

such case the period only runs when the absence is no longer temporary.²⁶⁸

Section 265(1)(c)(i) of the Insolvency Act 1986 not only deals with ordinary residence, but also with place of residence. This means that the English court will have international bankruptcy jurisdiction if the debtor has had a place of residence in England and Wales at any time within the period of three years before the bankruptcy petition is presented²⁶⁹. Evidence showing that the debtor actually resided in England and Wales or that he was ordinarily resident in England and Wales is not required.²⁷⁰ But as the definition of place of residence is a matter of fact and degree²⁷¹, one can only agree with the statement of Goff L.J. that "the more there is actual occupation, the easier it is to reach the conclusion that there was a dwelling house, and the shorter the actual occupation, the more difficult it becomes".²⁷² A legal or equitable interest by the debtor in the place of residence is not required²⁷³, as long as a personal residential nexus is established²⁷⁴. The mere possession of assets in the jurisdiction is therefore not sufficient.

A debtor who does not reside in England, but who keeps his English house to spend his holidays there once a year, has undoubtedly a place of residence in England.²⁷⁵ On the other hand the decision in *Re Brauch*²⁷⁶, where it was decided that the owner of a London house, who lived abroad and had installed in the house the mother of his son, did not have a place of residence in England²⁷⁷, and the decision in *Re Nordenfelt*²⁷⁸, where no place of residence was found because the owner had instructed an estate agent to let the house when he left England, demonstrate that the mere existence of a place in England where the debtor can go to and set himself down, does not imply the

268 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 45.

269 Cf. *Re Hecquard* (1903) 19 TLR 203.

270 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1166 (Vol. II).

271 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 46 and 48.

272 *Re Brauch* [1978] Ch 316, at 335.

273 *Ibidem*.

274 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 38.

275 Cf. *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941.

276 *Re Brauch* [1978] Ch 316.

277 Even if he may have stayed nights.

existence of a place of residence.

1.2.4. Carrying on business in the jurisdiction

The same three year period applies to the last ground of international bankruptcy jurisdiction. If the debtor, either personally or by means of an agent or manager, has carried on business in England and Wales at any time, i.e. for any measurable period, in the period of three years before the bankruptcy petition was presented, the English Court will be granted jurisdiction. The vital question is whether business was carried on at some stage and a continuation of the business at the time when the petition is presented is most definitively not required. The situation is identical if not the debtor, but a firm or partnership of which the debtor was a member carried on the business.²⁷⁹ The personal presence (or absence) of the debtor in England and Wales is irrelevant²⁸⁰ and a place of business or established place is not required²⁸¹.

A first important point is the definition of business. Neither the Act nor the case-law contain a precise definition of this concept. Preference is instead given to a commonsense appraisal of the facts of each case taking into account that a business is one way or the other a sustained and systematic attempt to generate an income²⁸². Isolated and non-systematic transactions are therefore excluded. Acts of buying and selling goods are obviously caught, but so are preliminary acts of trading. An example arose in *Re Oriel Ltd.* where the ownership of various business premises was sufficient to rule that the foreign company carried on business in England.²⁸³ Similarly have been accepted as sufficient evidence for the carrying on of business in England activities

278 *Re Nordenfelt* [1895] 1 QB 151.

279 Ss. 265(1)(c)(ii) and 265(2) Insolvency Act 1986.

280 See *Theophile v. S.-G.* [1950] AC 186, [1950] 1 All ER and *Re Bird* [1962] 2 All ER 406, [1962] 1 WLR 686.

281 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 49.

282 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 40 and *Re a Debtor (No. 3 of 1926)* [1927] 1 Ch 97 (CA).

283 *Re Oriel Ltd.* [1986] 1 WLR 180.

such as raising loan capital²⁸⁴, promoting companies and speculating in land²⁸⁵ and liaising with financial institutions²⁸⁶. So, this ground of jurisdiction is certainly not restricted to trading activities and whether or not any contracts were concluded in England and Wales is irrelevant.²⁸⁷ The latter principle is derived from the *South India Shipping Corporation Ltd. v Export-Import Bank of Korea* case²⁸⁸, but there is no reason not to apply it to individual debtors instead of agents without contractual authority, nor does Section 265 contain any indication that the conclusion of contracts or contractual authority are required.

Another important aspect is presented by the time element. The House of Lords²⁸⁹ ruled that the carrying on of business does not cease, which means that the three year period after which the English Court does no longer have jurisdiction does not start to run, until all debts arising out of the business have been discharged.²⁹⁰

A final and important point is that Section 265(1)(c)(ii) requires that it is the debtor's own business that is carried on, while Section 265(2)(a) makes it clear that this bankruptcy jurisdiction cannot be avoided by carrying on the business by means of a firm or partnership. In this author's view the latter provision would become senseless if the theory of corporate personality would be used to argue that the business carried on by the firm or the partnership is exclusively the firm's or the partnership's business, and that this prevents the bankruptcy of the individual debtor. Section 265(2)(a) should be seen as Statutory exception to the doctrine of corporate personality, such business should be seen as the business carried on by both the debtor and the firm or the

284 *Lord Advocate v. Huron and Erie Loan and Savings Co.* [1911] S.C. 612.

285 *Re Brauch* [1978] Ch 316.

286 *South India Shipping Corporation Ltd. v. Export-Import Bank of Korea* [1985] 1 WLR 585.

287 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 51 and 57.

288 [1985] 1 WLR 585.

289 *Theophile v. S.-G.* [1950] A.C. 186, [1950] 1 All ER applied in *Re Bird* [1962] 2 All ER 406, [1962] 1 WLR 686, *Re Vassis* (1986) 64 A.L.R. 407 and *Re a Debtor (No. 784 of 1991)* [1992] Ch 554, see also L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1166-1167 (Vol. II) and Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 55.

290 Tax liabilities are included, see *Theophile v S.-G.* [1950] A.C. 186, [1950] 1 All ER; *Re Bird* [1962] 2 All ER 406, [1962] 1 WLR 686 and *Re a Debtor (No. 784 of 1991)* [1992] Ch 554.

partnership.²⁹¹ The Court of Appeal in *Ransome v. Chancery plc* has indeed agreed to lift the corporate veil in this respect if necessary²⁹². A debtor who was in control of a number of companies and tried to carry out all transaction through these companies was nevertheless held to have been carrying on his business on his own account in the jurisdiction for the purposes of Section 265(1)(c)(ii) of the Insolvency Act 1986. He could not hide behind the argument that his only link with the jurisdiction was as a director of the companies concerned. The Court of Appeal only seemed to require that the debtor was effectively sole in charge and that he acted as if carrying out his own business. This is clearly an extension of the view held in *Re Brauch*²⁹³ where there was at least some suggestion that the debtor had been conducting his own business even if the latter was closely associated with the business of the companies involved.

1.2.5. The court's discretion

The general scope of the English international bankruptcy jurisdiction provisions is extremely wide, even cases with almost no factual link with England and Wales are caught. This exuberance is balanced by Section 266(3) of the Insolvency Act which gives the court discretionary powers: "The court has a general power, if it appears appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason, to dismiss a bankruptcy petition or to stay proceedings on such a petition; where it stays proceedings on a bankruptcy petition, it may do so on such terms and conditions as it thinks fit".²⁹⁴ There is at present little indication as to how this discretion will be exercised by the courts, but guidance can be obtained from older cases²⁹⁵ which implemented similarly worded provisions and this discretion will no doubt also be exercised relying *mutatis mutandis* on the test the House of Lords advanced when it accepted the general doctrine of forum non conveniens for issues of

291 Compare Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 51-54.

292 *Ransome v. Chancery plc* [1994] The Independent 31st March (judgment of 30th March 1994).

293 *Re Brauch* [1978] Ch 316, [1978] 1 All ER 1004; see also *Re Clark* [1914] 3 KB 1095. Dillon L.J. nevertheless referred to these cases as providing clear guidance for his decision in *Ransome v. Chancery plc* [1994] The Independent 31st March.

294 See the application in *Re Thulin* [1995] 1 WLR 165.

295 See e.g. *Re Behrends* (1865) 12 LT 149; *Ex p. Robinson* (1883) 22 Ch D 816 (CA).

jurisdiction in English private international law²⁹⁶. The court will indeed also in this context examine whether "there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice".²⁹⁷

Before considering which elements will be taken into account in the court's examination, some attention should be paid to general principles. First, the doctrine of unity is not part of English law.²⁹⁸ So, the sole fact that proceedings have equally been commenced before the court of the debtor's domicile will not convince the English court to stay the proceedings before it, nor will the court be convinced by evidence showing that the foreign bankruptcy proceedings were first in time.²⁹⁹ And secondly, although the territorial element of a separate bankruptcy in each jurisdiction is part of English law, the universality of the bankruptcy is accepted as long as no English bankruptcy proceedings have been begun and no English immovables are concerned.³⁰⁰ In general terms, the fact that a debtor has been declared a bankrupt abroad does not deprive the English court of jurisdiction to adjudge him a bankrupt in England³⁰¹.

It is important to see that the discretion of the court is not new in bankruptcy cases, although there are only few reported cases in which English courts effectively declined to take jurisdiction or stayed the proceedings.³⁰² In *Re Behrends* the court stayed proceedings, because the presence of the debtor and a few of his creditors in England could not prevent that the fact that the debtor's trading was going on in Hamburg and

296 See *Re Harrods (Buenos Aires) Ltd.* [1992] Ch 72 (CA) and I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 53-54.

297 *Spiliada Maritime Corpn. v. Cansulex Ltd.* [1987] AC 470, at 474 (per Lord Goff of Chieveley).

298 *Re Artola Hermanos* (1890) 24 Q.B.D. 640.

299 *Ibidem*, at 648-649, see also *Re Thulin* [1995] 1 WLR 165.

300 P. North and J. Fawcett, *Cheshire and North, Private International Law*, Butterworths (12th ed, 1992), at 906-907, this relates especially to the effects of bankruptcy judgments, see extensively Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), chapters 5 to 8.

301 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1170, rule 161 (Vol. II).

302 Smart "Forum Non Conveniens in Bankruptcy Proceedings" [1989] J.B.L. 126.

that his assets and the majority of his creditors were found there made Hamburg the appropriate bankruptcy forum.³⁰³ The absence of debts and assets in England and the existence of proceedings in Scotland made the English court decline to take jurisdiction in *Re Robinson*.³⁰⁴ But until recently these were exceptional cases. The old approach was in most cases based on the assumption that once jurisdiction was established the petitioning creditor was entitled to an order³⁰⁵. Fortunately this attitude has now changed and forum non conveniens has now established itself as an important consideration in this area³⁰⁶. Lord Justice Millett, as he then was, recently listed “flexibility, co-operation and judicial restraint” as the modern trends in cross-border insolvency.³⁰⁷

The burden of proving that the foreign forum is more appropriate lies on the party seeking a stay or asking the court to decline jurisdiction. The other party has to demonstrate that justice would not be done in the foreign forum in order to obtain an English trial.³⁰⁸ The following elements are taken into account in this process.

A first element is the comparison between the progress made in the foreign and the English proceedings at the time a stay is sought. But the speed and progress of the foreign proceedings will only be positive aspects in as far as they indicate their efficiency, expedition and economy.³⁰⁹ The gathering of evidence concerning the debtor's business can be seen as a positive point, but the fact that a court was first in time in taking jurisdiction is, as such, irrelevant.³¹⁰ The existence of a foreign bankruptcy judgment is a reason for the English court to exercise its discretion not to

303 *Re Behrends* (1865) 12 L.T. 149, see also *Re a Debtor* (1929) 1 Ch 362 where proceedings were not stayed.

304 *Re Robinson* (1883) 22 Ch. D. 816 (also reported as *Ex p. Robinson*).

305 Smart, "Cross-Border Insolvency and Judicial Discretion" [1999] *Insolvency Lawyer* 12, at 12.

306 See e.g. *Re Wallace Smith & Co. Ltd.* [1992] B.C.L.C. 970 and *Re Wallace Smith Group Ltd.* [1992] B.C.L.C. 989.

307 Millett, "Cross-Border Insolvency : The judicial Approach", (1997) 6 I.I.R. 99.

308 *Spiliada Maritime Corpn. v. Cansulex Ltd.* [1987] AC 470.

309 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 76-77, see *Spiliada Maritime Corpn. v. Cansulex Ltd.* [1987] AC 470, at 485.

310 *Re Artola Hermanos* (1890) 24 Q.B.D. 640, at 649 and Smart, "Forum Non Conveniens in Bankruptcy Proceedings" [1989] J.B.L. 126, at 130.

exercise jurisdiction³¹¹, but it is not a conclusive reason³¹². Its weight goes up if there are at the same time no assets in the jurisdiction³¹³, but it goes down further if the foreign decision is the simple result of the debtor's own bankruptcy petition.³¹⁴

An important element in favour of taking jurisdiction, though on its own not decisive³¹⁵, is the existence of a majority of creditors in that (English or foreign) jurisdiction.³¹⁶ The existence of a majority of assets in a jurisdiction³¹⁷ should be dealt with similarly.³¹⁸ It has also been argued that despite the absence of assets in the jurisdiction jurisdiction should be taken in respect of a debtor with international activities if the English order is to be recognised abroad and if it may assist the creditors in reaching assets abroad.³¹⁹

The location and availability of evidence and witnesses is another element that is to be taken into account.³²⁰ Any hint of an attempt to abuse the legal process or to commit fraud on creditors will militate strongly against the court declining jurisdiction.³²¹ The

311 *Ex p. McCulloch* (1880) 14 Ch D 716 (CA); in a corporate context see *New Hampshire Insurance Co. v. Rush & Tompkins Group plc* [1998] 2 B.C.L.C. 471.

312 *Re Thulin* [1995] 1 WLR 165.

313 *Ibidem*, see also *Re Behrends* (1865) 12 LT 149; *Ex p. Robinson* (1883) 22 Ch D 816 and *Re Otway* [1895] 1 QB 812 (CA).

314 *Re a Debtor (No. 199 of 1922)* [1922] 2 Ch 470 (CA).

315 It may be outweighed e.g. by a combination of a minority of creditors and the carrying on of business in the other jurisdiction, see *Re a Debtor* (1929) 1 Ch 362.

316 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 77 and Smart, "Forum Non Conveniens in Bankruptcy Proceedings" [1989] J.B.L. 126, at 131.

317 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 78 and Smart, "Forum Non Conveniens in Bankruptcy Proceedings" [1989] J.B.L. 126, at 131-132; the old rule that English assets prevented a stay and meant that no English court would decline jurisdiction, because the absence of assets in England motivated the stay in *Re Behrends* ((1865) 12 L.T. 149) and the decline to take jurisdiction in *Re Robinson* ((1883) 22 Ch. D. 816), is no longer valid due to the speed at which assets can be moved to another jurisdiction, see *Derby & Co. Ltd. v. Weldon (Nos. 3 and 4)* [1990] Ch 65 and *Re Thulin* [1995] 1 WLR 165, at 171.

318 The presence of English land amongst the assets is no obstacle. Although a foreign bankruptcy decree (special provisions provide a different solution for adjudications in Scotland and Northern Ireland) will not vest English land in a foreign assignee (*Waite v. Bingley* (1882) 21 Ch. D. 674), an order to allow a foreign assignee to dispose of English immovables can be made (see *Re Kooperman* (1928) 128 Weekly Notes 101 and *Re Osborn* (1931-1932) 15 B. and C.R. 189, see also Section 426 Insolvency Act 1986 (*infra*)).

319 *Re Thulin* [1995] 1 WLR 165.

320 *Re Behrends* (1865) 12 L.T. 149, see Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 82.

321 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 51-52.

presence of the debtor is, as such, a less important factor.

Elements that are not taken into account are the domicile of the debtor³²², the existence of foreign injunctions³²³, which party started the foreign proceedings³²⁴ and the presence of revenue claims in the foreign proceedings³²⁵.

If the foreign forum is clearly more appropriate, the English court will grant a stay or decline to take jurisdiction, unless the case presents special circumstances that result in a situation in which justice requires the continuation of the English bankruptcy proceedings.³²⁶ The most eminent example of such circumstances is unfair discrimination against English creditors in the foreign proceedings.³²⁷

It is submitted that no other circumstances justify full English proceedings in these circumstances. In response to concerns about the treatment abroad of preferential and secured creditors the English court should nevertheless grant a stay, but on condition that the relevant assets are used to satisfy these preferential and secured creditors.³²⁸ If certain property is only recoverable through proceedings in England, those proceedings should be restricted to the gathering of these assets and afterwards these assets should

322 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 80.

323 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 77-78, see *Felixstowe Dock and Railway Co. v. United States Lines Inc.* [1989] QB 360. Nevertheless, the English court will bear the conduct of the creditors and any existing orders of the foreign court in mind when determining where the interests of justice lie. See *Banque Indosuez S.A. v. Ferromet Resources Inc.* [1993] B.C.L.C. 112 and compare *Rowland v. Gulpac Ltd (No. 1)*, *Inoco plc v. Gulf USA Corp. (No. 1)* [1999] Lloyd's Rep. Bank. 86 (confirmed on appeal sub nom. *Inoco plc and others v. Gulf USA Corp.*, Court of Appeal 24th January 1997, unreported, Lexis transcript available).

324 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 76-77, Smart, "Forum Non Conveniens in Bankruptcy Proceedings" [1989] J.B.L. 126, at 132 and *Re Debtor* (1922) 2 Ch 470.

325 At least if the foreign proceeding do not have the enforcement of a revenue debt as main goal, see Smart, "Forum Non Conveniens in Bankruptcy Proceedings" [1989] J.B.L. 126, at 132, Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 82 and Smart "International Insolvency and the Enforcement of Foreign Revenue Laws" [1986] 35 I.C.L.Q. 704.

326 *Spiliada Maritime Corpn. v. Cansulex Ltd.* [1987] AC 470.

327 *Galbraith v Grimshaw* [1910] AC 508 and *Felixstowe Dock and Railway Co. v. United States Lines Inc.* [1989] QB 360, see also Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 83.

328 See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 84-86 and the Canadian case *Stabb, Preston and Prowse (Assignees) v. Stabb, Preston, Prowse and Co. (trustees)* (1821) Nfld. 298.

be given over to a foreign assignee.³²⁹ This solution guarantees efficiency, economy and justice and leaves a maximum of assets available for distribution amongst the creditors and wastes a minimum of assets on procedural costs.

1.2.6. Service of proceedings out of the jurisdiction

On many occasions the application of the jurisdiction provisions of the Insolvency Act 1986 will require service of the proceedings out of the jurisdiction, especially for those cases where the petition is presented by a creditor. Service is not required for the petition to be presented to the court, but in a second stage the petition must be brought to the attention of the debtor and it is at this stage that the issue of service out of the jurisdiction normally arises³³⁰. Special rules apply to these special circumstances. The Insolvency Rules 1986 allow the court to order service of the petition on the debtor in any way which it may direct³³¹. Service on a firm of solicitors in the jurisdiction was accepted in *Re Busytoday Ltd* as a valid option in a case where the debtor is resident abroad and it was accepted that Order 11 RSC and CPR practice in this area provide no binding guidance on this point. At a later stage in the same case the sending of a letter to the debtor at an address abroad without respecting local procedures abroad was equally accepted as valid service for these purposes³³². Personal service on the debtor is always the preferred option, but substituted service is also a possibility, for example for those cases where the debtor deliberately keeps out of the way to make sure that prompt personal service cannot be effected³³³.

Leave of the court may also be required once the proceedings are ongoing. This will apply for example to an action brought by creditors to undo the effects of a transaction

329 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 86-89, this seems to be a consequent application of the principle that formed the basis for Section 426 Insolvency Act 1986.

330 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1168-1169 (Vol. II).

331 R. 12.12 Insolvency Rules 1986; *Re Busytoday Ltd* [1992] 1 WLR 683.

332 *Re Busytoday Ltd* [1992] 1 WLR 683.

333 R. 6.14(2) Insolvency Rules 1986; see *Re Urquhart* (1890) 24 QBD 723 (CA); *Re a Judgment Debtor (No. 1539 of 1936)* [1937] Ch 137 (CA) and *Re a Debtor (No. 419 of 1939)* [1939] 3 All ER 429 (CA).

entered into at an undervalue by the debtor. Whilst the legal basis for such an action is found in the Insolvency Act 1986, leave to serve out of the jurisdiction will have to be obtained under the normal Civil Procedure Rules in this respect. The reason for this difference in approach is that whilst service of the petition is not service of the document instigating the procedure, as the latter has already started when the petition is presented to the court and as service on the debtor is not required in this respect, in the case of an action to undo the effects of a transaction there is nothing to distinguish it from a normal case. Instead of an action that will also affect third parties, this is a normal action between private litigants and the action will only start when service is effected. Hence the return to normal CPR principles.³³⁴ It is important to underline the discretion which the court has in this respect. In *Re Howard Holdings Inc.*, a case concerning wrongful trading proceedings, Chadwick J. put it as follows:

“the court must, it seems to me, be satisfied that the case is a proper case for service on a person who is abroad” and there had to be a “real issue [...] which the court might reasonably be asked to try” whilst at the same time “the court must take account of the fact that the prospective respondent is abroad, and should not be required to answer claims in England unless there is good reason why England is the proper place for those claims to be litigated”³³⁵.

1.3 Winding-up jurisdiction

As indicated above, an adequate comparison with Belgian law is only possible if the English provisions on corporate insolvency are also taken into account. This leads to the provisions on winding up insolvent companies.³³⁶

334 See *In re Banco Nacional de Cuba*, Chancery Division 11th April 2001 per Lightman J., [2001] The Times 18th May 2001.

335 *Re Howard Holdings Inc.* [1998] BCC 549.

336 A solvent (English or foreign) company can also be wound up subject to the provisions of the Brussels Convention 1968, but only the provisions on insolvent companies are relevant in a comparison with Belgian company-bankruptcy provisions. It would also lead too far to consider all special provisions relating to companies registered in Scotland or Northern Ireland, or with their only

1.3.1. *The place of registration*

The obvious connecting factor in relation to companies is the place of incorporation.³³⁷ Accordingly, the Insolvency Act 1986 provides that the High Court can wind up any company registered in England.³³⁸ The certificate of registration is the only thing that matters³³⁹. It is for example irrelevant whether or not the company was set up to trade in the jurisdiction or abroad³⁴⁰. This is a clear ground of jurisdiction for English companies but an equivalent for foreign companies is not found in the Insolvency Act 1986. It would however not be wise to assume that no English court has jurisdiction to wind up a foreign company, because foreign companies fall clearly within the scope of Section 220, which gives a definition of unregistered companies.³⁴¹

1.3.2. *Winding-up an unregistered company*

Section 221 permits the winding up of an unregistered company and allows the court to act if the company has been dissolved³⁴², no longer carries on business or carries it on only for the purposes of winding up its affairs, is unable to pay its debts or if the winding up of the company is a just and equitable solution.³⁴³ No specific link with England seems to be required, but the jurisdiction given to the English court is not an exorbitant one, because the courts introduced specific bases of jurisdiction that require

principal place of business there. A last point which will not be taken into consideration is the allocation of jurisdiction within the United Kingdom. See on all these issues Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), chapter 4.

337 See P. North and J. Fawcett, *Cheshire and North, Private International Law*, Butterworths (12th ed, 1992), at 897-899.

338 S. 117(1) Insolvency Act 1986.

339 See e.g. *Re Baby Moon (UK) Ltd.* [1984] The Times 12th November and (1985) PCC 103 for an example with interesting complicating factors in the sense that the head office of this English registered company seemed to be in Scotland.

340 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 124-126.

341 S. 220 Insolvency Act 1986 and Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 95.

342 Despite the use of the present tense in the Statute, see *Re Russian and English Bank* [1932] 1 Ch 663 and *Banque des Marchands de Moscou v. Kindersley* [1951] Ch 112, at 125 (CA).

343 Ss. 221(1) and 221(5) Insolvency Act 1986

a sufficient link with England and Wales.³⁴⁴ In this sense the jurisdiction for the English courts to wind up a foreign registered company or any other unregistered company³⁴⁵ is subject to further conditions being met.³⁴⁶ It is also required that there are persons who would benefit from the making of a winding-up order.³⁴⁷

The first ground of jurisdiction pointing towards a sufficient connection with the jurisdiction that has been suggested in this respect is the existence in England and Wales of a branch office of the foreign company. In *Re Matheson Brothers Ltd.* a New Zealand company was wound up because it had a branch office and assets in England.³⁴⁸ The latter requirement, i.e. the presence of assets in the jurisdiction, was dropped in *Re Lloyd Generale Italiano*. The absence of an English branch office was a sufficient reason to decline jurisdiction.³⁴⁹

More than fifty years later the requirement that there should be assets in the jurisdiction resurfaced, but in a different way. The Court of Appeal took the position that no jurisdiction was taken in *Re Lloyd Generale Italiano* because no assets were found in England. This interpretation led to the rule that jurisdiction to wind up a foreign company only exists provided there are assets and persons concerned or interested in their proper distribution in England and Wales, which was applied to *Banque des Marchants de Moscou (Koupetschesky) v Kindersley*.³⁵⁰ In practice though this rule consists of two parts, the presence of assets in the jurisdiction and the fact that certain persons would benefit from the making of a winding-up order. These will now be analysed in turn.

344 See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 97-102.

345 See *Maunder v. Lloyd* (1862) 2 J.& H. 718 in relation to the winding-up of a foreign partnership.

346 See generally *Re Matheson Brothers Ltd.* (1884) 27 Ch. D. 225; *Re Commercial Bank of South Australia* (1886) 33 Ch D 174 and *Re Federal Bank of Australia* [1893] W.N. 77 (CA).

347 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1116-1117, rule 155(2) (Vol. II).

348 *Re Matheson Brothers Ltd.* (1884) 27 Ch. D. 225.

349 *Re Lloyd Generale Italiano* (1885) 29 Ch. D. 219.

350 *Banque des Marchants de Moscou v. Kindersley* [1951] Ch 112, see for another application of the rule *Re Azoff-Don Commercial Bank* [1954] Ch 315.

The assets concerned can be of various origin and nature. The argument that non-commercial or non-business assets cannot be taken into account has been rejected in *Re Compania Merabello San Nicholas S.A.*³⁵¹ Assets of any description seemed to be sufficient, as even a right of action with a reasonable chance of success was accepted³⁵². It seems that every additional requirement relating to the assets has to be rejected. Further guidance on this point has been provided by *Re Compania Merabello San Nicholas S.A.* and *Re Kailis Groote Eylandt Fisheries Pty. Ltd.*³⁵³ The English assets do not need to be of substantial value³⁵⁴ and their presence within or absence from the jurisdiction is determined when the petition is presented.³⁵⁵ The fact that the court allowed an asset to be taken out of any winding up proceedings and to be vested in the petitioners shows that it is irrelevant whether or not the assets are handed over to the liquidator to be distributed amongst the creditors.³⁵⁶

Two recent cases seem to indicate that even without the existence of assets in England and Wales an English court might consider taking jurisdiction. In the *Re Eloc Electro-Optieck and Communicatie B.V.* case Nourse J. stated that "the ownership of assets by the company is not a matter of crucial importance".³⁵⁷ Jurisdiction was taken even though the relevant assets belonged to an outside source and the company only carried on business in England by means of an agent. The second case, *International Westminster Bank p.l.c. v. Okeanos Maritime Corpn.*, goes even further. The judge put forward this rule: "In the circumstances, I am prepared consistently with the *Eloc* case [1982] Ch. 43 to hold that the presence of assets in this country is not an essential condition for the court to have jurisdiction in relation to the winding up of a foreign company. In my judgment, provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign company".³⁵⁸ The latter

351 *Re Compania Merabello San Nicholas* (1973) Ch 75, at 88.

352 *Re Allobrogia Steamship Corporation* [1978] 3 All ER 423.

353 *Re Kailis Groote Eylandt Fisheries Pty. Ltd.* (1977) 2 A.C.L.R. 574.

354 *Ibidem*, at 580-581.

355 *Re Kailis Groote Eylandt Fisheries Pty. Ltd.* (1977) 2 A.C.L.R. 574.

356 *Re Compania Merabello San Nicholas* (1973) Ch 75.

357 *Re Eloc Electro-Optieck and Communicatie B.V.* [1982] Ch 43, at 48.

358 *Re A Company (No. 00359 of 1987)* [1988] Ch 210, at 225-226 and sub nom. *International Westminster Bank p.l.c. v. Okeanos Maritime Corpn.* [1987] B.C.L.C. 450 and [1989] Lloyd's M.C.L.

rule, although one can agree on the point that there is no logical reason to rely exclusively on assets (which can even work against the cause of justice), forms no workable solution because the close connection concept is far too vague as a ground for jurisdiction. It is submitted that the ground of jurisdiction which supports both cases is the carrying on of business in England by means of an agent.³⁵⁹ And there were assets in these cases. Only they were assets that did not belong to the debtor³⁶⁰, but there was nevertheless a reasonable chance that the creditors would ultimately benefit from these assets³⁶¹. One arrives therefore at the conclusion that assets in the strict sense are only an example of a close connection, but that carrying on business in the jurisdiction is equally an example, as is the combination of assets in a very loose sense as described above and further evidence that persons would benefit from the making of the order.

The latter element is almost automatically accepted when there are real assets in the strict sense in the jurisdiction. In such a case it is seen as self-evident that persons will benefit from the making of a winding-up order by the English courts. But the benefit aspect becomes more important and is less automatically accepted in those cases where the assets link becomes a very loose one. For example in *Re A Company (No. 00359 of 1987) International Westminster Bank p.l.c. v. Okeanos Maritime Corpn.* the only assets link was provided by a loan agreement that was governed by English law and that was to be performed in England and that some business was carried out in England. In the absence of assets in the strictest sense in the jurisdiction, much more attention was paid to the benefit of making the order. This was found in the possibility for the liquidator to succeed in an action for fraudulent or wrongful trading against the directors of the company if the latter was wound up³⁶². That benefit may also turn out

.Q. 20 (annotated).

359 See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 101-102.

360 Compare L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1119-1120 (Vol. II).

361 E.g. payments to unfairly dismissed employees by the Department of Employment redundancy fund, see *Re Eloc Electro-Optieck and Communicatie B.V.* [1982] Ch 43.

362 *Re A Company (No. 00359 of 1987)* [1988] Ch 210, at 225-226 and sub nom. *International Westminster Bank p.l.c. v. Okeanos Maritime Corpn.* [1987] B.C.L.C. 450 and [1989] Lloyd's M.C.L.-Q. 20 (annotated); see also *Re Compania Merabello San Nicholas* (1973) Ch 75 and *Re Eloc Electro-Optieck and Communicatie B.V.* [1982] Ch 43.

to be the protection of the public interest in appropriate cases.³⁶³

There are also cases that accept that the close connection can be established by the fact that the debtor, either as such or via an agent, carries on business in the jurisdiction³⁶⁴. Most of these cases do not discuss the presence of assets at all and quite readily accept that a benefit will arise without much in depth discussion or analysis. Carrying on business is therefore placed at the same level as the presence of assets in the strict sense.

Overall, one can only agree with Ph. Smart's summary that

"the English court has jurisdiction to wind up an insolvent foreign company if:

- (a) there are assets in England³⁶⁵ or the company has carried on business in England either through a branch office or by means of agents³⁶⁶; and
- (b) there is a reasonable possibility of benefit accruing to creditors from the making of a winding up order³⁶⁷." ³⁶⁸

363 *Re Vanilla Accumulation Ltd.* [1998] The Times 24th February.

364 *Re a Company (No. 003102 of 1991)*, *ex p. Nyckeln Finance Co. Ltd.* [1991] B.C.L.C. 539; *Re Mid East Trading Ltd., also known as Lehman Bros. Inc. v. Phillips, Phillips v. Lehman Brothers* [1997] 3 All ER 48, [1997] 2 B.C.L.C. 230 (affirmed on appeal without discussing the point [1998] 1 All ER 577 (CA)) and see also *Re Latreefers Inc.* [1999] 1 B.C.L.C. 271; *Re A Company (No. 00359 of 1987)* [1988] Ch 210, at 225-226 and sub nom. *International Westminster Bank p.l.c. v. Okeanos Maritime Corpn.* [1987] B.C.L.C. 450 and [1989] Lloyd's M.C.L.Q. 20 (annotated) and *Re Eloc Electro-Optieck and Communicatie B.V.* [1982] Ch 43. In contrast, in the absence of any business being carried on jurisdiction was declined in *Re Real Estate Development Co.* [1991] B.C.L.C. 210 and in *Re Titan International Inc.* [1998] 1 B.C.L.C. 102 (CA).

365 *Banque des Marchands de Moscou v. Kindersley* [1951] Ch 112.

366 Interpreting *Re Eloc Electro-Optieck and Communicatie B.V.* [1982] Ch 43 and *Re A Company (No. 00359 of 1987)* [1988] Ch 210.

367 *Re Compania Merabello San Nicholas* (1973) Ch 75, such creditors can be foreigners see *Re Azoff-Don Commercial Bank* [1954] Ch 315 and *Re Kailis Groote Eylandt Fisheries Pty. Ltd.* (1977) 2 A.C.L.R. 574.

368 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 123. Section 225 Insolvency Act 1986 may seem superfluous at first glance, as cases that are covered by it are already within the scope of Section 221. It is nevertheless worth including a provision that stipulates specifically that companies incorporated abroad but carrying out business in this country can be wound up as unregistered companies, irrespective of any proceedings in the country of incorporation. At present though section 225 has remained a dead letter. It was originally intended to deal retrospectively in this country with a foreign company that had already been dissolved abroad, but that retrospective effect

Obviously this rule comes on top of the rule giving the English courts jurisdiction to wind-up any company registered in England³⁶⁹, making it a very wide basis for jurisdiction. And clearly it will not always be appropriate to exercise this very wide power to take jurisdiction.

1.3.3. The court's discretion

It is important to add that the English courts have a similar discretion in corporate winding-up cases as in bankruptcy cases. The principles set out above in relation to bankruptcy cases will therefore not be repeated here, but apply *mutatis mutandis*. The courts can stay the proceedings or decline jurisdiction.³⁷⁰ On this point the authorities,³⁷¹ which point towards a principal winding up in the country of incorporation³⁷², assisted by ancillary liquidations in all other countries where jurisdiction is taken, should be supported.³⁷³ Such ancillary winding up could consist of the realisation of all English assets, where-after the funds could be transferred to the principal proceeding, eventually on a conditional basis (equality of creditors and special creditor's rights)³⁷⁴. This would be the most efficient procedure and would allow substantial economies of time and money while all essential rights of the creditors would be guaranteed. But there will no doubt also be cases where even an ancillary proceeding and taking jurisdiction in that respect cannot be justified on the basis of the facts of the case. In those cases English courts can and have proved willing

was denied by the judgment of Bennett J. in *Re Russian and English Bank* [1932] 1 Ch 663. For further details see I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 142-143.

369 Compare L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1116-1117, rule 155 (Vol. II). The latter rule takes also account of all those scenarios that were not included in the present comparative analysis.

370 See *Banque des Marchands de Moscou v. Kindersley* [1951] Ch 112, at 126 and *Re a Company* (No. 00359 of 1987) [1988] Ch 210, see *supra* for a more detailed analysis.

371 E.g. *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.

372 See e.g. *Re a Company* (No. 00359 of 1987) [1988] Ch 210 and *Re a Company* (No. 003102 of 1991), *ex p. Nyckeln Finance Co. Ltd.* [1991] B.C.L.C. 539.

373 See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed, 1998), at 127-130 and Chapter 14 (more extensively).

374 See *Re Bank of Credit and Commerce International S.A. (No. 10)* [1997] Ch 213 and [1996] 4 All ER 796.

to decline jurisdiction altogether in favour of the courts of the country of incorporation³⁷⁵ or in favour of the country where the company's central control and management are exercised³⁷⁶. On the other hand, the absence of an alternative forum is obviously no prerequisite for the jurisdiction of the English court to make an order.³⁷⁷

1.3.4. Assistance between courts

This brings us to cooperation between courts and Section 426 of the Insolvency Act 1986. The latter section is also the subject of further analysis at other stages of this work. Here it is looked at in the context of co-operation between courts that have both decided to take jurisdiction. These comments apply to bankruptcy and winding-up cases in the same way.

Section 426 organises the co-operation between courts exercising jurisdiction in relation to insolvency. It is important to see that the foreign court must have insolvency jurisdiction and that the only English court that can consider such co-operation is the court dealing with insolvency cases.³⁷⁸ This Section does not add anything concerning insolvency-jurisdiction issues, it only provides Statutory support in favour of ancillary proceedings.

In general, four conditions have to be satisfied before the English court can give assistance to a foreign court. First of all, a proper request for assistance should be made by the foreign court. That court should itself have jurisdiction in relation to insolvency law and the request should relate to insolvency law. A last condition is that the requesting court is a court in a relevant country. This means in practice that the country is designated specifically by the Secretary of State by order made by statutory

375 *New Hampshire Insurance Co. v. Rush & Tompkins Group plc* [1998] 2 B.C.L.C. 471.

376 *Re Harrods (Buenos Aires) Ltd.* [1992] Ch 72 (CA).

377 *Re Wallace Smith & Co. Ltd.* [1992] B.C.L.C. 970 and *Re Wallace Smith Group Ltd.* [1992] B.C.L.C. 989.

378 S. 426(4) Insolvency Act 1986, a full discussion on the provisions on co-operation between courts in the United Kingdom would lead too far, see Woloniecki, "Co-operation between National Courts in International Insolvencies: Recent United Kingdom Legislation" [1986] 35 I.C.L.Q. 644.

instrument, according to Subsection 11.³⁷⁹ The latter condition is very restrictive, and at present no EU Member-State, apart from Ireland, for example is a "relevant country". It is submitted that such a co-operation provision is useful, but that it will only work if the latter condition is dropped and if an English court can give ancillary assistance within the limits imposed by English law, even if it has no full insolvency jurisdiction.³⁸⁰ Abuses are ruled out by the discretion the court has in relation to the manner in which assistance is given³⁸¹, although it is bound to assist the requesting court once all conditions have been satisfied³⁸².

II. Choice of Law

II.1. The *lex fori* as obvious starting point

Choice of law in personal insolvency cases and in relation to the winding up of a company has long been regarded as a straightforward matter. The courts seemed to have agreed that English law would apply both to the procedural matters and to matters of substance.³⁸³ This rule seemed to apply as soon as an English court had taken jurisdiction to deal with the bankruptcy or insolvency case. It is submitted that the correct position is slightly more complex and that care needs to be taken when dealing with this rule.

379 S. 426(3),(4),(5) and (11) Insolvency Act 1986, see also Woloniecki, "Co-operation between National Courts in International Insolvencies: Recent United Kingdom Legislation" [1986] 35 I.C.L.Q. 644, at 652-653.

380 See I. Fletcher, *International Insolvency - The Way Ahead*, inaugural lecture delivered on 3rd June 1992, Queen Mary and Westfield College, University of London.

381 S. 426(4) Insolvency Act 1986

382 S. 426(3) Insolvency Act 1986; the obligation implies only a full examination of the request and a motivated response in certain border-line cases. Woloniecki, "Co-operation between National Courts in International Insolvencies: Recent United Kingdom Legislation" [1986] 35 I.C.L.Q. 644, at 653.

383 *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, at 394 per Vaughan Williams J., as affirmed by the Court of Appeal; *Re Suidair International Airways Ltd.* [1951] Ch 165, at 173-174 per Wynn-Parry J.; *Pardo v. Bingham* (1868) L.R. 6 Eq. 485; *Thurnburn v. Steward* (1871) L.R. 3 P.C. 478 (P.C.); *Ex p. Holthausen* (1874) L.R. 9 Ch. App. 722; *Re Focus Insurance Co. Ltd.* [1997] 1 BCLC 219 and *Re Kloebe* (1884) 28 Ch.D. 175.

II.2. Procedural issues

As a starting point one could refer to the many procedural issues involved. It is true without doubt that English law will apply as the *lex fori* once the English courts have agreed to take jurisdiction. This is a well-established principle of English private international law.³⁸⁴ The key issue here is to determine which issues in the insolvency and bankruptcy can be classified as procedural in nature. The issues that are to be classified as procedural include amongst others the steps that are necessary to commence bankruptcy proceedings (i.e. by presenting a petition), the steps that are necessary to commence winding up proceedings, the hearings that follow the start of the proceedings, the processing of the claims, the declaration of the bankruptcy and the payment of the dividends to the creditors. The distributional process is a key element in this respect. The *lex fori* will govern issues such as the determination of the types of claims that qualify as provable debts and the ranking in terms of priority of payment of the different types of debt³⁸⁵. In this latter respect English law applies as the *lex fori* and excludes any application of a different foreign law, for example the law under which the claim originally arose.³⁸⁶ Different modes of treating the claim under such a foreign law are irrelevant for the English courts when dealing with bankruptcy or insolvency cases. Here the principle is clear and the *lex fori* applies, i.e. English law deals with the issue of priority amongst creditors when England is the *forum concursus* and the foreign *lex fori* will be expected to determine the same matter in any foreign insolvency proceeding.³⁸⁷ Procedural matters seem therefore to be a good example of the basic rule that the *lex fori* applies³⁸⁸. But even here during the collection and realisation of the debtor's

384 *Re Doetsch* [1896] 2 Ch 836 and see L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1177, rule 163 (Vol. II).

385 See L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1178 (Vol. II).

386 *Ex parte Melbourn* (1870) L.R. 6 Ch 64, at 67-70 per Mellish L.J.

387 See also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 72-73.

388 This strong preference for the *lex fori* may even be a ground to refuse assistance to a relevant foreign court if the English court considers the request as an interference under a foreign law with what is essentially an English procedure under the *lex fori*, see *Re Focus Insurance Co.* [1997] 1

property incidental matters may arise which are not necessarily governed by the *lex fori*³⁸⁹.

II.3. Substantive issues: the main rule

Bankruptcy and insolvency cases are not simply a matter of procedure though. A whole range of substantive issues will for example arise between the debtor at the centre of bankruptcy proceedings on the one hand and his or her creditors and other interested parties on the other hand. These issues need to be dealt with and it is clear that their outcome can be materially affected by the choice of law process which will have to be carried out by the *forum concursus*. Obvious examples are the avoidance of transactions entered into by the debtor, the impact of the insolvency proceedings on current contracts to which the debtor is a party, the validity of claims arising from such contracts, the impact of the insolvency proceedings on any security on which a creditor wishes to rely and the availability of a right of set-off for the creditor who is at the same time also a debtor to the bankrupt's estate. Here too the starting point seems to be that English law will apply as the *lex fori*. A strong justification for such an approach is found in the absence in the substantive legislation in this area of any territorial restriction on the scope of the relevant provisions, with the notable exception of s. 426(5) Insolvency Act 1986. One could therefore assume that the legislator wanted the courts to apply these provisions to all cases before them, irrespective of any links with other jurisdictions and their legislation. It is respectfully submitted that this is a dangerous conclusion to arrive at, since private international law issues and especially choice of law issues are often simply not dealt with in national legislation. The omission of any restriction placed on the territorial scope of the legislation does by no means equal a positive decision to impose the application of the legislation as the *lex fori*, excluding in the process any application of a foreign law. Another factor that militates in favour of the application of English

B.C.L.C. 219.

389 E.g. the issue whether a debt is valid may be subject to another law, see *Re Bonacina* [1912] 2 Ch 394 (CA).

law as the *lex fori* is the supposed presence in insolvency law of a number of fundamental values that need to be defended by the courts. Points such as the equal treatment of creditors come to mind. These principles are considered to be so fundamental that they also need to be applied in a case with international ramifications and that the application of a foreign law that may not share exactly the same principles needs to be excluded. This is of course the well rehearsed public policy argument that leads in this case to the application of the *lex fori* in all insolvency and bankruptcy cases with an international character.

The impact of the latter provisions in relation to the *pari passu* principle and the even-handed approach to creditors irrespective of their nationality, residence or domicile is clearly illustrated by two cases. In *Re Wiskemann*³⁹⁰ a custodian of enemy property released a fund to which the bankrupt, a German national who was resident in England, was entitled. In line with the wishes of the executive at the time the trustee excluded foreign creditors. Lawrence J. overturned this exclusion, because it constituted a breach of the fundamental values highlighted above. Maybe the fact that there were foreign creditors in this case, but that none of them was German was also an important contributing factor in this case. Sometimes though the public policy tool is used for the wrong purposes. This became clear during the BCCI saga when funds collected elsewhere needed to be transferred to Luxembourg. The company in liquidation had been incorporated in Luxembourg and the main insolvency proceedings were therefore taking place in Luxembourg. The English proceedings were ancillary proceedings and a judicially sanctioned agreement had put in place the scheme under which the funds would be collected in the ancillary proceedings before being transferred to Luxembourg for distribution on a worldwide scale on a *pari passu* basis. In such a case the main point in setting up main and ancillary proceedings is to arrive at a single coordinated process that operates on a worldwide scale and in which the creditors are all subject to the same set of rules, as this is the best guarantee for them to be treated equally and for the fundamental values to be applied coherently on a worldwide level. The reality that the foreign

390 (1923) 92 L.J. Ch 349.

rules governing the main proceedings are not necessarily identical to English law even if they implement the same principles is in this respect an inevitable fact of life. It is submitted that insisting on a guarantee that the English rules on set-off which were more advantageous to the creditors involved and defending that decision on the basis that these provisions are part of English public policy³⁹¹ is highly regrettable, as it ultimately undermines the correct application of the fundamental values at issue on a worldwide basis. The vital coordination between main and ancillary proceedings cannot work properly on that basis. A more internationalist approach would have been warranted.³⁹²

II.4. Foreign companies

From a substantive law point of view English courts and English law can deal with the winding up of an insolvent company, even if the latter has been formed under a foreign law and is in the eyes of English law domiciled abroad and controlled by a foreign law. From a private international law point of view one could consider whether this would involve a departure from the strict application of English law as the *lex fori* both for procedural and substantive issues. English courts have however rejected any such suggestion that would one way or another involve the application of aspects of a foreign law. As far as procedural matters are concerned Vaughan Williams J. laid down the rule long ago when he ruled that

“the desire to act as ancillary to the court where the main liquidation is going on will not ever make the court give up the forensic rules which govern the conduct of its own liquidation.”³⁹³

391 *Re Bank of Credit and Commerce International S.A. (No. 10)* [1997] Ch 213; [1996] 4 All ER 796.

392 Fletcher, “International Insolvency Issues: Recent Cases” [1997] JBL 471, see also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 74-75.

393 *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, at 394 and the further explanation by Wynn-Parry J. in *Re Suidair International Airways Ltd.* [1951] Ch 165, at 173-174.

Scott V.-C. added that this rule that the *lex fori* applies to the exclusion of all other laws that have an involvement with the case also goes for substantive matters in his decision in *Re Bank of Credit and Commerce International (No. 10)*³⁹⁴. We have already expressed the view that this latter addition is to be regretted, particularly in those cases where the English proceedings are ancillary proceedings to the main foreign proceedings and where a judicially approved agreement to facilitate such co-operation is in existence.

This is not to say though that foreign law (or foreign laws) will have no impact whatsoever. Its role surfaces in relation to various incidental matters, even if the *lex fori* governs the insolvency proceedings. The issue whether a company that is part to the insolvency proceedings was ever created from a legal point of view or is still in existence and other questions of status and capacity are a matter for the foreign company law³⁹⁵. A similar approach applies to ascertaining the identity of any of the parties involved in the insolvency proceedings and to verifying the validity of the appointment of the officers and directors of a company and their power to bind the latter³⁹⁶. A further example is found in the continued application of the law applicable to contractual obligations to the contractual aspects of claims of a contractual nature. Allegations that the claim has become illegal or unenforceable for another reason³⁹⁷ are a case in point³⁹⁸.

394 This decision is part of the BCCI saga, [1997] Ch 213; [1996] 4 All ER 796, at 814-822.

395 See e.g. *Maunder v. Lloyd* (1862) 2 J.&H. 718, 70 E.R. 1248 and *Von Hellfeld v. E. Rechnitzer & Mayer Frères & Co.* [1914] 1 Ch 748.

396 See e.g. *General Steam Navigation Co. v. Guillou* (1843) 11 M. and W. 877, 152 E.R. 1061; *Re Banque des Marchands de Moscou (Koupetschesky)*(No. 4) [1958] Ch 182 and *Banco de Bilbao v. Sancha* [1938] KB 176 (CA) respectively.

397 See e.g. *Gibbs and Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 (CA); *Re Higginson and Dean* [1899] 1 QB 325; *Re Banque des Marchands de Moscou (Koupetschesky)*(No. 2) [1954] 1 WLR 1108 and [1954] 2 All ER 746; *National Bank of Greece and Athens S.A. v. Metliss* [1958] AC 509 (HL) and *Adams v. National Bank of Greece S.A.* [1961] AC 255 (HL).

398 As a matter of detail one also needs to refer to the regrettable hiatus in English law where if English law is the applicable law to the obligation concerned and a discharge has taken place as a result of insolvency proceedings abroad such a discharge cannot be recognised even if the foreign insolvency proceedings as such could be entitled to recognition. See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 154.

II.5. The law applicable to the issue of avoidance

A more helpful line of thought than that developed in the BCCI case has appeared in relation to the issue of avoidance. The Court of Appeal was confronted with the interpretation of s. 238(2) Insolvency Act 1986 and particularly with the term ‘any person’ used therein in relation to transactions entered into by a company in *Re Paramount Airways Ltd*³⁹⁹. One could obviously go down the public policy path and suggest that in choosing the wide term ‘any person’ without imposing any restrictions on its scope Parliament must have imposed the application of this provision of English law in all cases, irrespective of any international element. Strictly speaking the court did not deal with the choice of law issue and in terms of jurisdiction rejected the public policy centred approach. The court emphasised that it had a discretion whether or not to take jurisdiction and whether or not to grant the relief applied for and that in the exercise of the discretion in the presence of a foreign element the defendant must have a sufficient connection with England. As a result of that connection it must be proper to make an order against him with a view to restoring the previously existing position for the benefit of the creditors. The list of factors which the court thought were relevant when exercising its discretion is particularly revealing for our present purposes, as it includes

“the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction ... and *whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally*”.⁴⁰⁰

The latter phrase constitutes a clear departure from the strict public policy – *lex fori* approach and leaves the road open for a role for the foreign law in relation to the issue of avoidance. In certain circumstances the fact that the foreign law conferred a

399 [1992] 3 All ER 1.

protected title on the defendant may have to be taken into account by English law.⁴⁰¹

The problem with the *Paramount Airways* case is that it does not put forward a real choice of law rule. The Courts have until now never expressed a clear choice of law rule for the avoidance issue. This is not to say that the issue is devoid of practical importance, as the applicable law can determine the final outcome. One of the complicating factors when dealing with this point is that the law in reality gives the court a double discretion.⁴⁰² The main discretion at issue in the *Paramount Airways* case is the discretion of the court whether or not to grant relief, having regard to the sufficiency of the connection of the claim to England. This may involve giving a role to a foreign law. One should not forget though that the court has also a discretion on the pure jurisdiction issue⁴⁰³. In most cases leave to serve proceedings on a person abroad may indeed be required⁴⁰⁴. It will then be up to the plaintiff to prove amongst other things that there is a serious issue to be tried and that one of the headings under the Civil Procedure Rules applies⁴⁰⁵.

It may be possible to get some further guidance from the *Maxwell Communication Corporation* case⁴⁰⁶, and especially from the unsuccessful attempt by the administrators of Maxwell Communication Corporation to convince the courts in the United States to take jurisdiction. The choice by the administrators of the courts of New York to attack certain payments to major creditors of the company that were made shortly before the insolvency proceedings commenced was clearly based on

400 *Re Paramount Airways Ltd* [1992] 3 All ER 1, at 11-12, emphasis added.

401 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 76.

402 *In re Banco Nacional de Cuba*, Chancery Division 11th April 2001 per Lightman J., [2001] The Times 18th May 2001; see also L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1179 (Vol. II).

403 R. 12.12 Insolvency Rules 1986.

404 *Re Paramount Airways Ltd.* [1993] Ch 223 (CA); *Re Busytoday Ltd.* [1992] 1 WLR 683 and *Jyske Bank (Gibraltar) Ltd. v. Spjeldnaes* [1999] 2 B.C.L.C. 101.

405 *In re Banco Nacional de Cuba*, Chancery Division 11th April 2001 per Lightman J., [2001] The Times 18th May 2001.

406 *Re Maxwell Communication Corporation plc (No. 2)*, *Barclays Bank v. Homan* [1992] B.C.C. 757 (per Hoffmann J.) and 767 (CA); *Re Maxwell Communication Corporation plc* 170 BR 800, 801-807 (Bankr SDNY 1994), (Judge Brozman), aff'd 186 BR 807, 812-815 (SDNY 1995), (Scheidlin USDJ), aff'd 593 F3d 1036 (2nd Cir 1996), (Cardamone Circuit Judge).

the assumption that the American courts would apply the *lex fori* to the avoidance issue. The outcome of the case does not confirm whether this was a correct assumption, but it does refer to the Second Restatement's significant contacts approach. The suggested course of action is therefore to look at a range of points, such as the primary place from which the debtor conducts its business, the location of the debtor's 'nerve centre', the location of the assets, the location of the creditors and the location of the circumstances surrounding the transaction concerned. The main disadvantage of this balancing act is uncertainty and the fact that it is not predictable, but it makes it impossible for parties to build in advantages for themselves by structuring their transactions in advance in relation to the avoidance rule that may apply. The question needs to be asked though whether the English courts would eventually go down the same, flexible path.

Two elements are in this respect important in the relevant statutory provisions. Sections 339(2) and 340(2) of the Insolvency Act 1986 point in the direction of a possible positive answer. They make it possible for the court to make any order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into or the preference had not been given. The reference to any order seems to allow the court to look for the most significant connection and to apply to the avoidance issue the law of the country with which that closest connection exists. On the negative side there are the remaining provisions in the same sections 339(2) and 340(2) of the Insolvency Act 1986. The court is also bound by this part of the provisions and they contain substantive provisions on avoidance. It is not entirely clear how these provisions are to be combined with the flexible approach which may lead to the application of elements of a foreign law. In practice an application is made to overturn a transaction and the foreign law is pleaded because its provisions offer a better chance to do so. In such a situation it is hard to see how a court can deal with such an application that is necessarily brought before the court in reliance on sections 339 and 340 of the Insolvency Act 1986 by applying a foreign rule if the order can only be granted on the basis of the more restrictive provisions of sections 339 and 340. The only possible solution would be for the

English court to argue that the international aspect adds to the domestic solution in the Act and that the choice of law process adds the foreign avoidance rule to the procedure set out in the statutory provisions. This would be an extremely bold step for any English court to take.⁴⁰⁷

In conclusion, it seems unlikely that in the present situation any English court will take up the suggestion in the *Paramount Airways* and in the *Maxwell Communication Corporation* cases. Maybe from an English law point of view the discretion is to be exercised at jurisdiction level rather than at choice of law level. It is submitted that for the time being the choice of law rule that English law applies as the *lex fori* to insolvency issues unless there is an explicit rule to the contrary may be an accurate summary of the current position. The only real scenario where an English court maybe tempted to depart from that scenario and go down the *Paramount Airways* route is probably that were the defendant has no personal links with the jurisdiction. That may make the foreign law the dominant factor whenever such a case arises in the future before an English court.

II.6. Contracts concluded by the bankrupt

English private international law has a clear set of contract choice of law provisions. These are contained in the Rome Convention 1980 on the law applicable to contractual obligations⁴⁰⁸, which was brought into force in the United Kingdom by the Contracts (Applicable Law) Act 1990. It is therefore obvious that these provisions will determine the law that is applicable to the contracts to which the bankrupt is a party in the same way as they will determine the applicable law for any other contract that comes within their scope.

407 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 78.

408 [1980] OJ L266/1, a consolidated version of the text of the Convention appeared also at [1998]

In a bankruptcy context one has to add the *lex fori* as the *lex concursus* to this. The *lex fori* will have some form of impact on the contracts to which the bankrupt is a party. The question whether the bankruptcy has the effect of releasing the parties from their contractual obligations arises, as does the question of the further consequences in case of release. From a different point of view the question arises whether a contract on which the claim of a creditor, or any other party, is based is valid.

In a first stage reference will be made to the *lex contractus*, or for that purpose to any provision that the parties have expressly included in their contract. These provisions will determine the impact of the bankruptcy on the contractual obligations of the parties. Similarly the validity of the contract on which a claim is based is a matter for the *lex contractus*⁴⁰⁹. It is quite possible to envisage that the *lex contractus* will grant the creditors additional advantages which they would normally not have.⁴¹⁰ However, the *lex fori* also plays a role. In any proceedings over which the *forum concursus* has jurisdiction the effects of the application of the *lex contractus* will inevitably be compared with the effects of the application of the *lex fori*. In case of divergence the *lex fori* will prevail⁴¹¹. In practical terms this means for example that the trustee in bankruptcy will have the right to disclaim onerous property and onerous contracts by relying on section 315 of the Insolvency Act 1986 as the *lex fori*, even if this conflicts with the provisions of the *lex contractus*. Similarly a non-bankrupt party to a contract will be able to rely on section 345 of the Insolvency Act 1986 as part of the *lex fori* to apply to the court to be discharged of its obligations under the contract as a result of the other party's bankruptcy, even if this conflicts

OJ C 27/34.

409 See *Murphy's Trustee v. Aitken*, 1983 S.L.T. 78; *Re Hayward* [1997] Ch 45; see also *Re Grace* (1996) 131 D.L.R. (4th) 449 and L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1178 (Vol. II).

410 See *Re Suse* (1887) 18 Q.B.D. 660 (CA).

411 For an example of the separate operation of the *lex contractus* and the *lex concursus* / *lex fori* and the dominant influence of the latter in case of conflict in relation to discharge of a debt or liability see *Royal Bank of Scotland v. Cuthbert* (1813) 1 Rose 462, at 486; *Odwin v. Forbes* (1817) Buck 57 (PC); *Edwards v. Ronald* (1830) 1 Knapp P.C. 259; *Gill v. Barron* (1868) L.R. 2 P.C. 157, at 175-176 and *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, at 235-236.

with the provisions of the *lex contractus*.⁴¹²

II.7. Security interests

Creditors try to secure their rights via a recognised type of security in order to be able to have recourse to the security in case the debtor fails to meet its obligation. In that case they want to be able to satisfy their claim by having recourse to the security, rather than to the normal contractual regime. In case the debtor becomes insolvent the aim of such a system is obviously to allow the creditor with a secured claim to escape the normal process in which all claims have to be lodged and proof has to be provided before any assets can be distributed equally amongst creditors. The expectation of the debtor with a secured claim will be that he can have recourse to the security, be it a security right in respect of tangible property, intangible property, existing or future assets⁴¹³, even in a scenario where the debtor has become insolvent.

It is clear that security interests are governed by legal provisions that are not necessarily part of the *lex fori* and that we are therefore yet again confronted with a situation where both the *lex fori* and one or more foreign laws could potentially be applied. Starting from the dominant position traditionally occupied by the *lex fori* in English private international law one could suggest that the important aspect of the matter is that the *lex fori* as the *lex concursus* will determine whether the security is to be recognised and whether it retains its enforceability once the debtor has become the subject of bankruptcy proceedings. It is submitted though that this represents a simplistic approach that needs to be rejected and that such a move receives some support from the case law.

412 Compare I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 79.

413 There is also an enormous variety between various types of security. On the one hand an actual transfer of possession to the creditor may be involved, whilst on the other hand the debtor may retain control and possession and even the right to use and dispose of the asset in an unrestricted way. Special requirements concerning registration and notification of the creation and existence of the security interest may also exist.

It is submitted that the following process reflects more accurately the correct approach. In a first stage the agreement creating the security interest must exist, i.e. it must be valid between the parties. This is a matter that is to be decided by the law governing the contractual relationship between the parties and at the same time this law will also apply to the contractual provisions that create the security interest. They will need to be interpreted in accordance with the *lex contractus* to determine the maximum scope of the security interest. It is clear though that security interests are not simply a contractual matter between the parties. Therefore the *lex situs* will also have to be taken into account in a second stage. The parties are only at liberty to create a security within the framework of the *lex situs* of the property involved. The *lex situs* will therefore revisit the issue of the validity of the security interest and will also determine the exact scope and effects of the transaction by which the parties intended to create the security interest. On the latter point this may involve a reduction of the scope and effect that the parties intended to achieve in the contract. An additional phase arises in relation to moveable property as these items of property can be transferred from the place where they were situate when the security interest was originally created to a new *situs*. To the original *lex situs* needs therefore to be added the law of the new *situs*. The latter law may influence the security in the sense that it may be cancelled, altered, etc.⁴¹⁴ In a final stage the *lex fori* as the *lex concursus* will determine whether the security is to be recognised and especially whether it retains its enforceability once the debtor has become the subject of bankruptcy proceedings. Rules such as those on avoidance will play an important role in this respect.⁴¹⁵

In principle the approach set out above applies to individuals as well as to securities created by companies. The latter aspect gives rise to some additional problems though. Debtors that grant a form of security and that subsequently undergo insolvency proceedings are therefore subject to the same rules and additional

414 See *Cammell v. Sewell* (1860) 5 H. & N. 728 and 157 E.R. 1371; *Winkworth v. Christie, Manson & Woods Ltd.* [1980] Ch 496.

415 See the discussion of the possible impact of *Re Paramount Airways Ltd.* [1992] 3 All ER 1 (CA) on this point above and compare I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 79-80.

considerations arise when the debtor concerned is a company.

The first additional complication arises from the floating charge, a specific form of security that has no counterpart amongst securities granted by individual debtors. The key point here is that this form of security does not refer to specific and identified assets of the company. This difference between the floating charge on the one hand and any form of fixed security on the other hand has its importance for our present purposes. Suffice it to add that the holder of a fixed security can in case of insolvency immediately enforce its rights against the property comprised therein, whereas the holder of a floating charge is relegated behind the entitlement of the preferential creditors.⁴¹⁶ From a private international law choice of law point of view one has therefore to add one question to the existing analysis which was described above. It becomes indeed vital to determine whether we are dealing with a floating charge or with a fixed charge. This classification issue needs to be fitted in at the stage where the *lex concursus* gets involved, as it is essentially an issue that arises in the context of insolvency proceedings, for the purposes of which the distinction between floating charges and fixed charges becomes relevant. We are essentially dealing with the question whether or not the security will be valid and enforceable once the insolvency proceedings have been opened and how this enforcement process will unfold. This means that the *lex fori* governs the classification issue and will determine the character of the security interest.

From a substantive law point of view such a floating charge can also be created in relation to property situate abroad. The courts have held that an English company can grant a floating charge over any property, be it moveable or immoveable, which it owns abroad.⁴¹⁷ This conclusion applies irrespective of the fact whether the law of the country where the property is situate knows and/or recognises the type of security interest represented by the floating charge. This creates additional problems from a choice of law point of view. One may be able to assume in such a scenario that the

⁴¹⁶ See s. 175(2)(b) Insolvency Act 1986.

⁴¹⁷ *Penn v. Lord Baltimore* (1750) Ves. Sen 444; *British South Africa Company v. De Beers Consolidated Mines Ltd.* [1910] 1 Ch 354 (reversed on other grounds [1912] AC 52 (HL)) and *Re*

contract by means of which the floating charge has been created is governed by English law and that as a result no validity problems arise in this first stage of the process. But problems do arise in a second stage when the foreign *lex situs* has to be applied to the floating charge. Normally only those security interests that are recognised by the *lex situs* will get past this second part of the process. The floating charge should therefore be rejected in those cases where the *lex situs* does not operate a similar form of security interest or does not recognise it. Exceptionally though in the case of floating charges the courts have adopted a different approach and have nevertheless moved on to the third stage of the process, i.e. the stage where the *lex concursus* gets involved.⁴¹⁸ This can be explained on the basis that the link with the *lex situs* is based on the relationship between that law and a specific item of property covered by the security interest and situate in the territory of the *lex situs*. This is different for the floating charge. Certain or all goods may still be situate abroad in the territory of the *lex situs* that does not know the floating charge, but the security interest does not cover certain items of property that can be identified at any stage (before crystallisation). In that sense the charge is more correctly defined as a charge against the chargor company. That latter company is in these cases an English company⁴¹⁹ and one could therefore argue that its situs is in England. In that sense the company and the floating charge with it can pass the second, *situs* linked, stage of the process. Hence the opportunity to pass to the third stage of the process and the involvement of the *lex concursus*. The focus on the chargor company cannot entirely remove the impact of the *lex situs* of the place where the goods are situate though. English courts have adopted a pragmatic approach to this point and have taken into account any countervailing rights that may have arisen under the foreign *lex situs*.⁴²⁰

The provisions of the Companies Act 1985 give rise to an additional complication in relation to fixed or floating charges created by companies by way of security when

Anchor Line (Henderson Brothers) Ltd. [1937] Ch 483.

418 See *ibidem* and see also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 155.

419 Which is subject to the equitable jurisdiction of the English court, as argued in *Penn v. Lord Baltimore* (1750) Ves. Sen 444; *British South Africa Company v. De Beers Consolidated Mines Ltd.* [1910] 1 Ch 354 and *Re Anchor Line (Henderson Brothers) Ltd.* [1937] Ch 483.

420 See *Re Maudslay, Sons & Field* [1900] 1 Ch 602.

these companies become the subject of insolvency proceedings. The reasons for this complication are found in Part XII of the Companies Act 1985 and the regime for the registration of charges contained therein. More precisely, section 396 contains a list of the types of charges that need to be registered. Section 395(1) of the Act for its part contributes the sanction for non-registration. As a result of the failure to register the charge any security that would normally flow from it will be void against the administrator or liquidator as the case may be, as well as against any creditor of the company. For our present purposes an issue may arise when a foreign element appears either on the side of the company that granted the charge or on the side of the location of the property involved. At that stage the application of the English *lex fori* to the exclusion of any other law, which was self-evident when both the company and the property were located in England, as was the charge creating the security, is no longer to be taken for granted. English law insists though on its application as *lex fori*, even if the transaction and/or the property concerned are located outside the United Kingdom if the charge is to remain valid for the purposes of English law. Compliance with the *lex situs* may be required to assure the validity of the charge under that law, but it does not change the application and the requirements of English law. Additionally charges that are created in respect of property situate in England and Wales or that are acquired by a company that has been incorporated outside Britain also need to be registered for the same purposes according to the provisions of section 409 of the Companies Act 1985. Important from a private international law point of view is that this provision applies irrespective of the place where the charge has been created or of the law that applies to the transaction that created the charge. It is sufficient that the chargor company itself is subject to the provisions of the Companies Act 1985 and to a proceeding based on the Insolvency Act 1986 for the regime to apply as part of the *lex fori*.

*Re Weldtech Equipment Ltd.*⁴²¹ is a good example of the application of these provisions. In this case an English company had granted a reservation of title to the German seller which also included the proceeds of any resale of the welding

421 [1991] BCCC 16 and [1991] BCLC 393.

equipment originally acquired by the buyer. The contract that gave rise to the charge was governed by German law and no registration was required under German law. Hoffmann J. nevertheless held that the English registration requirement, as contained in the Companies Act 1985, applied as *lex fori*, as the addition of the entitlement to the proceeds of the resale brought the clause within the list of clauses contained in the Companies Act and more specifically within section 396(1)(e) of the Act as a charge on book debts. The fact that the charge was valid and enforceable under German law was put aside, as were the (unknown) whereabouts of the goods involved or their resale value. English law insists in this respect on the application of the (English) *lex fori*.

11.8. Set-off

The issue of set-off arises when the insolvent debtor and the creditor concerned have had mutual dealings before the commencement of the insolvency. Cases where there are mutual debts and/or credits are examples in point. The doctrine comes into operation when the creditor proves or claims to prove for a debt in the insolvency proceedings and it does so automatically and in a self-executing way on the date of the commencement of the bankruptcy or the date on which the company went into liquidation respectively. As a result of the doctrine only the net balance remains owing to whichever of the parties had the larger claim. The mutual claims and liabilities that are put together need not necessarily arise from the same contract. It is sufficient that the parties dealt with each other in identical capacities on each occasion giving rise to a claim or liability. The statutory provisions involved in relation to bankruptcy and corporate insolvency respectively, i.e. section 323 of the Insolvency Act 1986 and Rule 4.90 of the Insolvency Rules 1986, are identical in terms of substance and the principle of set-off therefore applies in all cases across the board.

This brings us to the question which law applies to the issue of set-off. It is indeed clear that not all legal systems operate a similar set-off principle, that is as advantageous to creditors. Many of them will for example require that the claims relate to the same contract, if a set-off is to be applied, whilst others will reject the principle altogether.

The House of Lords has taken a tough line when interpreting the statutory provisions involved in a domestic context.⁴²² These provisions were considered to be of a mandatory nature and to reflect English public policy. Any attempt by the parties to change or exclude their operation by means of contractual provisions was therefore bound to fail. That leaves the question whether this mandatory nature extends also to situation where an international element is present. That question came before the courts when they were dealing with the BCCI saga. The High Court decided that the law on set-offs is irrevocably part of English public policy and that the court was therefore not at liberty not to apply these rules and to allow the application of a foreign law on this point.⁴²³ This decision may be defensible when the English court is dealing with the main or only set of insolvency proceedings, but it is respectfully submitted that it must be wrong in the context of ancillary English proceedings that have been set up with the sole aim of assisting the main foreign proceedings. Insisting on the mandatory application of different set-off rules in relation to funds that are contributed to what is supposed to operate as a single proceeding can only have a negative impact on the efficiency of the proceeding and on the grand principle of equal treatment of creditors. In these circumstances the set-off rules of the *lex fori* / *lex concursus* of the main proceedings should be applied instead.

It has been suggested that a different approach altogether should be adopted. This involved the situation where the mutual claims were based on contracts to which different laws applied. If these laws contained substantially different approaches to set-off the creditors involved would no longer be able to benefit from the principle of

422 *National Westminster Bank Ltd. v. Halesowen Presswork and Assemblies Ltd.* [1972] AC 785 and *Stein v. Blake* [1996] AC 243.

423 *Re Bank of Credit and Commerce International S.A. (No. 10)* [1997] Ch 213; [1996] 4 All ER

set-off as contained in the English *lex fori* / *lex concursus* in the event of the insolvency of either of the parties, unless they were able to show that being able to benefit from the provisions on set-off formed part of their legitimate expectations in the course of their dealing with the debtor. One has to agree though that the prospects for such a development in English private international law are at present almost non-existent.⁴²⁴ Additionally, it is not entirely clear how the reasonable expectations part of the approach would work. In conclusion, this approach is no longer a viable alternative, even more so now that, as we will discuss later on, this suggestion has also not been taken on board in the new EU approach⁴²⁵ to cross-border insolvency cases.

III. Recognition of foreign insolvency proceedings

III.1 Introduction

It is clear that insolvency proceedings occupy a special place in the framework of English private international law. One could have derived from this that English law would not recognise foreign insolvency proceedings and that the opening of new English insolvency proceedings would be required on each occasion. Fortunately English law did not go down this path and early cases already indicate that an English court can recognise a foreign insolvency proceeding and give effect to it.⁴²⁶

This leaves us with the question how and under which conditions foreign insolvency proceedings will be recognised. As was already discussed above, the Brussels Convention system excludes bankruptcy and insolvency cases from its scope. The common law will therefore provide the answer how to deal with this type of

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424 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 81-82.

425 EU Council Regulation (EC) 1346/2000 on Insolvency Proceedings of 29th May 2000 [2000] OJ L160/1.

recognition case. There is however an additional complication. Normal judgments that are to be recognised concern only the parties directly. Bankruptcy and insolvency cases go further and also have a direct impact on third parties, such as creditors, which were not necessarily present in court. Or as Innes JP put it in *Ex parte Stegmann*

“It is not the mere settlement by a foreign tribunal of a dispute between two litigants; it affects the rights of third parties who were never before the foreign court; and not only does it affect such rights, but it regulates in the future the dealings between the insolvent and all other persons. It is, in fact, a species of arrest or execution upon the property of the insolvent, followed by a distribution of it among his various creditors; it restricts the ordinary legal remedies of those creditors, and it imposes upon the insolvent disabilities which tend in the direction of an impairment of his status. To enforce such a decree absolutely and entirely in this country, as if it were a foreign judgment, is, therefore, out of the question.”⁴²⁷

The final lines of this quote draw the conclusion from the fact that there is an additional impact on third parties that makes insolvency cases stand out from any other form of foreign judgments. The courts will not apply the standard common law regime for the recognition and the enforcement of foreign judgments and a special regime has therefore been put in place.

One further point should briefly retain our attention before we turn to this special regime for insolvency cases. The special nature of insolvency cases makes it also necessary to distinguish between the recognition of the foreign insolvency proceedings on the one hand and the effects that are given to them in the jurisdiction as a result of that recognition on the other hand. The impact on third parties and the

426 See *Solomons v. Ross* (1764) 1 Hy. Bl. 131n.

fact that they were not necessarily part of the original foreign proceedings are important additional considerations that need to be taken into account in this latter stage when the effects of the recognised proceedings are to be discussed.⁴²⁸ In a first stage we will deal with the recognition phase, of foreign bankruptcies and foreign winding-up proceedings respectively, before returning to the effects of the recognition of foreign insolvency cases.

III.2. Recognition of foreign bankruptcies

Many of the cases in this area are rather old and are not necessarily properly equipped to deal with modern conditions.⁴²⁹ What is clear though is that the English courts will base their decision whether or not to recognise the foreign proceedings on their evaluation of the question whether the foreign court had jurisdiction over the insolvent debtor. It is therefore not surprising to see that the criterion of domicile appears to play a prominent role.

III.2.1. Domicile

The early cases did indeed centre on the debtor and the link between the debtor and the foreign jurisdiction. The emphasis was clearly put on the impact of the bankruptcy on the debtor's personal status and capacity. The transmission of the debtor's property was seen as a direct result of the change in personal status and capacity. This link with the personal law of the debtor almost inevitably brought the English courts to the use of the criterion of the debtor's domicile when they had to decide whether the foreign court had bankruptcy jurisdiction over the debtor, which was in turn the prerequisite for the recognition of the foreign proceedings. Needless almost to add that the English courts are only concerned with the concept of

427 1902 T.S. 40, at 47.

428 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 141.

429 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*,

domicile as it is understood in English private international law and that any different concept of domicile that the foreign court has legitimately used under its own law is irrelevant for these purposes. In other words, the English court will recognise the foreign bankruptcy if in the eyes of the English court the foreign court had jurisdiction to deal with the matter because it was the court of the English style domicile of the insolvent debtor. Foreign bankruptcy judgments in respect of non-domiciliary insolvent debtors on the other hand are apparently not entitled to recognition.⁴³⁰

The key case on which this analysis is based is *Re Blithman*.⁴³¹ Lord Romilly MR's judgment in this case warrants some further analysis. *Re Blithman* was concerned with an English fund of personal property to which the debtor had become entitled before his death. The debtor had become insolvent in New South Wales and the money of the fund was only paid out after his death. The real issue before the court was whether the assignees in the Australian insolvency or his executrix were entitled to the fund. Lord Romilly MR ruled that the solution of this issue depended on the domicile of the debtor:

“[T]his is a question of domicile, and depends upon domicile alone; and that if Henwood was domiciled Australian at the time, then that this property passed to the assignees, but that if he was not, then it passes to his legal personal representative, and she is the person entitled to receive it.”⁴³²

The question which preoccupies us at present is whether this dictum really puts down an absolute requirement that a foreign bankruptcy needs to have been declared by the court of the territory where the debtor was domiciled at the time when the proceedings were opened if it is to be recognised or whether a more liberal interpretation that leaves other options open is to be preferred. One could argue that

Clarendon Press (1999), at 92.

⁴³⁰ *Re Hayward* [1897] 1 Ch 905.

⁴³¹ (1866) L.R. 2 Eq. 23.

Lord Romilly MR only decided to recognise the foreign proceedings on the basis that the debtor was at the relevant time domiciled in New South Wales. Such an interpretation would leave very little, if any, room for the recognition of foreign insolvency proceedings on other grounds than domicile. It may on the other hand be possible to find a more liberal interpretation for this dictum. In fact the judgment seems to deal more with the effects of the recognition of the insolvency proceeding than with the recognition of the foreign bankruptcy itself. The court deals with the question who is entitled to the fund and domicile is clearly a key factor in that respect, but to some extent this discussion is only possible as the court has already decided to recognise the foreign bankruptcy. Without this preliminary step the assignees would not enter the picture in the first place, and would not have had a claim which they could validly have brought before an English court⁴³³. It is in this respect interesting to note that an obiter passage in Lord Romilly MR's judgment seems to point in this direction:

“That does not dispose of everything, but it was argued with great force, although I do not think it affects this particular question, that if the domicile was not Australian, nevertheless, by reason of the comity of nations, this would follow that the insolvency being in the nature of a foreign judgment, the court would give effect to it. [...] I am disposed to assent to that, but I do not think it would entitle the assignees to receive this sum of money.”⁴³⁴

It is submitted that one can therefore derive from *Re Blithman* that English law clearly makes the distinction between recognition as such on the one hand and the effects or consequences that are to be given to that recognition and to the recognised foreign bankruptcy on the other hand. Further evidence for that distinction is found for example in the rule that recognition of a foreign bankruptcy does not

432 Ibidem, at 26.

433 See also *Re Artola Hermanos* (1890) 24 QBD 640, at 644.

434 *Re Blithman* (1866) L.R. 2 Eq. 23, at 26.

automatically have the effect of transferring immovables to the assignee⁴³⁵, even if such a step is normally part of the foreign proceeding. Another point to be derived from *Re Blithman* is that domicile is a ground for recognition. The court clearly was prepared to recognise a foreign bankruptcy and domicile was clearly seen as a key factor in this respect. But at the same time the door does not seem to have been closed entirely for other factors. The comity of nations factor was in this respect mentioned with some approval.⁴³⁶

This comity of nations aspect warrants further examination. It may have encouraged the English courts to accept an extended view of the concept of domicile as a ground for recognition. In *Re Tuticorin Cotton Press Co. Ltd.*⁴³⁷ the court arrived at its decision by recognising insolvency proceedings in Ceylon, as it then was. It was nevertheless clear that the debtor was domiciled in Scotland. Neither the debtor, nor any of the other individuals involved, were domiciled in Ceylon. The key point in that decision seems to have been that the law of the domicile of the debtor recognised the foreign bankruptcy. The concept of domicile was therefore extended to the scenario where the debtor is not directly domiciled in the territory of the court that took bankruptcy jurisdiction, but where the decision of that court is recognised under the law of the domicile of the bankrupt. Alternatively this case can be explained as having nothing to do with domicile, but as extending a rule which English private international law also operates in more family law related areas⁴³⁸ to the area of the recognition of foreign bankruptcies. Under this rule comity of nations will lead to the English court replicating the decision of the court or the law of the domicile of the *propositus* to recognise a foreign decision as valid.⁴³⁹

435 See *Waite v. Bingley* (1882) 21 Ch D 674.

436 Compare the analysis provided by Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 153-157.

437 (1894) 64 L.J. Ch 198 and 71 L.T. 723.

438 E.g. the recognition of foreign decrees of divorce or nullity of marriage, see e.g. *Le Mesurier v. Le Mesurier* [1895] AC 517; *Armitage v. Attorney-General* [1906] P. 135 and *Abate v. Abate* [1961] P. 29.

439 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 93.

III.2.2. Submission

Apart from domicile there is one other clear ground for recognition of foreign bankruptcies. A foreign bankruptcy will be recognised if the debtor submitted to the jurisdiction of the foreign court. This is in line with the general English private international law grounds for the recognition of foreign judgments, which also include submission.

The key issue here is to determine what will amount to submission to the jurisdiction of the court in the context of bankruptcy proceedings. In principle this means that the debtor voluntarily participated in the foreign bankruptcy proceedings. The debtor can in this respect have presented his own petition for adjudication⁴⁴⁰ or he can simply have appeared, either in person or through a legal representative⁴⁴¹. In the latter case he can also have appeared to present an appeal against the adjudication⁴⁴². Some of the key cases will now be analysed in more detail.

In *Re Davidson's Settlement Trusts*⁴⁴³ the deceased debtor had prior to his death been adjudicated insolvent upon his own petition in Queensland, Australia. After his death a dispute arose concerning a fund of property in England, to which both the assignee in the Queensland insolvency proceedings and his estate claimed to be entitled. In resolving this dispute the English court was confronted with the question whether or not the Queensland insolvency proceedings were entitled to recognition in England. The court ruled that the factor that meant that the proceedings qualified

440 See e.g. *Re Davidson's Settlement Trusts* (1873) L.R. 15 Eq. 383; *Re Lawson's Trusts* [1896] 1 Ch 175; *Hunt v. Fripp* [1898] 1 Ch 675 and *Re Burke, King v. Terry* (1919) 54 L.J.K.B. 430, 148 L.T. Jo. 175.

441 See e.g. *Houlditch v. Donegall* (1834) 2 CL. 7 F. 470, 6 E.R. 1232; *Re Anderson* [1911] 1 KB 896; *Re Craig* (1916) 86 L.J. Ch. 62 and *Bergerem v. Marsh* (1921) 125 L.T. 630, (1921) 91 L.J.K.B. 80. See also *Schemmer v. Property Resources Ltd.* [1975] Ch 273.

442 *Bergerem v. Marsh* (1921) 125 L.T. 630, (1921) 91 L.J.K.B. 80.

443 (1873) L.R. 15 Eq. 383.

for recognition in England was the fact that the debtor had voluntarily submitted to the jurisdiction of the court by petitioning the court of his own initiative. The issue of the domicile of the debtor was considered to be irrelevant in this respect.

This case was decided at first instance and the rejection of the relevance of the domicile criterion may therefore seem to create problems in the light of the fact that some reports of the *Re Blithman* case⁴⁴⁴, decided at appeal level, seem to indicate that the debtor also petitioned the court in that case. This element was not before the court in *Re Davidson's Settlement Trusts*, but it seems at first glance to have the potential to undermine the value of the dictum in the latter case. It is submitted that this is not the case though. *Re Blithman* dealt indeed with the effects of the recognition. The court decided to limit the effects of the recognition and used the domicile criterion at that stage, but referred at no stage to the way in which the proceedings had been commenced. The latter point is instead the focal point of *Re Davidson's Settlement Trusts* and the issue is really one of estoppel. The fact that the debtor petitioned the court, with the insolvency proceedings and the inherent transfer of powers to the assignee in mind made it impossible for the estate to contest the entitlement to the fund later on. The estate was estopped from doing so and had no longer *locus standi*. The absence of a decision on the initiation point in *Re Blithman* made it possible for the court in *Re Davidson's Settlement Trusts* to treat submission as a ground for recognition of foreign insolvency proceedings without being in breach of precedent.⁴⁴⁵

The debtor in *re Davidson's Settlement Trusts* petitioned the court himself. That view of submission has since been extended. Introducing the petition is only an example of the voluntary participation of the debtor in the foreign insolvency proceedings that is required to meet the submission criterion. Other cases have ruled that it is in this respect also sufficient if the debtor who had not petitioned the court himself appeared personally during the foreign insolvency proceedings. It is similarly sufficient if a legal representative appeared in the foreign insolvency proceedings on

444 (1866) L.R. 2 Eq. 23.

behalf of the debtor.⁴⁴⁶ And the death of the petitioner before the adjudication in the foreign court will not be able to destroy the submission case⁴⁴⁷. Submission is ultimately a matter of fact and the usual safeguards in this respect apply. An appearance in the foreign court to argue on the merits or to convince the court to exercise its discretion not to declare the debtor bankrupt will in all likelihood amount to submission, whereas an appearance merely to contest the jurisdiction (eventually presented in tandem with a substantive argument on the merit) will in all likelihood not amount to submission. Additionally it is important that the debtor submitted to the bankruptcy jurisdiction of the foreign court and not simply to its overall jurisdiction *in personam* in an action that started as a non-bankruptcy case.

A second case that needs closer consideration in a submission context is *Bergerem v. Marsh*⁴⁴⁸. At first glance this is not a case about submission, as the Belgian court had acted of its own motion when declaring the partnership⁴⁴⁹ and one of the partners personally bankrupt. When the partner received notification of the foreign court's decision he launched an appeal against the adjudication. That appeal was ultimately unsuccessful. Any voluntary participation by the defendant or his legal representative was therefore restricted to the appeal stage and the launching of this unsuccessful appeal. The question whether this amounted nevertheless to a submission to the bankruptcy jurisdiction of the Belgian court arose in the English court when Bailhache J. was asked to recognise the Belgian bankruptcy adjudication. In his judgment the learned judge ruled that launching an appeal against a foreign bankruptcy adjudication amounted to submission and he used this as a basis for his decision to recognise the Belgian bankruptcy adjudication. His decision was later cited with approval in the Court of Appeal by Parker LJ in *Metliss v. National Bank of Greece and Athens S.A.*⁴⁵⁰

445 Compare Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 156.

446 See e.g. *Re Anderson* [1911] 1 KB 896 and *Re Craig* (1916) 86 LJ Ch 62.

447 *Re Burke* (1919) 54 L. Jo. 430; cf. *Araya v. Coghill* 1921 S.C. 462.

448 (1921) 91 L.J.K.B. 80.

449 A "société en nom collectif", which makes the expansion of the bankruptcy to the partners more likely than in those case concerned with a proper company.

450 [1957] 2 QB 33, at 54.

III.2.3. Carrying on business

The traditional limitation of the grounds upon which a foreign bankruptcy can be recognised in English private international law to the principles of domicile and submission is to be regretted⁴⁵¹ and attempts have been made to ascertain alternative grounds for recognition in the case law⁴⁵². The ground that the debtor carried on business in the territory of the foreign court seemed an obvious candidate in this respect.

It could be argued that various elements point in the direction of the adoption by the courts of the fact that business was carried on in the territory of the court as a ground for the recognition of a foreign bankruptcy. First of all, in the old days substantive bankruptcy law did not allow creditors to file their claims in more than one set of insolvency proceedings. This domestic rule was also applied at the international level. In *Re Vanzeller*⁴⁵³ the bankrupt carried on business on his own account in England and was at the same time member of a firm in Brazil. In a first stage insolvency proceedings were opened in Brazil in respect of the firm and in a second stage insolvency proceedings were opened in England against the bankrupt himself. The recognition problem of the foreign proceedings arose when a creditor who had already participated in the Brazilian proceedings attempted to introduce the same claim in the English proceedings. The English court held that he could not be allowed to do so and held in the process that the foreign insolvency proceeding was to be treated as if it was a domestic one for these purposes. It is therefore clear that the court recognised the Brazilian insolvency proceedings. It is however less clear from the judgment on which basis this was done. It is clear that domicile was not an option here, but the firm clearly carried on business in Brazil. That could therefore be the implied ground for the recognition, but one could also argue that the creditor was simply estopped from bringing his claim second time around. A similar scenario

451 See also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 93-96.

452 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 148 *et seq.*

453 (1832) 2 L.J. Bcy. 18.

unfolded in *Goldsmid v. Cazenove*⁴⁵⁴. This time the bankruptcy in England preceded the insolvency proceedings in Brazil. The House of Lords confirmed that a creditor could not introduce its claim in both sets of proceedings and recognised the foreign proceedings for this purpose. But the House of Lords did not specify on which grounds it recognised the Brazilian insolvency proceedings. In the Court of Appeal⁴⁵⁵ the fact that business was carried out in Brazil was implicitly acknowledged when it was mentioned that the firm was domiciled abroad, but no particular importance was attached to this element. This kind of case can at least be explained as occasions on which the courts were implicitly relying on the carrying on of business criterion for the recognition of foreign bankruptcies.⁴⁵⁶

Secondly, the cases dealing with foreign dividends may contain further evidence of the use by the courts of the place of business as a ground for recognition. The starting point here is the principle laid down in *Selkrig v. Davies*⁴⁵⁷ that a creditor who has received a dividend in one set of proceedings will not be allowed to prove in another set of proceedings “without bringing into the common fund what he has received”⁴⁵⁸. In other words such a creditor will only receive an additional payment once all creditors in the second proceedings have received an amount amounting to a percentage of their claim that equals the percentage received by the creditor concerned in the first set of proceedings. The House of Lords applied this hotchpot approach to an international case in *Banco de Portugal v. Waddell*⁴⁵⁹. In this case members of a firm carried out business in Portugal and in England and were subject to bankruptcy proceedings in both fora. A creditor who had already received a dividend in the Portuguese proceeding was subjected to the application of the *Selkrig v. Davies*⁴⁶⁰ rule by the House of Lords. This means that account was taken of the dividend obtained in the foreign bankruptcy proceedings and in order to do so these proceedings had implicitly to be recognised as bankruptcy proceedings. It could be

454 (1859) 7 HL Cas. 785.

455 (1857) 1 De G. & J. 257, at 282.

456 See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 148-149.

457 (1814) 2 Rose 291.

458 Ibidem, at 318 per Lord Eldon LC.

459 (1880) 5 App. Cas. 161.

460 (1814) 2 Rose 291.

argued that the ground for this recognition must have been the fact that business was carried on in Portugal. However, at this stage it remains possible to explore the estoppel route as an alternative explanation. This alternative disappears when one moves on to the next stage. The case also implies that the creditor who had obtained a dividend in the Portuguese proceedings would have been allowed under English law to keep that dividend in case he had elected not to prove in the English proceedings. Such a decision would nevertheless have an impact on the English trustee and all the remaining creditors in the English proceedings. It does therefore involve the recognition by the English legal system of the foreign bankruptcy. And the ground for this recognition must apparently be the fact that business was carried out in the jurisdiction, as estoppel cannot play a role here in the absence of any involvement of the creditor concerned in the English proceedings. It is also worth noting that this case was decided after *Re Blithman*⁴⁶¹ and can therefore not have been overruled by the latter case. The only reservation one can have concerning the case is that the House of Lords merely applied *Selkrig v. Davies*⁴⁶² and gave no reasons for their implicit decision to recognise the foreign bankruptcy⁴⁶³.

Thirdly, one could argue that the willingness of the English legal system to grant foreign assignees the right to bring an action in the English courts must imply a recognition of the relevant foreign proceedings as the assignees can only act as assignees through their appointment in these foreign proceedings. That willingness surfaces in a number of cases where the domicile question has not been asked and where it is not certain that the domicile criterion would have been met. This demonstrates a willingness on behalf of the courts to go beyond domicile as the only ground for recognition of foreign insolvency proceedings and the cases are primarily helpful in this respect. It is less clear which criterion was used to decide on recognition. Once more the carrying on of business argument seems to apply to all cases, but again only in an implicit way. The first case that is worth mentioning in

461 (1866) L.R. 2 Eq. 23.

462 (1814) 2 Rose 291.

463 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 150.

this respect is *Alivon v. Furnival*⁴⁶⁴. In this case the French syndics of a merchant who had been appointed by the French bankruptcy judgment brought a case in the English courts. Their right to do so under French law was recognised and copied under English law on grounds of comity of nations. The implicit first step in this process is obviously the recognition of the French bankruptcy, which is the basis for the appointment of the syndics and the source of any right they may have. The syndics in this case were receivers, but later cases made no distinction between receivers and assignees in bankruptcy on this point.⁴⁶⁵

Another relevant case concerned the bankruptcy in Brazil of a firm of which a trader that was also declared bankrupt in England formed part.⁴⁶⁶ The two teams of assignees had a dispute about the proceeds of a sale and the case was brought before an English court. The sale involved goods that had been shipped from Brazil by the firm and which the trader had sold in England on account of the firm. Having been satisfied that the goods had continued to belong to the Brazilian firm until the sale, the court decided that the Brazilian trustees were entitled to the proceeds of the sale. The case is often referred to as evidencing that foreign assignees could recover property in England from English assignees, but it is equally important to note that the decision to allow the foreign assignees to bring the case must involve a recognition of the foreign proceedings. The court once more gave no precise reasons on that latter point, but domicile was clearly not an issue and business was clearly carried on in Brazil.⁴⁶⁷ In yet another case a Belgian curator administering a Belgian bankruptcy was heard in the English court, which involved a clear recognition of the Belgian bankruptcy proceedings. For our present purposes it is interesting to note that this case mentions the fact that the debtors carried on business in Antwerp as well as in London. The business activity in Antwerp may therefore have been a factor in the decision to recognise the Belgian proceedings.⁴⁶⁸

464 (1834) 1 Cr. M. & R. 277.

465 *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 TLR 99, at 100 per Clauson J.

466 *Ex p Wucherer* (1832) 2 Deac. & Ch 27 (The same Brazilian firm was also involved in *Re Vanzeller* (1833) 2 L.J. Bcy. 18.).

467 See also *Ex p Brown* (1838) 7 L.J. Bcy. 29 and *Clark v. Mullick* (1840) 3 Moo. P.C.C. 252.

468 *Re Borovsky and Weinbaum* [1902] 2 KB 312, see also Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 150-152.

Fourthly, there is a willingness to recognise foreign bankruptcy proceedings and a specific reference to the carrying on of business in the foreign jurisdiction in *Re Behrends*⁴⁶⁹. The debtor had been made bankrupt in Germany where he had previously resided and carried on his business. He came to England and presented a petition here. The court decided to adjourn the English proceedings *sine die* and to give preference to the German proceedings. This involved a recognition of the German proceedings and even though the court used it to justify the preference for the German proceedings and the adjournment of the English proceedings there was a clear reference to the factor of the place where business was carried on⁴⁷⁰ when the court ruled that

“[t]his man was, however, made bankrupt in Hamburg before he petitioned this court, and it may well be said that the place where his books of account and property were left, where his trading was carried on and the greater part of his debts were contracted, and where he was first made bankrupt, is the proper place for him to make such a disclosure of his affairs as his creditors may require”⁴⁷¹.

Where do all these cases and arguments lead us though? On the one hand there is clear evidence that submission and domicile are not the only grounds on which a foreign bankruptcy can be recognised⁴⁷². Many cases seem to ignore these points and on some of these occasions it may not even be possible to point towards the existence of submission or domicile. It seems necessary to admit though on the other hand that none of the cases provides explicit *dicta* and evidence to support the argument that carrying on business in the jurisdiction has been accepted by the English courts as a ground for the recognition of foreign bankruptcies. Doubt

469 (1865) 12 L.T. 149.

470 See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 152.

471 *Re Behrends* (1865) 12 L.T. 149, at 150.

472 See L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1182 (Vol. II).

therefore remains on this point.

III.2.4. De lege ferenda

Most of the cases in this area are over a century old and provide only convincing evidence for domicile and submission as grounds for recognition. Apart from that confusion seems to reign. It is first of all submitted that the domicile criterion is completely outdated. English private international law operates a concept of domicile that is unduly rigid and that does not allow for rapid change. This makes it a particularly inappropriate tool to deal with bankruptcy cases in an era of increased mobility and rapid changes. It is frankly no longer acceptable to suggest that a bankruptcy judgment of a court in the territory where the debtor took up temporary residence and/or where he carried on business for several years will not be recognised in England because the debtor was not (yet) domiciled there in the eyes of English law as the debtor had the intention to return to country where he lived originally and where he was domiciled as a result of the fact that his father had his domicile there. Such an approach is completely out of line with the modern legal reality and the role which modern bankruptcy law is supposed to play in a modern economy.

Changes are therefore long overdue and it may be time to formalise the existing implicit references to the place of carrying on business as an appropriate ground for the recognition of foreign bankruptcy judgments *de lege ferenda*.⁴⁷³ Such a criterion would fit in well with modern economic reality and would be meaningful from a commercial and business point of view. There is clearly a strong link between the debtor and the bankruptcy on the one hand and the forum where the debtor carried on his business on the other hand. It seems therefore entirely reasonable for the courts of the latter forum to exercise bankruptcy jurisdiction in relation to the debtor and there is no obvious reason why the English courts should object to this fact and

473 See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*,

refuse to recognise such a bankruptcy judgment.

The problem with a criterion such as carrying on business is that it is subject to change over time. The simplest manifestation of this problem occurs where a debtor stopped trading in the jurisdiction a while ago. It is therefore necessary to decide at which moment in time the debtor should have been carrying on business in the jurisdiction if the bankruptcy judgment is to be recognised. In principle this question can receive a simple answer and the recognition decision can be linked to the fact that the trader was carrying on business in the jurisdiction at the time when the bankruptcy proceedings were opened. That still leaves open the question though what exactly amounts to carrying on business. That question is particularly relevant whenever the debtor stops all active trading activity some time before the proceedings are opened. Such a situation is not at all exceptional in bankruptcy cases. But the key justification for accepting carrying on business as a ground for recognition, i.e. the strong commercial link with the jurisdiction, does not disappear in that situation, as the debts and liabilities and their impact on creditors remain in place. It is therefore submitted that the debtor should be deemed to continue to carry on business in the jurisdiction as long as there are outstanding debts and liabilities that were originally incurred in the course of the debtor's business activities.⁴⁷⁴ Additionally it is necessary to adopt the same broad definition that is adopted in substantive bankruptcy law. Business is therefore also carried on by the debtor if the latter deploys his commercial activities through membership of a partnership or firm or where any such activities are deployed by an agent or manager, be it on behalf of the trader, the partnership or the firm.⁴⁷⁵

It is submitted though that the introduction of the carrying on of business as a ground for the recognition of foreign bankruptcies is not sufficient. Carrying on business points towards a business presence within the foreign jurisdiction which in turn provides the strong link with the jurisdiction that is required. Not all potential

Clarendon Press (1999), at 94.

⁴⁷⁴ Compare *Re a Debtor* (No. 784 of 1991) [1992] Ch 554.

⁴⁷⁵ See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*,

bankrupts are traders though and not all of them carry on any form of business. It is submitted that for those that do not carry on business the obvious alternative of a business presence in the jurisdiction that gives rise to a strong link with that jurisdiction is the existence of a place of residence in the jurisdiction. It may therefore be wise to introduce the debtor's habitual residence in the foreign jurisdiction as an additional ground on which a foreign bankruptcy can be recognised in English law.⁴⁷⁶

It is also interesting to note in this respect that the Scottish courts already seem to have accepted the carrying on of business and the debtor's habitual place of residence as grounds for the recognition of foreign bankruptcies⁴⁷⁷. As has become clear above, it is submitted that the time is right for the English courts to follow this example at the earliest possible occasion.⁴⁷⁸

Presence of assets in the jurisdiction could be seen as another ground that is sufficient for the recognition of the foreign bankruptcy. It is submitted that this suggestion is not to be accepted. The mere presence of assets does not provide a sufficiently strong link between the debtor and the bankruptcy jurisdiction. It would therefore not be wise to rely on this sole fact to recognise a foreign bankruptcy in English law.⁴⁷⁹

Similarly any suggestion that there should be reciprocity between the grounds on which English courts take bankruptcy jurisdiction⁴⁸⁰ and the grounds on which they are prepared to recognise foreign bankruptcy judgments needs to be rejected. Such an argument is based on comity and the use of strict comity in this area was rejected

Clarendon Press (1999), at 94.

476 Similarly, I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 95 and Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 157.

477 See *Home's Trustee v. Home's Trustees*, 1926 S.L.T. 214 and *Obers v. Paton's Trustees* (1897) 24 R. 719.

478 Similarly, I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 94 and see also Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 157.

479 See also Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 159.

in *Felixstowe Dock and Railway Co. v. United States Lines Inc.*⁴⁸¹ Even more importantly, there is the additional element of discretion in relation to grounds of jurisdiction that cannot be replicated usefully in terms of recognition.⁴⁸²

III.2.5. Wider grounds for recognition on a statutory basis

Section 426(4) Insolvency Act 1986 provides for assistance that is to be given to foreign courts having bankruptcy jurisdiction:

“The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having corresponding jurisdiction in any other part of the United Kingdom or any other relevant country or territory.”⁴⁸³

The corresponding jurisdiction to which section 426(4) refers is probably jurisdiction under the provisions of the local *lex fori*. This is an important difference between section 426(4) and the provisions on recognition, which refer often to English concepts of domicile etc. Whilst it is clear that in most cases the courts in these other countries to which assistance is given would have jurisdiction in proceedings the outcome of which would be entitled to recognition in the England, there is no prerequisite in the provision which obliges the English courts to check whether or not the foreign proceedings would be recognised before lending their assistance to them.⁴⁸⁴ Assistance and recognition are two separate things for the purposes of section 426(4). Two conclusions flow from that. First, proceedings that do not qualify for recognition are nevertheless entitled to some form of assistance as

480 Cf. s. 265 Insolvency Act 1986.

481 [1989] QB 360.

482 Similarly, I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 96 and Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 157-159.

483 Not all countries and territories qualify for this purpose, only those that are relevant countries of territories and that are as such contained in a list established by statutory instrument.

484 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 159-160.

the courts may think is reasonable. And secondly, section 426(4) does not contain an additional ground for the recognition of foreign proceedings.

III.2.6. Exception to recognition: tax

English private international law in general does not deal with foreign tax cases and as a matter of public policy foreign tax laws are not enforced. It is nevertheless clear that in most modern insolvency and bankruptcy cases tax claims are present and sometimes they are even dominant. The presence of tax claims in the foreign proceedings is therefore an additional item that may have an impact in the context of the recognition of these foreign proceedings.

The older case law seems to adopt a radical approach on this point in the sense that the mere presence of a tax claim in a foreign bankruptcy will inevitably lead to a refusal of recognition of the foreign proceedings irrespective of any other element in the case. Recognition would from this point of view indirectly assist, albeit potentially only to a minimal extent, a foreign tax law and this would offend against public policy.⁴⁸⁵ There is also no clear discernable evidence that the courts are ready to depart from this extremist point of view⁴⁸⁶.

It is nevertheless submitted that such an extreme view disregards modern business and commercial reality and unduly penalises the other creditors. Whilst cases where the tax claims constitute more than fifty per cent of the total amount of all claims may correctly be described as tax bankruptcies, in respect of which public policy considerations are a bar to recognition, the same should not apply to all other cases where tax claims are not the dominant element in the bankruptcy case. Such cases should not offend against public policy and should be entitled to recognition.⁴⁸⁷ This

⁴⁸⁵ See *Huntington v. Attrill* [1893] AC 150 (PC); *Government of India v. Taylor* [1955] AC 491 (HL) and *Schemmer v. Property Resources Ltd.* [1974] 3 All ER 451.

⁴⁸⁶ See *QRS 1 Aps v. Frandsen* [1999] 1 WLR 2169, [1999] 3 All ER 289 (CA).

⁴⁸⁷ I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 97.

logical attitude has apparently already been adopted by the majority of civil law systems, despite the fact that their starting point is the same public policy bar to the enforcement of foreign tax laws⁴⁸⁸.

III.3. The effects and consequences of the recognition of foreign bankruptcies

We have already indicated above that a distinction needs to be drawn between the decision to recognise the foreign bankruptcy as such and the subsequent issue of the effects and consequences that are to be attached to such a recognition decision. It is to the latter aspect that we now turn.

English law has on this point always made a distinction between the effects on movable property on the one hand and those on immovable property on the other hand.

III.3.1. Movable property

The approach applied to movable property, be it tangible or intangible movable property, is characterised by its quasi-automatic nature. There is an automatic transmission of the title in any movable property, i.e. an assignment, to the foreign trustee in bankruptcy if the foreign bankruptcy has under the *lex concursus* the effect of transmitting the title in the debtor's property to the trustee⁴⁸⁹. The starting point is therefore that a foreign bankruptcy order that is entitled to recognition will produce the same effects in respect of English movable property as it produces

488 See G. Van Hecke and K. Lenaerts, *Internationaal Privaatrecht*, Story Scientia (2nd ed, 1989), at 75-79.

489 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1184, rule 167 (Vol. II); *Solomons v. Ross* (1764) 1 Hy. Bl. 131n, 126 E.R. 79; *Jollet v. Deponthieu* (1769) 1 Hy. Bl. 132n, 126 E.R. 80; *Alivon v. Furnival* (1834) 1 Cr. M. & R. 277; *Re Blithman* (1866) L.R. 2 Eq. 23; *Re Davidson's Settlement* (1873) L.R. 15 Eq. 383; *Re Anderson* [1911] 1 KB 896; *Re Craig* (1916) 86 L.J. Ch 62 and *Radich v. Bank of New Zealand* (1993) 116 A.L.R. 676.

under the *lex concursus*. In other words, the *lex concursus* will also determine whether the order and the assignment that flows from it are to have extraterritorial effects and the effects in England will be limited to the situation where such an extraterritorial effect was indeed envisaged⁴⁹⁰. The effects in England are in principle produced from the same moment on which the order is effective under the foreign law.⁴⁹¹

English law operates one further important restriction on this rule though. The trustee's title to the bankrupt's English movable property is subject to any rights of third parties that have been perfected in application of the requirements of the *lex situs* before the moment in time on which English law invests the trustee with the title in the movable property concerned.⁴⁹² This restriction is extremely unfortunate. Most bankruptcy laws operate rules by which the trustee can take action against or is entitled to ignore certain acts that have taken place immediately prior to the bankruptcy under certain circumstances. Certain acts of diligence of the creditors immediately before the appointment of the trustee, as well as certain acts of the bankrupt in the same period may indeed be objectionable from the point of view of the interests of the creditors as a whole. English law itself contains similar provisions. The restriction that is imposed in relation to the effects of foreign recognised bankruptcies has therefore the unfortunate effect of removing the trustee's power to act promptly and effectively in those situations. In certain cases the trustee will not be able to rely on the relevant provision of the *lex concursus* and the equivalent provision under English law will not apply either, unless a secondary local English proceedings can be opened promptly to assist the foreign proceeding. Such a proceeding could then rely on the equivalent English proceedings, but this solution is unduly complex and risky as it is not obvious that it will be possible to

490 Cf. *Re Blithman* (1866) L.R. 2 Eq. 23; *Re Davidson's Settlement* (1873) L.R. 15 Eq. 383; *Re Anderson* [1911] 1 KB 896 and *Re Craig* (1916) 86 L.J. Ch 62.

491 See *Solomons v. Ross* (1764) 1 Hy. Bl. 131n, 126 E.R. 79; *Richards v. Hudson* (1762) 4 T.R. 187n, 100 E.R. 962; *Jollet v. Deponthieu* (1769) 1 Hy. Bl. 132n, 126 E.R. 80; *Neale v. Cottingham* (1764) 1 Hy. Bl. 132n, 126 E.R. 81.

492 *Galbraith v. Grimshaw* [1910] AC 508 (HL), see also *Levaseur v. Mason & Barry* [1891] 2 QB 73; *Singer v. Fry* (1915) 84 L.J.K.B. 2025 and *Anantapadmanabhaswami v. Official Receiver of Secunderabad* [1933] AC 394 (PC).

act promptly in all cases.⁴⁹³

The suggested solution for the problems resulting from *Galbraith v. Grimshaw* already indicates that the existence and the recognition of a foreign bankruptcy do not preclude the English courts from in turn declaring the debtor bankrupt. The recognition of the foreign proceedings will nevertheless be a factor in their decision in this respect⁴⁹⁴. It is now clear in the same context that the foreign trustee in bankruptcy has the right to act in court, particularly when there is a need to sue to recover debts owed to the bankrupt⁴⁹⁵. As with the assignment of movables though, this will be subject to the trustee having equivalent powers under the *lex concursus*, which limits his powers.

In these circumstances one may be confronted with several bankruptcies in several countries, all of which purport to assign the bankrupts movable property to a trustee. English law will then give preference to the assignment that is earliest in date amongst the assignments resulting from bankruptcy proceedings that are entitled to recognition and it will do so irrespective of whether or not the first such bankruptcy took place in the United Kingdom⁴⁹⁶.

III.3.2. Immovable property

A different regime applies here. Any automatic transfer of title to immovable property is ruled out under English law⁴⁹⁷. Transfer of title to immovable goods is

493 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 98-99.

494 See *Re Thulin* [1995] 1 WLR 165.

495 See *Alivon v. Furnival* (1834) 1 Cr. M. & R. 277, at 296; *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 TLR 99 and *Obers v. Paton's Trustees* (1897) 24 R. 719.

496 See L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1187, rule 169 (Vol. II); *Re Anderson* [1911] 1 KB 896, at 903; *Geddes v. Mowatt* (1824) 1 Gl. & J. 414; *Re O'Reardon* (1873) L.R. 9 Ch. App. 74 and *Re Temple* [1947] Ch 345.

497 See L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1186, rule 168 (Vol. II); *Cockerell v. Dickens* (1840) 3 Moo.P.C. 98; *Waite v. Bingley* (1882) 21 Ch. D. 674; *Re Levy's Trusts* (1885) 30 Ch 119; *Phosphate Sewage Co. v. Lawson* (1878) 5R. 1125; *Araya v. Coghill*, 1921 1 S.L.T. 321 and *Radich v. Bank of New Zealand* (1993) 116

subject to the sovereign control of the *lex situs*. Even when recognised the foreign proceedings and the foreign *lex concursus* are not able to operate on their own such a transfer of title to immovable property situate in England. In practice the foreign trustee is obliged to apply to the courts to obtain such a transfer of title. Such an application can be made once his appointment, as part of the foreign bankruptcy, has been recognised.⁴⁹⁸

A first point that needs to be made in this respect is that such an application is not simply a formality that is imposed by English law. The court will exercise its sovereign control. In non-controversial cases the court may exercise its control over the bankrupt to incite him to co-operate in transferring the title to the trustee or alternatively a trustee may be appointed to sell the property and to sort out the proceeds of the sale in accordance with the provisions of the *lex concursus*. But the court can also impose conditions⁴⁹⁹ and it can even refuse the application, for example in cases where the foreign law is to an unacceptable degree different from English law in respect of the fair and equal treatment⁵⁰⁰ that is to be accorded to all creditors.

Secondly, the *Galbraith v Grimshaw*⁵⁰¹ principle according to which the trustee is always subject to any interest in the property which third parties have perfected before the trustee secured his interest applies here too. The same unfortunate restriction that applies to movable property has therefore also effect in relation to immovable property situate in England.

A.L.R. 676.

498 See *Waite v. Bingley* (1882) 21 Ch. D. 674; *Ex p Stegmann* 1902 T.S. 40 and *Re Levy's Trusts* (1885) 30 Ch. D. 119.

499 See e.g. *Re Kooperman* [1928] W.N. 101, 72 Sol. Jo. 400; *Re Levy's Trusts* (1885) 30 Ch. D. 119 and *Re Osborne* (1931-32) 15 B. & C.R. 189.

500 Cf. The controversial decision in *Felixstowe Dock & Railway Co. v. United States Lines Inc.* [1989] QB 360.

501 [1910] AC 508.

III.4. Scottish and Northern Irish bankruptcies

Inside the United Kingdom a special regime of automatic recognition for bankruptcies has been put in place by the Insolvency Act 1986.⁵⁰² At the enforcement stage an order from another part of the United Kingdom is to be treated as a local order. The only discretion that is left to the courts appears in relation to property in their territory and the impact thereon of an order made in another part of the United Kingdom. Assistance can be withheld if the court finds that the original proceedings were flawed in any way.⁵⁰³ Apart from that emergency brake the principle is that the effect on movable or immovable property of any bankruptcy order made in another part of the United Kingdom is the same as that of an order made locally⁵⁰⁴.

Section 426(4) Insolvency Act 1986 was already highlighted above and allows the courts to provide assistance to one another, both inside the United Kingdom and in dealings with courts in relevant countries and territories. Section 426(5) adds to that that in providing such assistance the court can apply its local law, but also the law applicable by the other court in relation to comparable matters. This has the advantage that the courts have the opportunity to circumvent the unfortunate consequences of the principle laid down in *Galbraith v. Grimshaw*⁵⁰⁵ that were already discussed above.

III.5. Recognition of foreign liquidations

A strong parallelism exists between the English approach to the recognition of foreign bankruptcies and foreign liquidations and most rules apply *mutatis*

502 S. 426(1) Insolvency Act 1986, see Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 213-214.

503 S. 426(2) Insolvency Act 1986.

504 See L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1181 and 1183, rules 165(1) and 166 respectively (Vol. II).

505 [1910] AC 508 (HL), see I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 101.

mutandis. We will therefore once again look at the grounds for recognition as such, before turning to the effect of such recognition and the situation inside the United Kingdom as regards the recognition of intra-United Kingdom liquidations.

III.5.1. The country of incorporation

It has been argued above that in the eyes of English private international law the concept of domicile corresponded to the identification of the natural forum for matters regarding a person's personal status and capacity and that bankruptcy cases could be brought within the scope of such matters. One could easily defend the point of view that for a company its place of incorporation is the logical equivalent of a person's domicile. Company law takes that principle on board and determines the birth and demise of a company by means of the law of its incorporation⁵⁰⁶. It seemed therefore logical to derive from that rule that English law will recognise the foreign liquidation proceedings for a company if those proceedings have been initiated in the forum that corresponds to the company's country of incorporation. The country of incorporation will therefore be the first ground for the recognition of foreign insolvency proceedings in English law. Such a recognition will also extend to the office holder appointed in these proceedings⁵⁰⁷, who will be recognised as the person to represent the collective interests of the creditors in the United Kingdom.⁵⁰⁸

506 See e.g. *Bank of Ethiopia v. National Bank of Egypt* [1937] 1 Ch 513 and *Banco de Bilbao v. Sancha* [1938] 2 KB 176.

507 L. Collins and others, *Dicey and Morris: The Conflict of Laws*, Sweet & Maxwell (13th ed, 2000), at 1141, rule 158 (Vol. II).

508 See *Baden, Delvaux and Lecuit v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.* [1992] 4 All ER 161 and [1993] 1 WLR 509; *Sea Insurance Co. of Petrograd* (1924) 20 Ll. L. Rep. 308 (CA); *Bank of Ethiopia v. National Bank of Egypt* [1937] 1 Ch 513; *Banco de Bilbao v. Sancha* [1938] 2 KB 176; *Burr v. Anglo-French Banking Corp'n. Ltd.* (1933) 49 T.L.R. 405; *Onassis v. Drewry* (1949) 83 Ll. L. Rep. 249 (CA); *Schemmer v. Property Resources Ltd.* [1975] Ch 273 and *White v. Verkouille* [1990] 2 Qd. R. 191.

Slight differences in the corporate format⁵⁰⁹ and/or the type of office holder will not affect this process. There is however, one important restriction in the sense that the office holder's powers and his eligibility to maintain a claim to the English assets of the company will be limited by the powers he received under the law under which his appointment originated. English law will only recognise the rights of which there is confirmation that the right holder possesses them under the law of his appointment and that that law intended such powers to extend to property situate abroad.⁵¹⁰

One could on the other hand suggest that this ground for recognition can be expanded to those cases where the court involved is not the court of the place of incorporation, but where the court of the place of incorporation recognises the winding-up proceedings. Some cases apply this principle for example where a company incorporated in one US state is involved in insolvency proceedings at federal level. The English court is then happy to recognise the US proceedings⁵¹¹ and it has been suggested that this should also apply to proceedings in a third country that are recognised in the country of incorporation.⁵¹² There are however two problems with such a suggestion. First, there is no case law that explicitly supports such an extension. And secondly, it would in practice be very difficult in most cases to ascertain whether or not the proceedings in the third country would de facto be entitled to recognition in the country of incorporation.⁵¹³ English courts may nevertheless be prepared to make use of this option in suitable cases.

509 *Baden, Delvaux and Lecuit v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.* [1992] 4 All ER 161 and [1993] 1 WLR 509 and see also Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 166-167.

510 *Macaulay v. Guaranty Trust of New York* (1927) 44 T.L.R. 99, [1927] W.N. 308 and *Onassis v. Drewry* (1949) 83 Ll. L. Rep. 249 (CA).

511 *Felixstowe Dock & Railway Co. v. United States Lines Inc.* [1989] QB 360.

512 Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 167.

513 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 168.

III.5.2. Submission

Submission as a ground for recognition was traditionally far less established in relation to foreign winding-up proceedings than in relation to bankruptcy proceedings.⁵¹⁴ Recent developments in the case law seem to indicate though that the courts are now also happy to recognise foreign proceedings in this area if the company in liquidation submitted to the jurisdiction of the foreign court. Maxwell Communications Corporation plc originally filed a Chapter 11 petition in the Southern District of New York and only subsequently presented its petition for administration in the English courts. The English judge, Hoffmann J., recognised the US proceedings, despite the fact that there was only one day of difference and that both proceedings were concerned with an English company. That approach met with the approval of Mann L.J. and Legatt L.J. in the Court of Appeal's decision in *Barclays Bank v. Homan*. Legatt L.J. expressed his approval as follows:

“Hoffmann J. recognised the jurisdiction of the United States Bankruptcy Court when he made his order of 31 December 1991. This court having recognised the jurisdiction of the United States in relation to this insolvency, it would, in my judgment, offend against comity for this court now to decree which claims the administrators can, and which they cannot, allege in the United States court are preferences.”⁵¹⁵

III.5.3. Recognition in other cases

This brings us to the remaining grey areas where there is no clear authority and which include those cases where there is a potential case of concurrent jurisdiction between the English court and the foreign court.

⁵¹⁴ See Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 175.

In a first scenario the company has been incorporated (formed and registered) in England. Here the basic rule giving preference to the place of incorporation is likely to play a very strong role. It should also be kept in mind that the English court will not lose its power over the company due to the fact that the latter no longer has assets and no longer deploys commercial activities in its country of incorporation. The English proceedings are therefore likely to be given a dominant role. If the company has nevertheless a strong link with the third country, essentially in terms of assets and commercial activities, then the English courts may be more readily disposed to recognise the foreign proceedings. In most cases these foreign proceedings will then become ancillary proceedings to the English proceedings.⁵¹⁶ More modern cases show also an increasing willingness to work out a more sophisticated ad-hoc arrangement.⁵¹⁷

There may even be a case where in the absence of assets no English proceedings are initiated. A company in England can then probably be the subject of a foreign liquidation which can be recognised in England. Dissolving such a company by striking it off the register may nevertheless be a matter for English law and the Registrar of Companies' powers under the Companies Act 1985.⁵¹⁸

In a second scenario the company concerned has been incorporated in a third country. Here the degree of transparency and legal certainty becomes absolutely minimal. It seems nevertheless likely that English law will translate its own preference for the country of incorporation as a ground for recognition in a decision to give preference to the foreign proceedings in the foreign country of incorporation over any other foreign proceedings. These other foreign proceedings may also be recognised, but it is likely that they will be secondary and ancillary to the main proceedings in the (foreign) country of incorporation. Things are even less clear in the absence of proceedings in the foreign country of incorporation. It is submitted

515 [1993] B.C.L.C. 680 at 706.

516 *North Australian Territory Co. Ltd. v. Goldsbrough, Mort & Co. Ltd.* (1889) 61 L.T. 716.

517 See the BCCI saga in which US, English and Luxembourg proceedings were involved and *Barclays Bank v. Homan* [1993] B.C.L.C. 680.

518 Ss. 652 and 652 A, see I. Fletcher, *Insolvency in Private International Law: National and Inter-*

that a blunt refusal to recognise any proceedings would not be the appropriate solution. There may be sound business and efficiency reasons to recognise foreign proceedings even in some of the latter cases. Two approaches could be proposed to develop a rule for such a scenario. First, one could suggest a parallelism between the rules on the basis of which the English courts would themselves take winding-up jurisdiction concerning a foreign registered company and the English rules of recognition for foreign proceedings. Any ground that is used for jurisdiction would also be used for recognition. The main problem with this approach is the fact that there is a discretion at jurisdiction level that is hard, if not impossible, to duplicate at recognition level. Nevertheless, this may be in certain cases the best and most efficient way forward towards an equal distribution of the assets, especially if there is only a minimal amount of assets present in the jurisdiction. The second approach involves giving the courts a discretion to recognise foreign proceedings on the basis of the presence of a place of business or the central management and control of the business in the foreign country concerned or on the basis that the company carried on business in that foreign country. The discretion should then be exercised in favour of recognition unless there are strong reasons to the contrary that substantially weaken the link between the company and the foreign jurisdiction.⁵¹⁹ It is submitted that the latter approach is to be preferred and it is hoped that the courts or the legislator will find the opportunity to confirm the existence of this option in the near future as it would remove the substantial amount of uncertainty that exists on this point at present.

III.6. Effects and consequences of foreign liquidations

The parallelism between the recognition of foreign bankruptcies and foreign winding-up proceedings applies only in part when it comes to the effects of these proceedings. In short the effects of foreign winding-up proceedings are similar to

national Approaches, Clarendon Press (1999), at 167.

⁵¹⁹ This approach has also been advocated by Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), 168-177 and I. Fletcher, *Insolvency in Private International Law: National and*

the regime that applies to immovable property in relation to foreign bankruptcies.⁵²⁰ No direct and automatic consequences flow therefore from the recognition of the foreign winding-up proceeding in relation to any form of property. The foreign liquidator will on each occasion be obliged to make an application to the English courts, even if it is very likely that he will receive assistance and cooperation.⁵²¹ Often the liquidator will be invested with the property of the company in England, be it movable or immovable.⁵²² The effects of the *Galbraith v. Grimshaw*⁵²³ doctrine is yet again the main disadvantage of the existing English approach. The liquidator will only receive his rights upon the decision of the court and will have to deal with previously perfected rights of creditors. Such may be the difficulties in dealing with these rights perfected by creditors that in many cases the liquidator does not even spend the money on the litigation to reverse them. The opposite conclusion may only apply to large cases where vast amounts of money are involved, such as in recent years the Maxwell and BCCI sagas.

The current English approach is largely based on the mistaken idea that most legal systems treat bankruptcies of individuals and the winding-up of companies differently. Hence the different approach to the effects of the recognition of foreign bankruptcies and foreign insolvencies. The detrimental effects of this misconception are however largely attenuated by the willingness of the English courts to lend assistance to foreign liquidators.

It is nevertheless submitted that the time has come to rethink the approach taken by English law on this point. Two key points should dominate any new approach. First, the negative impact of the delay in giving effectiveness to the foreign liquidator's entitlement to English assets has become abundantly clear. This can be avoided by giving retro-active effect to this entitlement as soon as the foreign proceedings have been recognised or as soon as the court accedes to the liquidator's request to be

International Approaches, Clarendon Press (1999), at 168-169.

⁵²⁰ See above.

⁵²¹ See the discussion in the context of the effects of the recognition of foreign bankruptcies above for further details.

⁵²² Compare Ph. Smart, *Cross-Border Insolvency*, Butterworths (2nd ed., 1998), at 223.

invested with the title to the property, as the case may be. That entitlement should be deemed to have arisen at the time of the liquidator's appointment under the foreign law. Secondly, the effect of *Galbraith v. Grimshaw*⁵²⁴ should be reversed. This can be achieved by giving the foreign liquidator any powers of avoidance of antecedent transactions and of the cancellation of the benefits of incomplete executions as soon as his appointment and his entitlement to claim property in England has been recognised by English law.⁵²⁵ Additionally, one could envisage getting rid of the distinction between foreign bankruptcies and foreign winding-up proceedings by according to the latter the same automatic effects in relation to movable property that are already accorded to foreign bankruptcies. This would put English law in a position to deal smoothly and effectively with the consequences of modern commercial reality in this area.

III.7. Scottish and Northern Irish liquidations

Section 426 Insolvency Act 1986 applies *mutatis mutandis* also to corporate cases and the winding-up of companies⁵²⁶. The rule within the United Kingdom is therefore that winding-up proceedings in any part of the United Kingdom will automatically be recognised in the other parts of the United Kingdom. Section 426(5) on assistance between courts is also applicable.

III.8. Judicial assistance

Section 426 of the Insolvency Act applies equally to corporate insolvency cases, both in cases amongst the various constituent parts of the United Kingdom and in relation to relevant countries, as discussed earlier. In this context subsections 4 and

523 [1910] AC 508 (HL).

524 Ibidem.

525 This is also the approach supported by I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 171.

526 See therefore *mutatis mutandis* the comments made above in the context of intra-United Kingdom

5 are particularly important. Subsection 4 allows for assistance to be provided between courts. The liquidator as such can therefore not invoke this subsection. But subsection 5 leaves the English court free to apply either English insolvency law or the insolvency law of the foreign court for comparable matters that fall within the courts insolvency jurisdiction if a request is received from a court in a relevant territory⁵²⁷. This reference to insolvency law does not mean though that any assistance provided under subsection 4 is also so limited. Subsection 5 simply adds an additional option⁵²⁸. The term comparable matters has also been given a broad, rather than a restrictive interpretation⁵²⁹. The aim is clearly to encourage and facilitate mutual assistance in as many cases as possible in order to achieve smooth and efficient solutions to cross-border winding-up cases.

bankruptcies.

⁵²⁷ *Re Dallhold Estates (UK) Pty. Ltd.* [1992] B.C.L.C. 621; *Re Bank of Credit and Commerce International S.A. (No. 9)* [1994] 3 All ER 764 (reversed in part on appeal, but not on this point, see [1994] 1 WLR 708 (CA)); *Hughes v. Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 B.C.L.C. 497 (CA); *Re Business City Express Ltd.* [1997] 2 B.C.L.C. 510; *England v. Smith* [2000] 2 WLR 1141 and *England v. Purves*, also reported as *Re JN Taylor Finance Pty. Ltd.* [1999] 2 B.C.L.C. 256 and [1999] B.C.C. 197.

⁵²⁸ *Hughes v. Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 B.C.L.C. 497 (CA).

⁵²⁹ *Re Business City Express Ltd.* [1997] 2 B.C.L.C. 510.

Chapter IV - The EU Council Regulation on Insolvency Proceedings

I. Introduction

1.1. A brief historical overview

The final adoption of EU Council Regulation (EC) 1346/2000 on Insolvency Proceedings on 29th May 2000,⁵³⁰ which will enter into force on 31st May 2002,⁵³¹ was the culmination of almost 40 years of efforts in the area of insolvency and bankruptcy. Soon after its creation the European Economic Community, as it then was, realised the need to deal with insolvency and bankruptcy, as they constituted a potential impediment to the free flow of commerce and the creation of a single market. The gradual creation of a single market gave indeed rise to a situation in which the activities of undertakings had more and more cross-border effects. In such a situation there is also necessarily a risk of insolvency and such an insolvency of an undertaking involved in cross-border trade necessarily has a cross-border impact. Such a cross-border insolvency of an undertaking therefore has an impact on the proper functioning of the internal market. Hence the need for Community action in this area to coordinate the measures that are to be taken regarding the insolvent debtor's assets. In the absence of such coordination undertakings might be confronted with higher risks resulting from potential insolvencies of their cross-border trading partners, than if they simply trade with domestic partners. Such a risk is bound to have a negative effect and can become an impediment to the creation and successful operation of the single market.⁵³²

530 [2000] OJ L160/1.

531 Article 47 of the Regulation.

532 See Recitals 2 and 3 to the Regulation.

Individual Member-States have domestic insolvency and bankruptcy legislation that is not necessarily uniform in approach and by definition insolvency proceedings have an impact on many other areas of law, such as employment law, social security, tax and revenue laws etc. It should therefore not come as a surprise that any harmonisation of substantial insolvency and bankruptcy laws is almost impossible to achieve. Suffice it to refer to the obvious reluctance of Member States to accept any change via the back door of insolvency to their tax and social security rules. National views in these areas are held strongly and Member States also used insolvency law as an economic tool. They were not prepared to give up control over such a useful economic tool.⁵³³

The option that remained open in the absence of a full scale harmonisation of national insolvency laws was a harmonisation at the level of private international law rules. But even in the context of private international law insolvency proceedings were seen as a special and particularly complex case. The main effort in the area of private international law became the Brussels Convention 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters⁵³⁴, but bankruptcy and insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings were specifically excluded from its scope.⁵³⁵ It was thought better to deal with these matters in a separate convention. Work on such an insolvency proceedings convention started as early as the 1960s and a Preliminary Draft Convention was achieved in 1970⁵³⁶. When the United Kingdom, Ireland and Denmark acceded to

533 See Omar, "New initiatives on Cross-Border Insolvency in Europe", [2000] *Insolvency Lawyer* 211, at 211.

534 The Convention was amended on several occasions when new Member-States joined the European Union and there is also a parallel Lugano Convention, which brings the EFTA States within the system. A consolidated version can be found at [1998] OJ C27/1. In a latest development the Convention has been replaced by Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1, which will enter into force on 1st March 2002 and which contains the same exclusion clause in its Article 1(2)(b).

535 See Article 1 of the Brussels Convention 1968.

536 E. Comm. Doc. 3.327/1/XIV/70-F, the Explanatory Report by Noël and Lemontey was published as E. Comm. Doc. 16.775/XIV/70-F. See Noël, "Lignes directives du projet de Convention CEE relative à la faillite" (1975) *Rev. Trim. Dr. Eur.* 159; Lemontey, "Perspectives d'unification du droit dans le projet de Convention CEE relative à la faillite" (1975) *Rev. Trim. Dr. Eur.* 172; Hunter, "The

the Community, further work was undertaken, which resulted in a Draft Convention 1980⁵³⁷. This Draft Convention was submitted to the Council of Ministers, but it was so problematic that attempts to secure its adoption were soon abandoned.⁵³⁸

A new Committee of Experts was convened by the Council in 1989. Under the dynamic chairmanship of Dr Manfred Balz a new draft was produced, which proved far more satisfactory.⁵³⁹ This became the EU Insolvency Proceedings Convention 1995⁵⁴⁰, which was initialled by the Council at its meeting on 25th September 1995 and opened for signature on 23rd November 1995. Member-States were given six months to sign the Convention. In the absence of all of them signing up to the Convention the project would fail. Fourteen Member States signed the Convention, but the UK failed to do so. Officially the UK refusal was explained by the BSE boycott imposed by the Conservative Government of the time, but it has been suggested that an oversight that resulted in the reluctant inclusion of Gibraltar within the scope of the Convention was the real reason behind it.⁵⁴¹ Be that as it may, the Convention failed and never came into force.

Three years almost to the date after the period during which the Convention had been open for signature had expired Germany and Finland revived the draft. They came up with what became the Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on

Draft Bankruptcy Convention of the European Economic Communities" (1972) 21 I.C.L.Q. 682 and "The Draft EEC Bankruptcy Convention: A Further Examination" (1976) 25 I.C.L.Q. 310.

537 E. Comm. Doc. III/D/72/80, see [1982] E.C. Bull. C. Supp. 2/82, at pp. 5-46, the Explanatory Report by Lemontey was published [1982] E.C. Bull. C. Supp. 2/82, at pp. 47-123. See Aminoff, "The EEC Draft Bankruptcy Convention – An Exercise in Harmonising Private international Law" (1990) Leg. Iss. Eur. Int. 121; Daniele, "Les problèmes internationaux de la faillite : heur et malheur du projet de convention communautaire" (1987) Cahiers Dr. Eur. 512 ; J. Thieme, *Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens*, Mohr-Siebeck (1988), I. Fletcher, *Conflict of Laws and European Community Law*, Kluwer (1982), Chapter 6, pp. 187-249 and D. Beukenhorst, *Het ontwerp Europees faillissementsverdrag : het ontwerp van Verdrag inzake faillissement, akkoord en andere soortgelijke procedures van 1980*, Kluwer (1983).

538 For further details concerning these developments see I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), pp. 246-255.

539 See Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485.

540 35 I.L.M. 1223 (1996).

541 I Fletcher, *Insolvency in Private International Law: National and International Approaches*,

insolvency proceedings, which was submitted to the Council on 26th May 1999.⁵⁴² The initiative retained all the substantive provisions of the Convention, the main changes being the transformation from a Convention into a Council Regulation. This change in terms of legal instrument used obliterated the lengthy ratification process and as a Regulation the instrument also avoided the phase associated with a Directive where Member States have to bring their internal legislation into line with the Directive. The slightly amended initiative became in the end EU Council Regulation (EC) 1346/2000 on Insolvency Proceedings of 29th May 2000.⁵⁴³

Before turning to the terms of the Regulation itself, it may be useful after this brief historical introduction to examine the purpose of the Regulation in more detail.

1.2. The Purpose of the Regulation

As the preamble to the Regulation sets out, the main purpose of the Regulation is to introduce rules for dealing with insolvencies with a cross-border element. These rules are seen as vital if the European Union is to achieve its aim of forming a single legal area based on the ideals of freedom, security and justice.⁵⁴⁴ From a more practical point of view it can be said that these ideals underpin the single market and the whole process of economic integration. As indicated above cross-border insolvencies and divergent rules on how to deal with them can constitute an impediment to the operation of the single market. It was therefore seen necessary to improve the framework for dealing with insolvency cases and to speed up insolvency proceedings with cross-border implications. The Regulation sets out to achieve this aim.

The legal basis used is that of Article 65 EC which deals with judicial co-operation in civil matters. This route became available by the introduction of new provisions in

Oxford Monographs in Private International Law, Clarendon Press (1999), at 249 and 298-301.

⁵⁴² [1999] OJ C221/8.

⁵⁴³ [2000] OJ L160/1.

the Treaty, which after the adoption of the Treaty of Amsterdam now form the third pillar on justice and home affairs. Two main advantages are associated with the use of Article 65 EC as a legal basis. First, it eliminates the need for the use of a separate convention. Such a convention needs to be ratified by all Member-States and any updating requires a new convention and again the whole ratification process. This is a slow and cumbersome procedure, which is bound to give rise to delays.⁵⁴⁵ The use of a Regulation avoids the need for ratification and facilitates the updating process.⁵⁴⁶ The use of a Regulation instead of a Directive, which had been suggested at an earlier stage⁵⁴⁷, has the additional advantage that no time is lost with the introduction of national implementation measures by the Member-States. There is also no risk of slightly divergent national implementations. Secondly, a separate convention raised the possibility that it would not apply to any of the Member-States' overseas territories. The EU Convention on Insolvency Proceedings 1995 did not contain a provision that provided clarification on this point and the Gibraltar saga illustrates the problems that may arise as a result. The use of a Regulation adopted on the basis of Article 65 EC means that the standard regime of the Treaty applies and that problems of this nature are avoided. There is however also a major disadvantage that is associated with the use of Article 65 EC as a legal basis. The United Kingdom, Ireland and Denmark secured an opt-out for any measure adopted under this Treaty provision during the negotiations that led to the adoption and eventual ratification of the Treaty of Amsterdam.⁵⁴⁸ The German-Finnish Initiative for the adoption of the Regulation therefore excluded those three Member-States from participation in the adoption process of the Regulation.⁵⁴⁹ The eventual Regulation would also not be binding on them and not applicable to them. This could potentially create problems in case of a cross-border insolvency that extended

544 Recital 1 of the Regulation.

545 See the serious doubt expressed in relation to the EU Insolvency Proceedings Convention 1995 by Idot, "La 'faillite' dans la Communauté: Enfin une convention internationale?" (1995) 21 D.P.C.I. 34 (issue 1), at 39-40.

546 See Recital 8 to the Regulation.

547 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 301.

548 See Articles 1 and 2 of the Protocols on the position of Ireland, the United Kingdom and Denmark, which the Treaty of Amsterdam annexed to the Treaty on European Union and the Treaty establishing the European Community.

to these three Member-States and it would clearly reduce the effectiveness of the Regulation and prevent it from reaching its aim in the most satisfactory manner possible. Fortunately the United Kingdom and Ireland decided to exercise their right to opt in to measures adopted under Article 65 EC, which they held under Articles 3 and 4 of the Protocols on their position which the Treaty of Amsterdam annexed to the Treaty on European Union and the Treaty establishing the European Community.⁵⁵⁰ That means that the Regulation now applies to all Member-States except Denmark. Denmark did not use the option open to it to inform the Council that it did no longer wish to avail itself of all or the relevant parts of the Protocol⁵⁵¹, but it is understood that Denmark undertook to put in place national legislation along the lines of the Regulation.⁵⁵² If this eventually becomes the case, as it should in the light of the earlier Danish willingness to sign up to the very similar provisions of the EU Insolvency Proceedings Convention 1995, the disadvantage associated with the use of a Regulation adopted on the basis of Article 65 EC will have been overcome.

The Regulation clearly emerged in this context from the recognition that undertakings and especially their cross-border activities can have a profound effect on the operation of the single market and that a set of common rules to deal with them was therefore required. The logic behind the Regulation is therefore similar to that behind many measures in the company law and competition law areas. Insolvency and bankruptcy and their macro-economic market regulating function have an impact on the single market. The logic behind it therefore requires the Regulation to put in place a legal regime that allows for the co-ordination of measures that are taken to deal with an insolvent debtor and his assets that are spread across Member-States. Such a regime can remove or pre-empt any impediments to the single market that cross-border insolvency cases could create⁵⁵³ and in this respect it is similar to the competition law regime put in place by the Community.

549 Recitals 30 and 31 to the Initiative [1999] OJ C221/11.

550 As acknowledged by Recital 32 to the Regulation.

551 As acknowledged by Recital 33 to the Regulation.

552 See the Report by Professor Ian Fletcher at the session of the Clive Schmitthof Symposium on 1st-3rd June 2000 in London, referred to by Omar, "New initiatives on Cross-Border Insolvency in Europe" [2000] *Insolvency Lawyer* 211, at 217, footnote 49.

553 See Recital 3 to the Regulation.

Effective co-ordination measures should eliminate any potential incentive for parties in financial difficulties to engage in forum shopping by transferring assets to those Member-States that are perceived to have a more favourable protective regime. Therefore, resorting to judicial proceedings for an insolvent debtor or his creditors is not to be allowed on the basis of the presence of a more favourable legal position outside the most appropriate forum to hear the insolvency case.⁵⁵⁴ This can only be achieved by a legal regime that co-ordinates proceedings at the supranational level. Community action was therefore required to create a level playing field by removing unequal national barriers to the exercise of rights by any party involved in insolvency proceedings.⁵⁵⁵ Whilst it is no doubt true to say that the Regulation goes a long way to achieve this aim through the introduction of harmonised jurisdiction and choice of law rules, it can nevertheless be doubted whether private international law measures can achieve this aim entirely. Any choice of law rule and any jurisdiction rule in this area is somehow based on where the debtor and the assets are located. Moving around will therefore still allow a debtor to a very limited extent to influence which court will have jurisdiction and therefore which law applies. Secondary proceedings may even be slightly more prone to this. But this is an inevitable side effect of the fact that a harmonisation of substantive bankruptcy laws is at present not feasible. The negative impact of this side effect should however be very limited in scope.

The fact that the Regulation restricts itself to private international law measures can as a result of these arguments also be justified by means of the principle of proportionality. The same principle dictates that the special regime put in place by the Regulation should be limited to the opening of insolvency proceedings and to judgments delivered directly on the basis of insolvency proceedings or that are directly connected to such proceedings. It was thought that the aim and purpose of the regulation could be achieved by harmonising jurisdiction rules, hence eliminating forum shopping, giving the appropriate court a uniform choice of law rule and making sure that a judgment obtained via this route can be recognised and enforced

⁵⁵⁴ See Recital 4 to the Regulation.

easily throughout the Community. There was no need to go beyond that and the substance of national insolvency laws was a matter that could be left to the Member-States.⁵⁵⁶

The starting points of the Regulation could therefore be summarised as follows. In the absence of a full scale harmonisation of the substantive bankruptcy and insolvency rules of the Member States a common approach to private international law issues concerning international bankruptcies was attempted. The main aim of the regulation is to make sure that each insolvency is dealt with by means of a single procedure, which will have effects across all Member States. This starting point presents a clear link with the principles of unity and universality. A territorially inspired exception has also been included though. This exception applies if the debtor has establishments in other Member States than the one in which the main insolvency proceeding were started. Each such establishment can give rise to a separate insolvency procedure. Such a secondary insolvency procedure has territorial effects. It only affects the assets of the debtor that are located in the territory of the State of the establishment. Even in such a situation the main insolvency proceedings will take the lead, hence the name 'secondary' insolvency⁵⁵⁷. The regulation reaches its aim mainly through a harmonisation of the rules on jurisdiction and on the recognition and enforcement of foreign bankruptcy judgments. Additionally there are a few harmonised choice of law rules.

1.3. The scope of the Regulation

The scope of the Regulation has been restricted in three ways. First, the Regulation deals with insolvency procedures. Article 1 paragraph 1 puts forward four requirements that need to be met before a procedure becomes an insolvency

⁵⁵⁵ See Recital 5 to the Regulation.

⁵⁵⁶ See recital 6 to the Regulation.

⁵⁵⁷ Any other solution would have seriously undermined the effectiveness of the main proceedings and therefore also of the whole system put in place by the Regulation. See I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridique Belgique (1998), at 627.

procedure for the purposes of the Regulation. The procedure must be a collective procedure, which is based on the fact that the debtor has become insolvent. The procedure must remove the debtor's right to manage and dispose of its assets. These rights are to be transferred to a liquidator. Annex C list the types of persons that can be appointed as liquidator for these purposes and that fit the definition of 'any person or body whose function is to administer or liquidate the assets of which the debtor has been divested or to supervise the administration of his affairs'⁵⁵⁸. This means that any procedure, even if collective in nature, that leaves the debtor in full control of his business and estate does not qualify. There has to be at least a partial loss of the debtor's powers over his affairs⁵⁵⁹. It is however not sufficient that the procedure at issue is a collective insolvency procedure⁵⁶⁰ which entails the partial or total divestment of the debtor and the appointment of a liquidator for the procedure to qualify as an insolvency procedure for the purposes of the Regulation. Such a procedure should also be officially recognised and legally effective in the Member-State in which the insolvency proceedings are opened. This additional requirement forms a counterbalance for the fact that the Regulation does not require the intervention of a judicial authority in the insolvency proceedings. In this respect any use of the term 'court' in the Regulation is said to involve a broad concept⁵⁶¹ that includes a person or body empowered by national law to open insolvency proceedings.⁵⁶² From a United Kingdom point of view this has resulted in the inclusion within the scope of the Regulation of creditors' voluntary liquidations if they are confirmed by a court⁵⁶³, since in such a case the procedure is provided for by law and involves official recognition and legal effectiveness, whereas any form of receivership has been excluded from the scope of the Regulation as this type of procedure effectively amounts to remedies invoked by individual creditors, mostly without the form of involvement of a 'court' that is required by the Regulation.⁵⁶⁴

⁵⁵⁸ Article 2(b) of the Regulation.

⁵⁵⁹ I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridique Belgique (1998), at 626.

⁵⁶⁰ See Article 1(1) and Article 2(a) of the Regulation.

⁵⁶¹ See Article 2(d) of the Regulation.

⁵⁶² Recital 10 to the Regulation.

⁵⁶³ Only with such confirmation will they benefit from the extraterritorial recognition and effectiveness that is provided for by the provisions of the Regulation.

⁵⁶⁴ See I Fletcher, *Insolvency in Private International Law: National and International Approaches*,
153

An additional lock is put on the door by Annex A which contains a list of the relevant insolvency proceedings in the various Member-States that meet the requirements⁵⁶⁵. Any qualifying procedure in the list can now only be brought in cases of cross-border insolvency, if this is done in conformity with the provisions of the Regulation⁵⁶⁶.

The Regulation does not define the concept of 'insolvency', nor does it define which type of debtor to whom these proceedings can apply. Looking back at the EU Insolvency Proceedings Convention 1995 does not clarify the matter either. It too was silent on this point and even the explanatory report to the Convention only managed to clarify that insolvency implies a situation of financial crisis.⁵⁶⁷ These issues are left to the non-harmonised domestic bankruptcy or insolvency laws of the Member States. The Member States will therefore continue to define in which circumstances insolvency proceedings can be opened and which debtors, for example only traders and corporate bodies, can be subjected to the proceedings. Differences of approach concerning this point are bound to remain. The only guidance on this point is provided by Recital 9 to the Regulation. This Recital provides that the Regulation should apply to insolvency proceedings irrespective of whether the debtor is a natural person or a legal person, or whether the debtor is a trader or an individual. What this does not mean though is that all these types of debtors should be subject to insolvency proceedings. That decision is a substantive law one with which the Regulation does not deal. All the Regulation does is to specify that its provisions will apply to any debtor if the latter is subject to insolvency proceedings on the basis of the national insolvency laws of the Member-State concerned. What is clear though is that, depending on the provisions of the national insolvency laws of the Member-States, the Regulation potentially applies to natural persons that are

Oxford Monographs in Private International Law, Clarendon Press (1999), at 257-258.

565 See Article 2(a) of the Regulation.

566 See Bogdan, "The EU Bankruptcy Convention" 6 (1997) *Int. Insolv. Rev.* 114, at 117.

567 Paragraph 49 at page 33 of the Virgos-Schmit Report. The Virgos-Schmit Report is the report to the EU Insolvency Proceedings Convention 1995, 35 *I.L.M.* 1223 (1996). Apart from the United Kingdom all Member-States signed the Convention. As a result of the UK's refusal to sign the Convention never entered into force, but later became the basis for the present Regulation. The report to the Convention was never formally approved or published in the Official Journal. It was however circulated as EU Council Document 6500/96, DRS 8 (CFC), dated 3rd May 1996.

private individuals rather than traders. At least some of these debtors could be classified as consumers. And whereas traditionally all private international law instruments in the European Union have given a special regime of protection to consumers this is not the case in this Regulation. No special regime has been provided. It is submitted though that this will hardly matter in practice. Primary jurisdiction is given to the courts of the Member-State where the debtor has the centre of his main interests.⁵⁶⁸ For a consumer that will almost necessarily correspond to his place of habitual residence which in turn is normally the court to which the consumer is guaranteed access by any special regime of protection. The same applies in terms of applicable law where the court will apply its own law, which is also the consumer's own law in the context of any special regime of protection. The only real potential problem arises in the context of secondary jurisdiction.⁵⁶⁹ A consumer whose national law does not allow for insolvency proceedings to be brought against natural persons that are not traders may escape these proceedings at home, but that impossibility to bring main proceedings is exactly one of the grounds on which secondary proceedings can be opened in another Member-State. It would seem that the consumer may lose out here and be subject to proceedings under an applicable law that is not his home law. This will require though that the consumer has an establishment in the other Member-State concerned and it is hard to see how a secondary residence of an individual that is not a trader could qualify as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'.⁵⁷⁰ Only a trader is likely to have such an establishment and any special regime of protection is supposed to apply to consumers rather than to traders. The impact of the lack of such a special regime of protection for consumers in the Regulation is therefore bound to be minimal.⁵⁷¹

⁵⁶⁸ Article 3(1) of the Regulation.

⁵⁶⁹ Article 3(2) to 3(4) of the Regulation.

⁵⁷⁰ Article 2(h) of the Regulation.

⁵⁷¹ Compare Bogdan, "Consumer Interests and the New EU Bankruptcy Convention" [1997] 5 *Consum.L.J.* 141. This piece was obviously written on the basis of the provisions of the EU Insolvency Proceedings Convention 1995, but the relevant provisions have been retained without change in the Regulation.

Coming back to the definition of the concepts of insolvency and debtor, the uncertainty in this area is substantially reduced though by the inclusion of an Annex A in the Regulation. This Annex A contains a list of all national types of proceedings that are to be considered an insolvency proceeding for the purposes of this Regulation. These national regimes will define what is meant by insolvency and which kind of debtors are subject to them. Some problems remain though, if these Annexes cannot be changed easily. For example, Article 8 of the Belgian Bankruptcy Act 1997 introduced a new procedure that leads to the appointment of a temporary administrator. This procedure was not included in Appendix A to the Convention, as it then was, because it did not exist when the list was drafted in 1995, and it would therefore not be covered by the Convention. The new Belgian procedure would therefore be denied any international effectiveness and would be bound not to lead to the beneficial results that were intended in cases where the debtor's activities covered the territory of more than one Member State. The Regulation acknowledges this risk associated with developments in the substantive insolvency laws of the Member-States and Article 45 gives the Council the opportunity to amend the Annexes to the Regulation in the light of such changes in the substantive insolvency laws of one or more Member-States. Such an amendment needs a qualified majority in the Council and any Member-State or the Commission can introduce a proposal for such an amendment. This Article significantly improves the value of the Regulation and allows for it to stay up to date.

This Belgian procedure also brings us to another difficult point. The Regulation does not require that the proceedings lead to the winding up of the debtor's activities and its assets being disposed of to the benefit of the creditors. Proceedings that aim at the continuation of the debtors activities once the financial problems have been sorted out are also covered by the Regulation. It is not entirely obvious how different national proceedings of a different nature will be co-ordinated in practice. It seems logical to assume that any proceeding that aims at the continuation of the business should normally cover the debtor's activities in all Member States, but this may clash with a territorial winding up proceeding that covers the activity in one (other)

Member State. The Regulation tries to co-ordinate these proceedings to some extent to avoid these clashes. Article 3, paragraph 4, which will be discussed later in more detail, provides assistance on this point.

Secondly, certain types of companies are excluded from the scope of the Regulation.⁵⁷² This exclusion covers insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings. This exclusion can be justified by the fact that these entities are subject to strict regulatory regimes under national law, which include procedures for insolvency cases. Many of these undertakings are already regulated by means of specific EU Directives⁵⁷³. This regulatory regime often includes specific rules concerning insolvency, as do the special regulatory regimes under national law that apply to other of these undertakings. All these systems rely on the universality principle and the country of the undertaking's main centre of activities is generally in charge of any potential insolvency proceeding in application of the home country control principle⁵⁷⁴. The final aim is therefore not so much to exclude these entities from the scope of the Regulation, as to put in place a tailor-made special regime for them.⁵⁷⁵

Thirdly, the scope of the Regulation has been restricted to the European Union. This is made very clear in paragraph 1 of Article 3. The provisions of the Regulation will only apply to those international insolvency cases where the centre of the debtor's main interests is located in one of the Member States.⁵⁷⁶ The Regulation will not apply in any other circumstances and all cases that fall outside the scope of the

⁵⁷² Article 1(2) of the Regulation.

⁵⁷³ See more specifically European Parliament and Council Directive 2001/17/EC of 19 March 2001 on the reorganization and winding-up of insurance undertakings [2001] OJ L110/28 and European Parliament and Council Directive 2001/24/EC of 4 April 2001 on the reorganization and winding-up of credit institutions [2001] OJ L125/15.

⁵⁷⁴ See e.g. Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions [2000] OJ L126/1, Article 26 and European Parliament and Council Directive 2001/17/EC of 19 March 2001 on the reorganization and winding-up of insurance undertakings [2001] OJ L110/28.

⁵⁷⁵ The EU Insolvency Proceedings Convention 1995 contained identical language on this point. The comments found at paragraphs 54 to 60 of the Virgos-Schmit Report apply therefore also to the Regulation.

Regulation will be governed by the national laws of the Member States. This means in practice that the Regulation will not deal with the insolvency of a foreign company where the only link with the European Union consists of a branch office in one of the Member States. Nor will the Regulation deal with the effects in the other Member States of any national procedure that has been opened in such a case. The Regulation does not deal with the consequences outside the European Union of any insolvency proceeding. The issue whether or not branches or establishments outside the European Union of debtors that have the centre of their main activities in one of the Member States come within the scope of the Regulation is left to the national law of that Member State. A clash with the laws of the countries in which such branches or establishments exist cannot be excluded, assuming that the latter national law applies the unity and universality principles.⁵⁷⁷

1.4. The Regulation and international treaties

There is necessarily an interaction between the regulation and international treaties dealing with certain aspects of cross-border insolvencies. It will be important to see how the Regulation fits in with any existing treaties. Two types of existing treaties can be distinguished in this respect.

Due to the restrictions placed on the scope of the Regulation any treaties concluded between Member States and third countries will remain unaffected. The Regulation explicitly rules out its own application in that context. The situation is different in relation to those treaties that were concluded between Member States. Article 44 of the Regulation stipulates that the Regulation only replaces these treaties in as far as they deal with the same issues that are dealt with in the Regulation. Most of the treaties, such as the ones concluded by Belgium with France, the Netherlands and Austria and that were discussed earlier, will therefore not disappear entirely, but they

⁵⁷⁶ See Recital 14 to the Regulation

⁵⁷⁷ See De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998),

will become of subsidiary importance. For example, these treaties can still deal with recognition issues in relation to the insolvency proceedings concerning a branch in one of the Member States concerned or a company that has the centre of its main interests outside the European Union. This solution will also apply to the Istanbul Convention, concluded in the context of the Council of Europe⁵⁷⁸. The Regulation will prevail between the Member States.⁵⁷⁹

Even more vital is the interaction between the Regulation and the Brussels Convention 1968 and Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁵⁸⁰ that will replace it from 1st March 2002.⁵⁸¹ The starting point is in theory very straightforward. The Regulation is supposed to fill a gap left by the Brussels Convention and their interaction is supposed to be seamless. The Regulation will not deal with any case that comes within the scope of the Brussels Convention on the one hand, but it will deal with any European insolvency related case that falls outside the scope of the Brussels Convention. In practice things are slightly more complicated.

Proceedings related to the winding up of insolvent companies, bankruptcies and similar proceedings are excluded from the scope of the Brussels Convention.⁵⁸² The Court of Justice has ruled in *Gourdain v Nadler* that this exclusion covers all cases that are based exclusively on the law of bankruptcy and insolvency.⁵⁸³ It is nevertheless not very easy to define the bankruptcy and insolvency category that has been excluded. It is helpful though, especially in the light of the fact that each

132, at 141.

578 The Council of Europe finalised its insolvency convention at Istanbul on 5th June 1990. At the time of writing it seemed unlikely that the Convention will ever gather enough ratifications to enter into force. See Council of Europe, *International Aspects of Bankruptcy*, Council of Europe Press (1991).

579 See also Article 38 paragraph 2 of the Istanbul Convention.

580 [2001] OJ L12/1.

581 The relevant provision still reads: 'The Regulation [or Convention as it was] shall not apply to : [...] Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. The only difference is that it has been renumbered as Article 1(2)(b) (instead of Article 1(2) of the Brussels Convention 1968).

582 Article 1 paragraph 2(2).

583 Case 133/78 *Gourdain v Nadler* (1979) ECR 733.

national law defines bankruptcy and insolvency in a slightly different way, that the Court of Justice also made it clear that the scope of the limitations placed on the scope of the Brussels Convention should be given an autonomous interpretation.⁵⁸⁴ The fine detail has been left to the national courts.

The Brussels Convention remains applicable in all cases where the matter is addressed by an agreement between the parties that does not involve any intervention by the courts.⁵⁸⁵ This is also so for any claims that result from the situation of insolvency of a person that is not a trader.⁵⁸⁶

Claims by the liquidator or administrator present more difficulties. These claims can be subdivided in those claims that the debtor could have brought him- or herself on the one hand and the claims that are specifically linked to the insolvency proceedings on the other hand. The latter type of claim falls outside the scope of the Brussels Convention, because the special powers of the liquidator or administrator to bring this kind of claim are based entirely on the law of bankruptcy and insolvency. This category includes for example all actions to undo actions of the debtor in the period immediately preceding the insolvency proceedings and the action to render the directors of the company directly responsible for the debts of the company in case of insolvency.⁵⁸⁷ The provisions of the Brussels Convention will however apply to all those claims which the debtor could have brought him- or herself. Examples of such claims are found in cases where the liquidator or administrator sues a client of the debtor to obtain payment for goods that were sold and delivered to the client before the insolvency proceedings had been initiated⁵⁸⁸ or any claim that arises from the normal continuation of the business by the liquidator or the administrator⁵⁸⁹. The

584 Case 133/78 *Gourdain v Nadler* (1979) ECR 733, see also Case 29/76 *LTU v Eurocontrol* (1976) ECR 1541.

585 See the Jenard Report to the Brussels Convention (1979) O.J. C59/12.

586 Ibidem.

587 See e.g. *Rechtbank van Koophandel Tournai* (Commercial Court Tournai, Belgium), D Series, I-1.2-B5 and *Rechtbank Haarlem* (Court of First Instance Haarlem, the Netherlands), 17th September 1996, (1996) N.I.P.R. 438.

588 *Hof Amsterdam* (Court of Appeal Amsterdam, the Netherlands), 14th May 1992, (1992) N.I.P.R. 260; *Cour d'Appel de Paris* (Court of Appeal Paris, France), 14th June 1979, (1980) Rev. Soc. 555.

589 See *Rechtbank van Koophandel Verviers* (Commercial Court Verviers, Belgium), 14th July 1977, 160

court of appeal in 's Hertogenbosch in the Netherlands rightly ruled that the claim by the liquidator of the debtor against a third party that provided bail for the insolvent debtor also came within the scope of the Brussels Convention, because such an agreement could equally have been entered into in the absence of any insolvency proceedings.⁵⁹⁰

Claims that are brought against the liquidator or administrator are even more complicated. The issue whether or not they fall within the scope of the Brussels Convention has given rise to a degree of divergence of opinion between the courts of the Member States. Claims such as those that dispute the order of preference given to the claims by the liquidator or administrator clearly find their legal basis entirely in the law of bankruptcy or insolvency and they are therefore covered by the Regulation rather than by the Brussels Convention.⁵⁹¹ But the conclusion is less obvious in other cases. It is submitted that the test is whether or not the insolvency proceedings are nothing more than the event that triggers a claim that could also have been brought before the institution of the insolvency proceedings.⁵⁹² The provisions of the Brussels Convention, rather than those of the Regulation, should be applied if that is the case. All these claims are based on commercial transactions that took place before the start of the insolvency proceedings. The following claims will therefore come within the scope of the Brussels Convention. A first example is the claim based on a retention of title clause by the seller that has not been paid.⁵⁹³ A second example is the claim for payment of the sale price by the seller against the purchaser that has been subjected to an insolvency proceeding.⁵⁹⁴ Claims against the liquidator or administrator that are based on the continuation by the latter of the normal commercial activities during the insolvency proceedings are different in

(1978) Jur. Liège 278.

590 Hof 's Hertogenbosch (Court of Appeal 's Hertogenbosch, the Netherlands), 16th November 1995, (1996) N.I.P.R. 119.

591 See the Virgos-Schmit Report at paragraph 196 on page 122.

592 Compare *David Charles Pollard and Mary Louisa Pollard v Christopher R Ashurst (The trustee in bankruptcy of the estate of David Charles Pollard)*, (2001) 98(3) L.S.G. 42, (2000) 150 NLJ 1787, *The Times* 29th November 2000, CA and [2000] 2 All ER 772, Ch.D.

593 But see contra *Cour d'Appel Douai* (Court of Appeal Douai, France), 21st June 1991, (1992) J.D.I. 54.

594 *Rechtbank Rotterdam* (Court of First Instance, Rotterdam, the Netherlands), 21st November 1986,

nature. Nevertheless, the Brussels Convention should be applied to claims that are based on commercial transactions entered into by the liquidator or administrator in their official capacity, for example to purchase raw materials to continue the commercial activities during the insolvency proceedings.⁵⁹⁵

The same debate exists in the area of the recognition and execution of foreign judgments. The provisions of the Brussels Convention will only apply to those judgments where the instituting claim was not an insolvency proceeding.⁵⁹⁶

One can also discern a tendency in the case law to interpret the exclusion of bankruptcy and insolvency related issues from the scope of the Brussels Convention in a wide sense. It is argued that a narrow interpretation has undesirable effects, because it leads to the application of the Brussels Convention, which leads in turn to several related cases being heard by different courts that will apply different laws to these related issues.⁵⁹⁷

The explanatory report to the EU Insolvency Proceedings Convention 1995 states that there are no gaps or overlaps in scope between the 1995 Convention and the Brussels Convention.⁵⁹⁸ Since the Regulation operates on the basis of exactly the same provisions in this respect, this conclusion should also apply to it. The analysis above demonstrates that this may have been the aim and that this aim is achievable, but the restriction of the scope of the Regulation to strictly intra-community cases is not helpful. Not all these cases fall within the scope of the Brussels Convention. An example is easily found in straightforward bankruptcy and insolvency claims such as that of Japanese curator or administrator who claims the transfer of the money held

(1987) N.I.P.R. 257.

595 Cour de Cassation (French Supreme Court), 12th April 1993, (1993) R.C.D.I.P. 67 and (1994) J.D.I. 167.

596 Cour de Cassation (French Supreme Court), 12th April 1993, (1993) R.C.D.I.P. 67 and Cour d'Appel de Paris (Court of Appeal Paris, France), 16th March 1979, (1980) R.C.D.I.P. 121.

597 See e.g. Arbeidshof Antwerpen (Court of Appeal for Labour Law Antwerp, Belgium), 19th February 1980, (1980) J.T.T. 231. This decision excluded the claim by a former employee for the payment of unpaid wages from the scope of the Brussels Convention. The supreme court declined to overrule the decision (Cour de Cassation, 5th October 1982, (1982) Pas. I-183).

598 See also Bogdan, "The EU Bankruptcy Convention" 6 (1997) Int. Insolv. Rev. 114, at 120.

in the Luxembourg bank account of a Japanese debtor against whom insolvency proceedings have been started in Japan. The Regulation and Article 1 paragraph 2(2) of the Brussels Convention clearly leave a gap in this case and this gap has to be filled by the national laws of the Member-States.

II. Jurisdiction

II.1. Primary jurisdiction

The best way to achieve harmonisation in this area is to give insolvency proceedings to a single court for each cross-border insolvency case. This would also fit in with the unity principle. The Regulation's basic rule in Article 3(1) does just that. The connecting factor used to determine which court will have jurisdiction is 'the centre of a debtor's main interests'. This flexible criterion is thought to provide a link to the place where the debtor was economically active and where one is likely to find assets. The Regulation gives the courts of the Member-State on the territory of which this centre of the debtor's main interests is situated jurisdiction to open insolvency proceedings. We are concerned here with the main or primary proceedings that will have effect in the Community as a whole. These proceedings are deemed to be universal in scope, they encompass all the debtor's assets on a worldwide basis and they affect all creditors wherever they are located.

But how is the key concept of the 'centre of main interests' defined? Recital 13 to the Regulation retains the principle that was originally set out in the Virgos-Schmit report to the 1995 Convention and according to which the concept corresponds to the place where the debtor conducts the administration of his interests on a regular basis and which place is therefore ascertainable by third parties. A first key point to make is that this concept can only work in conjunction with the unity and universality principle with which it is supposed to work if it points to a single place. The aim is

to have one court that is competent to open a single set of insolvency proceedings, leading to a single worldwide insolvency case. If the centre of main interests concept is to identify this court, it should lead to a single place. The use of the word ‘main’ helps in this respect, as it leaves on one side all places where the debtor has a centre of his ancillary interests and all temporary places where the debtor establishes the centre of his main interests are also ruled out as Recital 13 refers to the place where the administration of the debtor’s interests is conducted on ‘a regular basis’. Every debtor is therefore supposed to have only a single ‘centre of main interests’⁵⁹⁹ and the application of the Regulation should steer clear of the trap into which the French courts seem to have fallen in a similar context. The décret 85-1388 of 27th December 1985 refers to the concept of the debtor’s ‘principal établissement’ and gives insolvency jurisdiction to the court in the territory of which this ‘principal établissement’ is located for those cases where there is no seat of the (company of the) debtor in France. The French courts have almost always interpreted this to mean that they can have jurisdiction if the debtor has a ‘principal établissement’ in France, rather than only if the company’s single ‘principal établissement’ is located in France.⁶⁰⁰ As a result debtors that operate at a truly international level could have more than one ‘principal établissement’ and the French courts will have bankruptcy jurisdiction if at least one of them is located in France. This type of approach is clearly not acceptable under the Regulation. The court will have to identify the debtor’s single centre of main interests in the world and will only be able to take cross-border insolvency jurisdiction if that single centre of main interests is located in the territory of the court.

The Regulation’s concept of the centre of the debtor’s main interests is nevertheless very flexible in nature. However, the Regulation tries to enhance legal certainty further through the introduction of a rebuttable presumption that the centre of main interests of a company or a legal person is the place of its registered office.⁶⁰¹

599 See Bogdan, “The EU Bankruptcy Convention” 6 (1997) *Int. Insolv. Rev.* 114, at 119.

600 Péricard, “La faillite de la BCCI, Quelques enseignements tirés des conflits judiciaires issus d’une faillite bancaire internationale” [1996] *Banque et Droit* (special issue, April 1996) 21.

601 This corresponds to a principle already in use in most Member-States, See (in relation to the EU Insolvency Proceedings Convention 1995) Idot, “La ‘faillite’ dans la Communauté: Enfin une

Although the Regulation is silent on this point, it is presumably up to the party that does not want the presumption to apply to discharge the burden of proof. Such proof to the contrary will have to show that this is not the place where the debtor conducts the administration of its interests on a regular basis and presumably also that there is another identifiable centre of main interests where the debtor conducts the administration of its interests on a regular basis⁶⁰². It is indeed not conceivable that a debtor will have no centre of main interests⁶⁰³. The court will always be able to choose the main interests of the debtor among its interests as no specific requirements need to be met and these interests will always be administered from somewhere. Article 3(1) clearly envisages that there will always be a centre of main interests and allocates insolvency jurisdiction to a single court as long as that centre is located in the Community.⁶⁰⁴

Even though Article 3(1) does not provide a presumption to determine the centre of main interests of natural persons, it seems logical to assume that a distinction can be drawn between traders or natural persons engaging in a professional activity and natural persons that fall outside this category. A trading or other professional activity is indeed bound to give rise to the very strong likelihood that the centre of the main interests of such natural persons will be located in the place where they carry out this trading or professional activity.⁶⁰⁵ This seems to be the place where they conduct the administration of their interests on a regular basis. For other natural persons this is bound to be the place of their habitual residence⁶⁰⁶. Any non-professional interest is bound to circle around the place of residence of the debtor, especially as the term 'habitual' refers to the place where the debtor usually or mainly resides and this

convention internationale?" (1995) 21 D.P.C.I. 34 (issue 1), at 47.

602 I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridique Belgique (1998), at 627.

603 Compare I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 261, who considers a negative conflict to be a 'somewhat unlikely' possibility.

604 See also Recital 14 to the Regulation.

605 See Paragraph 75 of the Virgos-Schmit Report. Article 3(1) of the Regulation was copied without change from the 1995 Convention.

606 See *ibidem*. It should be kept in mind though that the Regulation does not decide whether or not such a person can be subject to insolvency proceedings, but leaves this to the substantive laws of the Member-State concerned.

corresponds to the idea that the debtor conducts the administration of his interests there 'on a regular basis'. In relation to natural persons there is clearly a change here when compared to the former rigid reference under Belgian law to the place where the natural person was registered. One may easily be registered in one place and conduct the administration of his interests in a different place. The place of registration may nevertheless remain a valuable tool or factor to determine the centre of main interests of a debtor, especially when it comes to natural persons that do not engage in any form of trading or professional activity.⁶⁰⁷ In many cases it will still provide an important indication, but it can no longer be the determinative factor.⁶⁰⁸

All this leads to the point that the Regulation introduces a flexible tool. The place from where the administration of the interests is conducted seems to be preferred above the place where the assets are located. The same tendency is also clear from the presumption. The place of the registered office, or the statutory seat for the civil law countries⁶⁰⁹, is preferred to the place where the offices or production facilities are located in case they are located in different places. This approach also has the additional advantage that there will only be one registered office or one statutory seat, which facilitates the identification of a single centre of main interests, whereas there may be for example more than one place where production facilities are located. The management of the administration aspect clearly takes centre stage. On the other hand, there is also a reference in Recital 13 to the fact that the centre of interests corresponds to the place where the debtor conducts the administration of his interests on a regular basis and specifically that this place is therefore ascertainable by third parties. The logic behind the requirement that the place must be ascertainable by third parties is a simple one.⁶¹⁰ Creditors and other interested parties

607 See Claey's, "De bevoegdheidsregels voor de internationale faillietverklaring naar huidig en toekomstig recht" (1997) 30 TBH 501, at 509.

608 See De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 151-152.

609 The French language version of the Regulation refers to the "siège statutaire" and the Dutch language version refers to the "statutaire zetel". Registration of a company is an alien concept to the company laws of most Member-States and is replaced the statutes of the company determining a statutory seat that replaces the place of incorporation in the common law tradition.

610 See also Fletcher, "A New Age of International Insolvency – The Countdown Has Begun" [2000]

need to be able to determine the debtor's centre of main interests if Article 3(1) of the Regulation is supposed to work and if they are to be able to bring insolvency proceedings in the court that has jurisdiction. In this sense the creditors are able to calculate in advance the legal risk they are taking in case of an insolvency in dealing with the debtor.⁶¹¹ For natural persons at least this ascertainable place where the debtor administers his interests seems to refer back to the place of the assets. This illustrates the flexibility of the concept of the centre of main interests rather than a paradox or a contradiction. For companies and legal persons preference is given to a formal criterion, i.e. the place of the registered office, making it easy to determine a single place where the centre of the debtor's main interests is located. That place is also easily ascertainable by any interested third party. The fact that this is based on a rebuttable presumption means that in appropriate cases, such as when the debtor has nothing more than a letterbox in the place where it is registered, the formal criterion can be set aside in favour of an entirely flexible determination of the centre of the debtor's main interests on the basis of the facts of the case. For natural persons the Regulation does not bother with formal criteria as there is not necessarily an obviously suitable criterion that fits all possible scenarios. Here a purely factual criterion is used and applied to the facts of each case. That criterion is where they conduct the administration of their interests on a regular basis.

Overall, Article 3(1) of the Regulation seems to provide the right balance between legal certainty on the one hand and flexibility on the other hand. There remains a risk though that several courts will take insolvency jurisdiction in a particular case on the basis of slightly different interpretations of Article 3(1)⁶¹², but this seems to be the inevitable price one has to pay for any form of flexibility in this area. One important problem has not been addressed though. The Regulation does not provide any specific tool to deal with the insolvency of groups of affiliated companies. Article

Insol. Int. 57 at 59 (Vol 13 / Issue 8).

611 See Paragraph 75 of the Virgos-Schmit Report. Article 3(1) was worded identically in the 1995 Convention.

612 For example if one court accepts that on the facts of the case the presumption has been rebutted (in favour of a real center of interests based on assets and commercial activities in its area), whilst the second court decides that the presumption applies in the same case (on the basis of a registered office that is not entirely fictive in its area).

3(1) as it stands needs to be applied separately to each of the affiliated companies in as far as they have a separate legal personality.⁶¹³ Article 3(1) may therefore give primary insolvency jurisdiction to the courts of different Member-States for each of the affiliated companies. It is easy however to imagine a scenario where it would be desirable to let one court deal with the whole set of cases of insolvency of closely related affiliated companies. The Regulation fails to provide an adequate solution for such a scenario.⁶¹⁴

Finally, Article 3(1) of the Regulation only establishes the insolvency jurisdiction of the court of a Member-State. It does not deal with the issue of which court in that Member-State will have jurisdiction. “Territorial jurisdiction within [each] Member-State must be established by the national law of the Member-State concerned.”⁶¹⁵ And Article 3(1) can only apply if such a centre of main interests is found within the Community. If the centre of main interests is located outside the territory of the European Union the Regulation does not apply, no court will have jurisdiction on the basis of it and the matter is left to the laws of the Member-States.⁶¹⁶

The main advantage of Article 3(1) is that it allows for a quick and rather straightforward determination of a single court that has jurisdiction to deal with the entire insolvency. That court can then take urgent action to preserve the assets for the creditors. Recital 16 to the Regulation emphasises this point when it states that this court “should be enabled to order provisional and protective measures from the time of the request to open proceedings”. It is indeed the case that preservation measures both prior to and after the commencement of insolvency proceedings are of primary importance to guarantee the effectiveness of these proceedings and especially to stop any fraudulent disposal of assets. Having a single court in charge for the whole case

613 See Paragraph 76 of the Virgos-Schmit Report. Article 3(1) was worded identically in the 1995 Convention.

614 See Balz, “The European Union Convention on Insolvency Proceedings” 70 (1996) Am. Bankr. L.J. 485, at 503-504.

615 Recital 15 to the Regulation, *in fine*.

616 See Recital 14 to the Regulation and I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 260 (commenting on Article 3(1) in the context of the 1995 Convention).

in the Community is a clear advantage in this respect. The court can order provisional protective measures covering assets not only in the court's own territory, but in the whole of the Community.⁶¹⁷

II.2. Secondary jurisdiction

Article 3(1) is heavily inspired by the principles of unity and universality. These principles were however not shared by a number of Member-States and hence the need for a compromise. Such a compromise could also address the problems often experienced by the liquidator in unitary proceedings when dealing with assets abroad. The Regulation therefore allows secondary insolvencies as well as a single primary set of insolvency proceedings. The remainder of Article 3 deals with the issue of the jurisdiction of the courts to open such secondary insolvency proceedings. We will first deal with the proceedings themselves and the jurisdiction points before returning to the obvious problem of the coordination between primary and secondary insolvency proceedings.

These secondary proceedings are by definition territorial proceedings that only include assets that are situated on the territory of the Member-State the court of which is dealing with the secondary proceedings. This obviously raises the issue where assets are located. The national laws of the Member-States do not necessarily have identical rules to determine where certain types of assets are located. The Regulation addresses this point head-on and contains a set of uniform definitions that will allow any party to locate the assets for the purposes of cross-border insolvency jurisdiction. Article 2(g) defines the concept of 'the Member State in which assets are situated'. For assets that consist of tangible property this will be the Member-State within the territory of which the property is situated.⁶¹⁸ The location

⁶¹⁷ See Recital 16 to the Regulation and Omar, "New initiatives on Cross-Border Insolvency in Europe" [2000] *Insolvency Lawyer* 211, at 214.

⁶¹⁸ Compare the approach adopted by the Commercial Court in London in *Glencore International AG v Metro Trading International Inc (formerly Metro Bunkering & Trading Co.) and others* [2001] 1 All ER 103, [2001] 1 Lloyd's Rep 284.

of claims is the territory of the Member-State within the territory of which the third party that is required to meet them has the centre of its main interests, as defined in Article 3(1) of the Regulation. And finally, property or rights, the ownership of or entitlement to which must be registered in a public register are located in the member-State under the authority of which the register is kept. Whilst this will solve most problems, it is to be regretted that no attempt was made to provide a uniform definition of the place where shares or unregistered intellectual property rights are located. In the latter category copyright provides a clear example of the difficulties that remain in the absence of such a uniform definition. Copyright is granted automatically in all countries that are Contracting Parties to the Berne Convention⁶¹⁹ and is organised on a territorial country-by-country basis. One could argue that each copyright is therefore located in the country where it is automatically granted. This is the approach traditionally associated with tangible property. Alternatively one could rely on the immaterial nature of copyright and argue that it therefore escapes the traditional distinction between tangible and intangible property, which are both forms of material property, and all that flows from that distinction. The key aspect of immaterial rights (be they property rights or not) is that there is nothing tangible about them. They only come to life in the case of copyright through the rightholder exercising his right to authorise or to prohibit certain acts. There is therefore a strong link between the rightholder and the right and one could argue on this basis that copyright (or all copyrights for all countries if one prefers this terminology) is located wherever the rightholder is located. In the context of the Regulation reference could then again be made to the concept of the centre of main interests as defined in Article 3(1). All that can however be concluded in the present circumstances is that in the absence of a harmonised uniform solution in the Regulation, or for that part in the national laws of the Member-States, this point is left to the law of the court that takes jurisdiction. As a result several courts could take jurisdiction because they each locate the copyright, to go back to the example, in their territory. This is a clear failure in the Regulation, which may become increasingly obvious as copyright more and more becomes one of the key assets of

619 Or to the TRIPS Agreement as TRIPS members have to implement the provisions of the Berne

many Internet companies and other companies engaged in the entertainment or information trade.

Having defined the concept of the Member-State in which assets are located, this brings us back to the question of jurisdiction. Where, when and under which circumstances can secondary insolvency proceedings be opened?

Secondary insolvency proceedings are not the rule. They can only be opened in the Member-States in which the debtor does not have the centre of its main interests and even then there is an important additional requirement that needs to be met. The opening of secondary insolvency proceedings is only possible if the debtor has an establishment in the Member-State concerned. The presence of an establishment in the Member-State needs to be seen therefore as a threshold upon which the possibility to open secondary proceedings will depend and the concept of an establishment needs to be interpreted accordingly. The only guidance provided by the Regulation on this point is found in Article 2(h). An establishment is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”. There are a number of restrictive aspects contained in this definition. First of all, only a place where the debtor carries out an economic activity will potentially qualify. Secondly, such economic activity should not be of a transitory nature, which means that some form of continuity is required. And thirdly, the cumulative presence of human means and goods in the place of operations is also required.

This is about as far as the text of the Regulation goes, but additional guidance can be found in the Virgos-Schmit Report to the 1995 Convention. That Convention contained the same wording both in Article 3 and in the definition of an establishment. Even though the Report has no specific authority in respect of the Regulation, it provides some form of insight in what the draftsmen’s intentions were. The first point that becomes clear is that the presence of goods in the place of

operations needs to be seen in relation to the economic activity that is carried out in that place.⁶²⁰ In other words, only goods that are used in such an economic activity are to be taken into account. This combination will make it impossible to open secondary proceedings on the simple basis that the debtor has assets in the jurisdiction.⁶²¹ For example, the presence of a bank account in the jurisdiction will not be sufficient.

The requirement of a non-transitory economic activity linked to a place of operations and human resources and goods also makes it impossible to argue that the conclusion of a number of contracts in the jurisdiction will be sufficient to open a secondary insolvency. This is so despite the Report's clear indication that the concept of an establishment is to be given an autonomous and wide interpretation⁶²², apparently in exchange for the fact that certain Member-States dropped their practice of accepting the mere presence of assets as a sufficient ground to open secondary insolvency proceedings.⁶²³ An establishment requires some form of organisation of the human means and goods and some form of stability and permanency of the economic activity that is being deployed.⁶²⁴ A debtor's holiday home, an individual trade representative or agent or a temporary office dealing with a single transaction whilst using the equipment of a third company therefore do not amount to an establishment. What is effectively required is a place of business⁶²⁵, which creates the impression for the creditors of a locally established business operation.⁶²⁶ In this sense the external impression is more important than the intentions of the debtor.⁶²⁷ It should also be kept in mind that affiliated companies with separate legal personality cannot be seen as establishments of their parent company, as the

620 Paragraph 70 of the Virgos-Schmit Report.

621 See Bogdan, "The EU Bankruptcy Convention" 6 (1997) Int. Insolv. Rev. 114, at 119.

622 Paragraph 70 of the Virgos-Schmit Report.

623 See also Fletcher, "A New Age of International Insolvency – The Countdown Has Begun" [2000] Insolv. Int. 57 at 59 (Vol 13 / Issue 8).

624 See Beukenhorst, "Verscheidenheid in Eenheid. Het Europees Faillissementsverdrag" [1997] S.E.W. 90, at 93.

625 See I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridique Belgique (1998), at 627.

626 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 264.

627 Paragraph 71 of the Virgos-Schmit Report.

Regulation treats them as independent debtors and does not allow their inclusion in the insolvency proceedings affecting the parent company.

The Regulation does not specify when the establishment should be in existence, but it seems logical to assume that the requirements for there to be an establishment should be met at the time when the secondary insolvency is opened, as it is de facto a prerequisite for the court that opens the proceedings to have jurisdiction to do so.⁶²⁸

Once the presence of an establishment has been demonstrated outside the Member-State where the debtor's centre of main interests is situated, the court of the Member-State where the establishment is located can open a secondary insolvency, keeping in mind that the effect of this secondary insolvency will be restricted to the assets of the debtor that are situated in the Member-State where the secondary insolvency proceedings are opened.⁶²⁹ The Regulation contains further rules on secondary proceedings, depending on which one of the two situations in which they can be opened is applicable.

First of all, secondary insolvency proceedings can be opened after the main insolvency proceedings have been opened. In this case the secondary proceedings will necessarily be winding up proceedings.⁶³⁰ Article 2(c) specifies that this involves realising the assets of the debtor. Proceedings that aim at the continuation of the economic activity are not possible in this scenario. What is envisaged is mainly that the liquidator in the main insolvency proceedings can request the opening of secondary insolvency proceedings⁶³¹ to facilitate the effective administration of the estate of the debtor. This can cover cases where the estate would be too complex for it to be administered under the main proceedings only or where differences in the legal systems involved are such that difficulties may arise

628 Compare De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 164.

629 See also Idot, "La 'faillite' dans la Communauté: Enfin une convention internationale?" (1995) 21 D.P.C.I. 34 (issue 1), at 47 (based on an early draft of the 1995 Convention).

630 Article 3(3) of the Regulation.

631 Article 29(a) of the Regulation.

from the extension of effects deriving from the law of the Member-State where the main proceedings have been opened to the other member-States where assets are located that can be administered by means of secondary insolvency proceedings.⁶³² Giving this power to the liquidator in the main proceedings involves an interference with and a change to the national insolvency laws of the member-States and the conditions they contain.⁶³³ Besides that secondary proceedings can also be used to protect local interests, for example the advantages enjoyed under local law by local creditors⁶³⁴. As a result the right to request the opening of these proceedings is not restricted to the liquidator in the main insolvency proceedings. Any other person that is empowered to do so by the national law of the Member-State concerned can also request that secondary insolvency proceedings are opened once the main proceedings have been opened.⁶³⁵ There is no need to show a special interest.⁶³⁶ It is interesting to note though that the Regulation does not specifically give the liquidator in any secondary insolvency proceedings the right to request that further secondary insolvency proceedings be opened.⁶³⁷ The fact that creditors can request the opening of secondary proceedings and that these proceedings are necessarily liquidation proceedings creates the risk of a potential clash with any attempt under the main proceedings to rescue the business. Creditors could deliberately try to use this tool to kill off the rescue attempt.⁶³⁸ In an attempt to redress this situation slightly the Regulation gives the relevant courts the power to require the applicant in the secondary insolvency proceedings to make an advance payment to cover the costs and expenses of the proceedings in as far as local law allows this.⁶³⁹ This could prove a deterrent against nuisance applications.

632 Recital 19 to the Regulation. Immovable assets that may have to be sold through the intervention of a notary and a change in a public register in some Member-States could provide a good example.

633 De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 165.

634 For a critical view on the combination of different proceedings and different insolvency laws and the effect of all this on the principle of equality amongst creditors see U. Weinbörner, *Das Neue Insolvenzrecht mit EU-Übereinkommen*, Rudolf Haufe Verlag (1997), at 216-217.

635 Article 29(b) of and Recital 18 to the Regulation.

636 See paragraph 227 of the Virgos-Schmit Report.

637 See paragraph 226 of the Virgos-Schmit Report.

638 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 263.

639 Article 30 of the Regulation.

It is also of vital importance to note that in this set of circumstances secondary insolvency proceedings are opened without there being a need for the court opening them to examine whether or not the debtor has become insolvent.⁶⁴⁰ That matter is left exclusively to the court in charge of the main insolvency proceedings and every chance of duplication and contradictory judgments has therefore been excluded. Annex B to the Regulation contains an exhaustive list of the proceedings that can be opened as secondary proceedings in this set of circumstances and they are subject to the rules found in Chapter III of the Regulation.

Secondly, secondary proceedings can also be opened prior to the main insolvency proceedings. Such proceedings then effectively become independent territorial insolvency proceedings. Independent secondary proceedings are however only possible in two well defined sets of circumstances, because they “are intended to be limited to what is absolutely necessary”⁶⁴¹. The first of these sets of circumstances arises when the national laws of the Member-State in which the debtor has the centre of its main interests do not allow main proceedings to be opened against the debtor.⁶⁴² This can for example be the case if the debtor is a natural person who is not a trader and if the national law concerned stipulates that only traders, legal persons and companies can be the subject of insolvency proceedings. In this example the conditions for the opening of main insolvency proceedings are not, and cannot be, met and the only option left is the opening of independent territorial proceedings in those Member-States where the debtor has an establishment, at least if the conditions under the respective national laws of the latter Member-States for the opening of insolvency proceedings have been met and if these laws do not similarly exclude natural persons that are not traders from the scope of their insolvency laws. The Regulation does not define who can request that independent territorial insolvency proceedings be opened in this set of circumstances. That matter is left to

640 Article 27 of the Regulation. The main proceedings must be recognized in the Member-State where secondary insolvency proceedings are opened.

641 Recital 17 to the Regulation, *in fine*. In practice assets will also be concentrated for distribution rather than to cover costs and fees in the various proceedings.

642 See Article 3(4)(a) of the Regulation.

the substantive laws of the Member-State concerned.⁶⁴³

The second set of circumstances in which independent territorial insolvency proceedings become possible stipulates that alternatively independent territorial insolvency proceedings can be opened “where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member-State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment”.⁶⁴⁴ This severely restricts the number of parties that can apply for proceedings to be opened in this set of circumstances. This stops any abuse of the facility by creditors who simply want to apply disruptive tactics without being able to demonstrate a strong link with the jurisdiction concerned.⁶⁴⁵

It is therefore clear that independent territorial proceedings are only considered to be necessary in three cases. Obviously, they are necessary if main proceedings simply cannot be opened⁶⁴⁶. But the protection of local interests may also require them if a creditor who dealt with an establishment and whose claim arises from the operation of the establishment wants to see the establishment dealt with separately. In this case there is no immediate need to oblige such a creditor to seek the opening of main insolvency proceedings abroad. It was also felt that obliging the local creditor to seek the opening of main insolvency proceedings abroad, rather than being able to bring local territorial proceedings, could potentially put an unduly high burden on a (small) party, even if the claim did not arise from the operation of the local establishment. The latter case is only required for small local creditors, but the Regulation applies it to all local creditors. In practice the long term implications of this will not be enormous though, especially as the latter case will often trigger the initiation of main

643 See Balz, “The European Union Convention on Insolvency Proceedings” 70 (1996) Am. Bankr. L.J. 485, at 524.

644 See Article 3(4)(b) of the Regulation.

645 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 263.

646 Be it for legal reasons, technical delays or because none of those eligible to do so takes the initiative. See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 263.

insolvency proceedings by a third party. One does indeed have to keep in mind that only the effects of the secondary insolvency proceedings are subject to territorial restrictions.⁶⁴⁷ The conditions under which an insolvency claim can succeed and a liquidator can be appointed are not so restricted by the Regulation and are referred back to national law. Most of these national laws will apply their conditions to the debtor as a whole rather than only to an establishment that by definition has no separate legal personality.

In the absence of main insolvency proceedings the independent territorial proceedings need not be restricted to liquidation proceedings. They can therefore aim at the continuation of the business. Annex B to the Regulation is therefore not applicable here as the Regulation refers to insolvency proceedings rather than winding-up proceedings. Article 2(a) refers to Annex A for a list of insolvency proceedings. This list is longer than the one contained in Annex B.

II.3. The relationship between the various insolvency proceedings

There is an obvious potential for conflict between the main insolvency proceedings and any secondary insolvency proceedings.⁶⁴⁸ Suffice it to refer in this respect to the fact that the main insolvency proceedings cover all the debtor's assets in every member-State, which means that there is an overlap in terms of the assets that are to be administered with any local secondary insolvency proceedings that have territorial effect in one Member-State, as the main proceedings are also to have effect where the secondary proceedings have their effect. The Regulation clearly works on the basis that there is ultimately one insolvency that needs to be addressed as a whole. There is no ringfencing of the secondary proceedings that would separate them entirely from the main proceedings. That leaves us with the difficulty of sorting out how exactly these various insolvency proceedings are to be allowed to interact and

⁶⁴⁷ See Article 3(2) of the Regulation.

⁶⁴⁸ See also Otte, "Inländischer einstweiliger Rechtsschutz im Inland bei Auslandskonkurs – ein neuer internationaler Justizkonflikt?" 58 (1994) *RabelsZ* 292.

what form of hierarchy, if any, is to be established between them.⁶⁴⁹ Recital 20 to the Regulation confirms this difficulty and points towards a solution with the statement that “[m]ain insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the assets only if all the concurrent proceedings pending are coordinated”. The Regulation therefore provides a set of mandatory coordination measures between the various insolvency proceedings. This is one of the key points and strengths of the Regulation.⁶⁵⁰ It is also important to keep in mind that the rationale behind the system, its combination of main and secondary proceedings and the coordination of these various proceedings is the effective realisation of the assets and the effective administration of the cross-border insolvency case. The latter is therefore also the ultimate aim.⁶⁵¹

The starting point for the Regulation was the principle of unity and universality.⁶⁵² This was in a second stage tempered by the introduction of secondary insolvency proceedings. As the main insolvency proceedings are the practical translation of the unity and universality principle and as they cover all assets, including those affected by secondary proceedings, it is indeed logical to set up a hierarchy between the various proceedings and to give priority to the main proceedings over any secondary proceedings.⁶⁵³ This key point translates itself in turn into a number of very practical rules that enable that hierarchy to be enforced.

Article 33 is the first of these practical rules that enable the hierarchy between the insolvency proceedings to be enforced. This article allows the liquidator in the main insolvency proceedings to apply to the court that opened the secondary proceedings

649 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 292.

650 Idot, “La ‘faillite’ dans la Communauté: Enfin une convention internationale?” (1995) 21 D.P.C.I. 34 (issue 1), at 51.

651 See Idot, “La ‘faillite’ dans la Communauté: Enfin une convention internationale?” (1995) 21 D.P.C.I. 34 (issue 1), at 52.

652 See Claeyss, “De bevoegdheidsregels voor de internationale faillietverklaring naar huidig en toekomstig recht” (1997) 30 TBH 501, at 508.

653 See De Wulf and Wautelet, “Aspecten van internationaal privaatrecht” in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 166 and Idot, “La ‘faillite’ dans la Communauté: Enfin une convention internationale?” (1995) 21 D.P.C.I. 34 (issue 1), at 49 and 51.

for a stay of the secondary proceedings. The court may stay the secondary insolvency proceedings as a whole, or it may decide to stay only part of it. Such a stay can be ordered by the court for a period of up to three months, but it can also be renewed for similar periods. This flexible procedure can prove to be particularly useful in the light of the fact that the secondary proceedings are by definition winding up proceedings. If the liquidator in the main proceedings has found a buyer prepared to continue the activities any attempt in secondary proceedings to realise assets could be highly detrimental to the chances of ultimately achieving a successful outcome in the main proceedings. The possibility for the liquidator in the main proceedings to apply for a stay of the secondary proceedings and the liquidation process that comes with it may therefore be a vital tool to ultimately achieve success.⁶⁵⁴ Looked at from the other side, any abuse of the procedure by the liquidator in the main proceedings, for example because he simply wants to deal alone with the liquidation of the whole business disregarding any special interests of the local creditors of the secondary proceedings, can be prevented by the proviso that the court to which the application is made can “require the liquidator in the main proceedings to take any suitable measures to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors”.⁶⁵⁵ This seems to represent an effective deterrent, especially in the light of the fact that any stay is only temporary and that the liquidator will have to return to the court if he wishes to apply for an extension of the stay. At that stage the court will also be able to check whether the liquidator has put any “suitable measures” in place. In conclusion, a stay should normally be granted almost automatically, but ultimately the court needs to be able to impose a sanction if the liquidator does not meet the requirement it imposed that “suitable measures” be put in place. One could therefore have imagined that the only reason why a stay could be refused would be the exceptional scenario in which the liquidator failed to put in place the “suitable measures” requested by the court. The Regulation has not gone down this path though and no sanction is even provided for the exceptional scenario described here. Instead the Regulation provides that there is only one single

654 See Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 525-526.

655 Article 33(1) of the Regulation.

reason why the almost automatically granted stay may be refused. Such a refusal can according to the text of Article 33 only be based on the fact that “it is manifestly of no interest to the creditors in the main proceedings”.⁶⁵⁶ Whilst it is no doubt true that in such a case the application must be abusive and should be turned down, it remains a mystery why on the one hand the interests of the creditors in the secondary proceedings have to be excluded from the equation and why on the other hand the court dealing with the secondary proceedings is necessarily best placed to judge whether or not the application for a stay of the proceeding pending before it is manifestly of no interest to the creditors in the main proceedings. One could argue in relation to the latter point that the liquidator in the main proceeding is at least as well placed as the court in the secondary proceedings to make this judgment and that ultimately the court in the main proceedings is best placed to make the final judgment. But it was no doubt politically not acceptable to ask the liquidator in the main proceedings to apply to the court before which the main proceedings have been opened for an authorisation to apply to the court before which the secondary proceedings are pending for a stay of the latter proceedings, which would then be granted automatically, since that would involve a court in one Member-State interfering almost directly with proceedings pending before a court in another Member-State. The current solution has the benefit of giving the court before which the secondary insolvency proceedings are pending an emergency brake in cases of abusive applications, but it remains the case that it is not well equipped to operate that emergency brake. It can also not take into account the interest of creditors in its own jurisdiction. This contradicts the basic rationale for secondary proceedings which involves to a large extent the protection of local creditors and their interests. The latter point is remedied to some extent by the fact that a stay, the grant of which could not be stopped to protect the interests of the creditors in the secondary proceedings, can at least be terminated of its own motion by the court before which the secondary proceedings are pending at the request of a creditor or at the request of the liquidator in the secondary proceedings. When doing so the court must be convinced that the stay is no longer justified, “in particular by the interests of the

⁶⁵⁶ Article 33(1) of the Regulation.

creditors in the main proceedings or in the secondary proceedings”.⁶⁵⁷ Yet again the creditors in the main proceedings come first and the stay may be terminated if it no longer serves their interests, for example because a continuation of the business no longer looks possible, but the court can also terminate the stay simply because it is no longer justifiable because of the harm it does to the interests of the creditors in the secondary proceedings. Article 33 does not impose the balancing of the interests of the various groups of creditors, but there is little doubt that this will in practice be what the courts will do in such a case.

Whilst a stay is in place in application of Article 33 the liquidator in the main proceedings will have the exclusive power to wrap up the secondary proceedings in any other way than by means of a liquidation, as that part of the process has been stayed at his request. He may exercise this power either himself or through the debtor acting with the consent of the liquidator. In practical terms the exclusive right allows him to use any possibility offered by the law applicable to the secondary proceedings to close them without liquidation.⁶⁵⁸ This may be possible by means of a rescue plan, a composition or any comparable measure. Only the liquidator can propose such a measure.⁶⁵⁹

The second of the practical rules that enable the hierarchy between the insolvency proceedings to be enforced is found in Article 31. This article imposes a duty to cooperate and communicate on the various liquidators. Recital 20 stresses in this respect the primary importance of the liquidators exchanging a sufficient amount of information for the effective realisation of the total assets of the debtor. Article 31(1) builds on these general principles and imposes a duty on the liquidator in the main proceedings and on the liquidators in any secondary proceedings to communicate information to each other. In particular there shall be immediate communication of any information that may be relevant to the other proceedings, such as any

⁶⁵⁷ Article 33(2) of the Regulation.

⁶⁵⁸ See Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485 at 526.

⁶⁵⁹ Article 34 (3) and (1) of the Regulation, see also Idot, “La ‘faillite’ dans la Communauté: Enfin une convention internationale?” (1995) 21 D.P.C.I. 34 (issue 1), at 51.

information concerning progress made in lodging and verifying claims or such as any information concerning measures aimed at terminating the proceedings. This duty is made subject to one condition. The liquidators are not under a duty to exchange information if to do so would constitute an infringement of any rules restricting the communication of information, for example if confidence would be breached as a result of the communication of a particular piece of information. The one problem that arises from this provision is that it contains no sanction for those situations where there is a failure by a liquidator to live up to the duty to exchange information on an immediate basis. This is left to the national laws of the Member-State concerned, but any sanction under national law may well prove to be a hypothetical sanction.

Article 31(1) adds a duty on the liquidator in the main insolvency proceedings and the liquidators in the secondary insolvency proceedings to cooperate with each other in as far as this proves to be possible under the national laws in application of which they administer the respective insolvency proceedings. Once again the Regulation leaves the sanction for any failure to carry out this duty to the national law concerned.

The first two paragraphs of Article 31 apply in the same way to all liquidators. The difference in hierarchy becomes clear in the final paragraph of the article. Only the liquidator in the main insolvency proceedings is given the opportunity to interfere directly in the other insolvency proceedings. Recital 20 says explicitly that this is done “in order to ensure the dominant role of the main insolvency proceedings”. In practice the liquidator in any secondary proceedings is under a duty “to give the liquidator in the main insolvency proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings”.⁶⁶⁰ The provision stops a long way short though of allowing the liquidator in the main proceedings to impose his solution on the liquidator in the secondary proceedings. He can only make a proposal and combine this with the duty on the liquidator in the

secondary proceedings to cooperate. This must rule out a refusal to implement the proposal without reason, but the adoption of another solution by the liquidator in the secondary proceedings remains possible as long as he can justify it. It is also not clear what exactly is meant by the term 'early'. It is therefore clear that the satisfactory implementation of Article 31 will to a large extent depend on the goodwill of those involved, as well as on the necessary degree of flexibility being allowed by national insolvency laws. Despite that, this is a vital provision for the success of the system put in place by the Regulation. Cooperation and communication are necessary to realise the assets successfully, but most importantly, since the aim is to satisfy all creditors to the greatest extent possible, there must be a possibility for the liquidator in the main proceedings to launch proposals that aim to facilitate the achievement of and to safeguard this aim whilst the secondary proceedings with their local focus are carried forward.

Thirdly, the dominance of the main insolvency proceedings is also made clear by the fact that the liquidator in the secondary proceedings is under an obligation to transfer any remaining assets to the liquidator in the main proceedings on an immediate basis once all claims in the secondary insolvency proceedings have been met.⁶⁶¹ In practice this will often be a symbolic measure⁶⁶², either because there rarely is a surplus of assets or more importantly because the creditors can introduce their claims in any proceedings anyway.⁶⁶³ It should be added though that it may be very costly for the creditors to introduce their claims in every single procedure. That problem is addressed by Article 32 of the Regulation. The liquidators in the main insolvency proceedings and in any secondary insolvency proceedings are given the power to lodge all claims that have already been lodged in their proceedings in any other proceedings. Obviously they can only do so if this is in the interest of the creditors concerned and the creditors are given the right to oppose the move or to withdraw

660 Article 33(3) of the Regulation.

661 Article 35 of the Regulation.

662 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 293.

663 Article 32 of the Regulation. See also Fletcher, "A New Age of International Insolvency – The Countdown Has Begun" [2000] *Insolv. Int.* 57 at 60 (Vol 13 / Issue 8).

the lodgement of their claim if that is possible under the applicable law.⁶⁶⁴ Additionally, the liquidator in any other proceedings can participate in the insolvency proceedings on the same basis as a creditor.⁶⁶⁵ All this substantially reduces the burden which the multiplicity of insolvency proceedings places on creditors.⁶⁶⁶

At first glance the scope of all these provisions which impose the dominance of the main insolvency proceedings is severely limited by the fact that they only apply in respect of secondary insolvency proceedings, as defined by Article 3(3) of the Regulation. This would seem to exclude all independent territorial insolvency proceedings based on Article 3(4) of the Regulation. This conclusion is however not correct. It is only valid in the obvious case where there are no main insolvency proceedings and where there is no issue of dominance of the main proceedings. As soon as main insolvency proceedings have been opened any independent territorial proceedings become *de facto* secondary proceedings for these purposes.⁶⁶⁷ They are therefore also subject to the hierarchy⁶⁶⁸ that is imposed from that moment onwards.

Fourthly, the dominance factor also surfaces when the two types of insolvency proceedings are of a different nature. There could indeed be a very serious conflict between main insolvency proceedings that aim at the winding-up of the business and secondary proceedings that were started before the main proceedings and that aim at the continuation of the business. The liquidator in the main proceedings would then be under a duty to realise all assets, including those in the Member-State where the liquidator in the secondary proceedings is trying to use the same local assets to continue the business. The Regulation addresses this problem by giving the liquidator in the dominant main insolvency proceedings the power to apply to the

⁶⁶⁴ Article 32(2) of the Regulation.

⁶⁶⁵ Article 32(3) of the Regulation.

⁶⁶⁶ See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 292.

⁶⁶⁷ Article 36 of the Regulation.

⁶⁶⁸ Article 36 of the Regulation makes Articles 31 to 35 applicable to these proceedings “in so far as progress of those proceedings so permits” (i.e. final decision in the independent territorial proceedings will not have to be reversed).

court that opened the secondary proceedings under Article 3(2) of the Regulation to have the secondary proceedings converted into winding-up proceedings. This request is to be granted almost automatically. The only condition is that the conversion should be in the interest of the creditors in the main proceedings. The liquidator in the main proceedings will normally find it rather easy to show that this is the case, since in most cases the conversion will lead to there being more assets to realise in order to satisfy the claims of the creditors. Looked at it from the other side, the court will only be able to refuse to order the conversion of the proceedings if there is evidence that it does not serve the interests of the creditors in the main proceedings.

Fifthly, the dominance of the main proceedings is also clear from the rule that the decision taken in the context of the main proceedings on the issue of whether the debtor has become insolvent binds any court before which the opening of secondary proceedings is requested, even if the law that is to be applied⁶⁶⁹ by that court would lead to a different conclusion. The decision in the main proceedings is applicable *erga omnes* and any other national concepts of insolvency are put to one side⁶⁷⁰. It remains to be seen though whether the concept of insolvency will also include for these purposes the question whether a certain category of persons, such as for example natural persons that are not traders, can be subject to insolvency proceedings, i.e. can they be insolvent. In practical terms the question arises whether the national court before which the opening of secondary insolvency proceedings is requested and under the laws of which the debtor-natural person-not trader cannot be declared insolvent and subject to insolvency proceedings is bound by the decision of the court in the main proceedings that the debtor has become insolvent (under the different national law of the court before which the main proceedings are pending).⁶⁷¹ The first indications, for example in Belgium, are that this question will receive a positive answer.⁶⁷²

669 See Article 4(2) of the Regulation, discussed *infra*.

670 Article 27 of the Regulation.

671 See De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 167-168.

672 See I. Verougstraete, *Manuel de la faillite et du concordat*, Kluwer Editions Juridique Belgique (1998), at 628.

Sixthly, the dominant role that is played by the main insolvency proceedings and the liquidator in these proceedings is reinforced by the fact that the closure of any secondary proceedings by a measure other than the liquidation of the assets cannot in principle become final without the consent of the liquidator in the main insolvency proceedings.⁶⁷³ Any such closure of the secondary insolvency proceedings by means of a rescue plan, a composition or a comparable measure is therefore subject to the consent of the liquidator in the main insolvency proceedings. The liquidator in the main insolvency proceedings' power of veto is however limited. Even in the absence of his consent the closure of the secondary proceedings can become final if the financial interests of the creditors in the main insolvency proceedings are not affected by the proposed measure. The real purpose of this provision is therefore to enable the liquidator in the main insolvency proceedings to block an unduly favourable settlement that has independently been agreed to by the creditors in the secondary proceedings and that is detrimental for the general body of creditors.⁶⁷⁴ Once more the interests of the insolvency case as a whole prevail and the dominance of the main proceedings and their liquidator are used to achieve that aim.

All measures aimed at coordinating the various insolvency proceedings hinge on the main insolvency proceedings. It is the driving force behind this effort.⁶⁷⁵ There is no hierarchy between the various secondary proceedings and coordination between them happens via the supremacy of the main insolvency proceedings. Due to their territorial scope there is also no direct need for coordination between the various secondary proceedings. The text of Article 31 of the Regulation makes it clear though that the duty to communicate information and the duty to cooperate also applies to the liquidators of the secondary proceedings amongst themselves.⁶⁷⁶ This will be of particular importance in the exceptional scenario where no main

673 Article 34(1) of the Regulation. See also Article 34(2), which reinforces the territorial scope of the secondary proceedings by excluding any impact on the debtor's assets outside the territory of the secondary insolvency of any restriction on creditors' rights that results from the application of Article 34(1). Further comments are found in paragraphs 248-251 of the Virgos-Schmit Report.

674 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 294.

675 See Idot, "La 'faillite' dans la Communauté: Enfin une convention internationale?" (1995) 21 D.P.C.I. 34 (issue 1), at 52.

676 Article 31(1) and (2) of the Regulation.

insolvency proceedings are opened.⁶⁷⁷

III. Choice of Law

III.1. The general rule

The problems associated with cross-border insolvencies cannot simply be solved through the implementation of a set of uniform rules on jurisdiction. The latter can only be a first step. As has already become clear from the several references to it in the discussion concerning the jurisdiction rules, the applicable law is an extremely important element. Ideally therefore there should not only be a harmonisation of the rules on jurisdiction, but also a harmonisation in terms of substantive insolvency law. At present this is however way beyond what can be achieved at European Union level.⁶⁷⁸ Instead the Regulation goes for the second best solution of harmonising the choice of law rules. In doing so the intention is clearly that the Regulation's rules refer to the substantive laws of the Member-State the law of which is designated as the applicable law and that any reference to choice of law rules and *renvoi* is excluded.⁶⁷⁹ Any other approach would effectively destroy any intended harmonisation of the relevant choice of law rules. The text of the Regulation fails to spell out the exclusion of *renvoi* though. The main aims of the harmonisation of the choice of law rules are on the one hand to improve the predictability of insolvency proceedings, their conduct and their outcome and on the other hand as a result of all this the creation of legal certainty in the area of cross-border insolvency. Recital 23 to the Regulation summarises the approach as follows:

⁶⁷⁷ See also paragraphs 35 and 39 of the Virgos-Schmit Report.

⁶⁷⁸ Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 506.

⁶⁷⁹ I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 265-266 and Balz, "The

“This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law”.

Before turning to the choice of law rules that have been put in place by the Regulation it is important to set out the cases to which these rules will apply. The Regulation only applies to cross-border insolvency cases in the Member-States of the European Union. The harmonisation of choice of law rules is therefore subject to the same limitation in terms of its territorial scope. The harmonised rules will apply to any proceedings before a court of a Member-State, but they do not affect proceedings that may be opened in the courts of third countries. Conflicts between the laws of the Member-States and those of third countries remain possible and the Regulation does not provide a solution. Instead this matter is left to the Member-States and their own existing rules on private international law in this area. The Regulation only deals through its choice of law rules with conflicting laws among Member-States.⁶⁸⁰ This limitation may make sense for those that see subsidiarity as a sacred cow of EU law, but it is unfortunate from both an insolvency law and a private international law point of view. From a private international law point of view the co-existence of two divergent regimes is undesirable, especially if, as here, they may affect a single case (i.e. a single cross-border insolvency).⁶⁸¹ From an insolvency law point of view uncertainty is bound to result from the fact that mobile assets that can be moved to a different jurisdiction may at different times be subject to different rules.⁶⁸²

The main choice of law rule is contained in Article 4(1) of the Regulation. The starting point is quite simple and was already universally accepted by the Member-States as part of their traditional rules. Each set of insolvency proceedings is

European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 506-507.

680 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 265; Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 507 and paragraph 44 of the Virgos-Schmit Report.

681 See Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 507.

682 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 265.

governed by the *lex concursus*, or the law of the Member-State within the territory of which such proceedings are opened⁶⁸³. The *lex concursus* will be the law applicable to all issues affecting the insolvency proceedings and their effects. It is important to note that the choice of law rule does not distinguish between main insolvency proceedings, secondary insolvency proceedings and independent territorial proceedings.⁶⁸⁴ The rule simply applies to any insolvency proceedings that are cross-border in nature and that are hence covered by the provisions of the Regulation. The choice of law rule also applies to each set of insolvency proceedings individually. The law of the place where the main insolvency proceedings have been opened will therefore apply to these main insolvency proceedings, whilst the law of the place where the secondary (or independent territorial) insolvency proceedings have been opened will apply to these latter proceedings.⁶⁸⁵ The main success of the Regulation is the fact though that it manages to define in substantial detail which points are covered by the *lex concursus*. Or as Balz puts it:

“The purpose of these rules is to delineate the issues which are properly governed by insolvency law from those that should be treated as nonbankruptcy issues because nonbankruptcy policies should prevail”.⁶⁸⁶

A uniform approach in this area must be considered to be a major breakthrough. That approach is based on an initial statement in Article 4(1) that the *lex concursus* applies to the insolvency proceedings and their effects, which is followed up in Article 4(2) by a statement that this covers the conditions for the opening of insolvency proceedings, the conduct of these proceedings, as well as their closure. At the same time the following non-exhaustive list of issues that fall within the scope of the applicable law as determined in Article 4 is provided in this first stage before the Regulation provides exceptions (i.e. issues that are taken out of the scope of the

683 This could also be described as an application of the *lex fori*.

684 See also Article 28 of the Regulation.

685 Recital 23 to the Regulation.

686 Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 506.

applicability of the *lex concursus*) in its Articles 5 to 15.

The *lex concursus* shall in principle determine *inter alia*⁶⁸⁷:

- (a) against which debtors insolvency proceedings may be brought on account of their capacity, i.e. the opening requirements and the question who can be a debtor;
- (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings (is after-acquired property exempted from the estate?);
- (c) the respective powers of the debtor and the liquidator;
- (d) the conditions under which set-offs may be invoked;
- (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
- (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
- (g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
- (h) the rules governing the lodging, verification and admission of claims;
- (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
- (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
- (k) creditors' rights after the closure of insolvency proceedings (or the discharge of the debtor);
- (l) who is to bear the costs and expenses incurred in the insolvency proceedings;
- (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

⁶⁸⁷ See Article 4(2) of the Regulation and the way it was summarised by Balz, "The

This list covers both procedural issues that are indeed normally governed by the *lex fori*, which is also the *lex concursus* and also many substantive insolvency issues. Many of them are straightforward, but in the light of the fact that the laws of the Member-States differ on a number of these points, it is important that the Regulation states clearly that a single law will now apply to them.⁶⁸⁸ An example of such a difference is the argument in some jurisdictions that the law governing the debtor's obligation should be applied as the *lex contractus* to the issue of discharge, eventually cumulatively with the *lex concursus*. Article 4 now makes it clear that this is one of the points that are now to be decided exclusively on the basis of the *lex concursus*⁶⁸⁹. We will now turn to the issues that have been taken out. These are effectively limitations placed on the scope of the *lex concursus*.

III.2. Security interests

The most important restriction placed on the scope of the *lex concursus* involves security interests. Secured credit is strongly linked to the financial markets and to the *lex rei sitae*. The Regulation recognises that to disregard this traditional strong link in favour of the *lex concursus*, which is not easily determined in advance and may affect the legitimate expectations of credit institutions, would be too disruptive and would not reflect the balance of the interests involved.⁶⁹⁰

Article 5 therefore adopts the solution that the opening of insolvency proceedings and the application of the *lex concursus* that follows from it will not affect security interests in as far as they take the form of a right in rem. In those cases the possibility of direct access to the collateral is retained. These rights in rem can be in respect of

European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 508.

688 For further details see I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 267-269.

689 See Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 508, who refers for further details to Nadelmann, "Compositions, Reorganizations and Arrangements in the Conflict of Laws" (1948) 61 Harv. L. Rev. 804.

690 See Omar, "New initiatives on Cross-Border Insolvency in Europe", [2000] *Insolvency Lawyer* 211, at 216.

tangible or intangible, movable or immovable assets belonging to the debtor, as long as they are situated in the territory of another Member-State at the time of the opening of the insolvency proceedings. The concept of assets that is used is therefore extremely wide in scope, even if assets located in a third country are not covered. Both creditors' and third parties' rights in rem are covered and such rights can cover either specific assets or collections of indefinite assets as a whole which change from time to time. Tools such as the floating charge are therefore also included.⁶⁹¹

Two further definitional points arise in relation to Article 5. The Regulation first of all defines the time of the opening of proceedings as "the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not". Such a precise definition is important to pin down assets which can be moved easily in one location. Locating the assets is further facilitated by the definition of the concept of the Member-State in which the assets are situated. For tangible property this will be the Member-State within the territory of which the property is situated at the relevant time⁶⁹². For property and rights, the ownership of or entitlement to which must be entered in a public register this will be the Member-State under the authority of which the register is kept. And finally, for claims this will be the Member-State in the territory of which the third party required to meet them has the centre of its main interests, as defined in Article 3(1) of the Regulation. The problems that arise from these definitions have already been highlighted above.

Article 7 of the Regulation expands the exception to reservations of title.⁶⁹³ "The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's right based on a reservation of title where at the time of the opening of proceedings the asset is situated in a Member-State other than the State of opening of proceedings."⁶⁹⁴ It is therefore clear that the *lex concursus* will not apply to this

691 See paragraph 104 of the Virgos-Schmit Report.

692 Compare the approach adopted by the Commercial Court in London in *Glencore International AG v Metro Trading International Inc (formerly Metro Bunkering & Trading Co.) and others* [2001] 1 All ER 103, [2001] 1 Lloyd's Rep 284.

693 Idot, "La 'faillite' dans la Communauté: Enfin une convention internationale?" (1995) 21 D.P.C.I. 34 (issue 1), at 48.

694 Article 7(1) of the Regulation.

point, but it is less clear which law will apply. Obviously, the *lex contractus* will apply to the issue whether the contract and the retention of title clause in it are valid and this will have to be taken into account under the *lex situs*. All that is clear is that in a similar way as in Article 5 the application of the *lex concursus* is denied all effect.⁶⁹⁵ The exception also applies in the opposite scenario. “The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of the proceedings the asset sold is situated within the territory of a Member-State other than the State of the opening of proceedings.”⁶⁹⁶ This latter rule is in fact a uniform substantive rule, rather than a choice of law rule.

The holder of a security interest therefore specifically retains the right to dispose of assets and to obtain satisfaction from the proceeds of or the income from the assets, the exclusive right to have a claim met, the right to demand the assets from anyone having possession or use of the assets concerned, as well as the right *in rem* to the beneficial use of the assets.⁶⁹⁷ These rights will de facto remain unaffected by the opening of the insolvency proceedings and application of the *lex concursus*.⁶⁹⁸ In describing these rights Article 5(2) of the Regulation also offers a form of definition of a right *in rem*. But the absence of a complete and uniform definition of rights *in rem* must be seen as one of the weak points of the Regulation.⁶⁹⁹ Any stay issued in insolvency proceedings in another Member-State for example will not affect creditors that have the benefit of a security interest such as a right *in rem*. The latter statements must be qualified slightly though. Security interests are not immune

695 See De Wulf and Wautelet, “Aspecten van international privaatrecht” in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 187 and paragraph 94 of the Virgos-Schmit Report.

696 Article 7(2) of the Regulation.

697 Article 5(2) of the Regulation. A right, recorded in a public register and enforceable against third parties, under which a right *in rem* can be obtained is also to be treated as a right *in rem* (Article 5(3) of the Regulation).

698 For further details see Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 508-510.

699 De Wulf and Wautelet, “Aspecten van international privaatrecht” in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 187.

against any claim based on the rules of avoidance. Article 4(2)(m) and the *lex concursus* remain applicable on this point.⁷⁰⁰

This exception covering security interests in assets located in a Member-State other than the one in which insolvency proceedings have been opened could be quite disruptive for the liquidator in these proceedings. This disruptive effect could be tempered somewhat if the debtor also had an establishment in the Member-State where the assets covered by the security interests are located. The application of the local law could not be avoided, but the liquidator in the main insolvency proceedings could request that secondary insolvency proceedings be opened in these Member-States and hence trigger the application of the local insolvency laws.⁷⁰¹ That local *lex concursus* would then apply because the conditions for the exception in Articles 5 and 7 will no longer be present.

III.3. Set-offs

Set-offs are not exactly another example of a security interest, but the Regulation treats them in a similar way.⁷⁰² In other words, this is another exceptional limitation on the scope of the *lex concursus*. The exception has a limited scope.⁷⁰³ It only applies to those cases where the creditor is also simultaneously a debtor to the insolvent estate and where the *lex concursus* would lead to the conclusion that a set-off would not be allowed in this particular case. If in such a situation the law that is applicable to the insolvent debtor's claim, i.e. the law applicable to the claim in which the insolvent debtor is the creditor in relation to the other party,⁷⁰⁴ would

700 Articles 5(4) and 7(3) of the Regulation.

701 See Article 29(a) of the Regulation and Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 509-510.

702 Idot, "La 'faillite' dans la Communauté: Enfin une convention internationale?" (1995) 21 D.P.C.I. 34 (issue 1), at 48 and De Wulf and Wautelet, "Aspecten van internationaal privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 193.

703 See Omar, "New initiatives on Cross-Border Insolvency in Europe", [2000] Insolvency Lawyer 211, at 216.

704 See paragraph 108 of the Virgos-Schmit Report.

allow a set-off then the creditor shall not be denied the right to the set-off of his claim against that of the debtor.⁷⁰⁵ It is important to note that the text of Article 6 does not limit its application to the law of a Member-State. The applicable law can therefore also be the law of a third country.⁷⁰⁶ But any cumulative application of the laws that apply to all claims involved is also excluded.⁷⁰⁷

In all other circumstances the Regulation submits the whole issue of set-offs and the conditions under which they can be invoked to the *lex concursus*.⁷⁰⁸ It was felt though that it would be unduly harsh on the creditor to take away the right to a set-off to which he became entitled under the law applicable to the debtor's obligation towards him. The latter aspect may have been an important consideration in entering into what is most likely to be a contractual obligation. Not only would the imposition of a potential *lex concursus* take away the aspect of predictability, it would also fly in the face of the major principle that the parties are allowed to choose the applicable law in contractual matters.⁷⁰⁹ The chances that creditors would enter into this kind of deal to avoid the application of the *lex concursus* is in any case substantially reduced by the proviso that the exception is subject to the rules on avoidance.⁷¹⁰ Set-offs based on contracts entered into in the period immediately before the insolvency proceedings were opened can therefore still be refused in appropriate cases.⁷¹¹

It is also important to note that the exception will only allow a creditor to rely on a set-off under a different applicable law. It is therefore restricted to the scenario in

705 Article 6(1) of the Regulation.

706 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 274-275.

707 De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 193.

708 This is an important improvement brought about by the Regulation, as the various legal systems in Europe have very different views on set-offs. Harmonisation of the choice of law rules means that only one identifiable law will apply. See Article 4(2)(d) of the Regulation.

709 See the Rome Convention 1980 on the law applicable to contractual obligations [1980] OJ L266/1 and the consolidated text at [1998] OJ C27/34, especially its Article 3, which applies across the European Union.

710 Article 6(2) of the Regulation, which refers back to Article 4(2)(m) of the Regulation.

711 Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 510.

which the *lex concursus* would not allow the set-off. It cannot work negatively to deny a creditor a set-off that is available under the *lex concursus*, even if the other law would not allow it.⁷¹²

III.4. Payment systems and financial markets

International financial markets and international payment systems rely heavily on the fact that their large numbers of routine transactions are subject to a single (legal) regime that is known in advance by all involved. Fragmentation due to the application of different laws to different aspects or stages of transactions would do considerable harm to these markets and payment systems, for example if a claim and a counterclaim were to be subjected to different legal regimes. The reasonable expectation of all involved is therefore that the law of the country where the financial market or the payment system is operating will apply to all transactions.⁷¹³ The Regulation is careful not to upset this delicate system and preserves the exclusive application of the latter law.⁷¹⁴

This is done through Article 9(1) that provides that “the effects of insolvency proceedings on the rights and obligations of parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member-State applicable to that system or market”.⁷¹⁵ The *lex concursus* is excluded in so far as the law applicable to the system or market is the law of a Member-State. Otherwise the exception does not apply and the *lex concursus* reclaims its dominant role. This is the standard approach taken by the Regulation. On another aspect though the exception goes further than most of the other exceptions. The exception

712 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 274-275.

713 *Ibidem*, at 277-278.

714 Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 513.

715 See also Omar, “New initiatives on Cross-Border Insolvency in Europe”, [2000] *Insolvency Lawyer* 211, at 216.

will include the rules on avoidance.⁷¹⁶ Instead of the *lex concursus* the law applicable to the system or market will apply on this point. The only additional restriction that is placed on the scope of this exception is that it applies without prejudice to Article 5 of the Regulation and the special regime for rights in rem put in place by that Article.⁷¹⁷ This reinforced exception clearly leads to one conclusion:

“[N]o matter where insolvency proceedings are opened, only one insolvency law applies to the operations of a payment system or a financial market, namely, the insolvency law of the Member-State where the system or market is in operation”⁷¹⁸.

III.5. Contracts of employment

Employees are seen as a weaker party in contractual relationships deserving special protection. Special choice of law rules therefore apply to individual contracts of employment.⁷¹⁹ They also have this status of a weaker party in the context of insolvency proceedings. It was therefore thought to be unfair to remove their special protection in terms of choice of law rules.⁷²⁰ The *lex concursus* is therefore put to one side when it comes to the effects of insolvency proceedings on employment contracts and employment relationships.⁷²¹ These effects shall be governed solely by the law of the Member-State that is the applicable law to the contract of employment.⁷²² The exception clearly only applies if the applicable law, determined

716 Article 9(2) of the Regulation.

717 Article 9(1) of the Regulation.

718 Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 513.

719 See Article 6 of the Rome Convention 1980 on the law applicable to contractual obligations [1980] OJ L266/1 and the consolidated text at [1998] OJ C27/34.

720 Consumers are another weaker category that often gets special protective choice of law rules. The Regulation does not contain any special consumer protection rules though. These were apparently rejected during the negotiations that led to the 1995 Convention and the approach was copied into the Regulation. See Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 511.

721 See Idot, “La ‘faillite’ dans la Communauté: Enfin une convention internationale?” (1995) 21 D.P.C.I. 34 (issue 1), at 49.

722 Article 10 of the Regulation, see also Recital 28 to the Regulation.

on the basis of the relevant provisions of the Rome Convention 1980⁷²³, is the law of a Member-State. In all other cases the *lex concursus* reclaims its applicability. A second limitation is that the exception only applies to the effect of the insolvency proceedings on the contract of employment, for example to the question whether it will automatically be terminated.⁷²⁴ All other types of questions, such as the ranking of the employee's claim for wages that are still to be paid under the contract, are governed by the *lex concursus*.⁷²⁵

III.6. Contracts relating to immovable property

The debtor may have entered into agreements conferring rights to acquire or make use of immovable property before the opening of the insolvency proceedings. Irrespective of the law applicable to such contracts the liquidator is normally given the power to decide either to continue or to terminate such executory contracts to which the debtor is a party at the time the insolvency proceedings are opened.⁷²⁶ Article 4(2)(e) confirms the basic principle that the effects of insolvency proceedings on current contracts is a matter for the *lex concursus*, rather than for the *lex contractus*. This provision is however subject to an exception that is contained in Article 8 of the Regulation.

If the contract conferring the right to acquire or make use of immovable property covers immovable property situated in a Member-State that is not the Member-State in the territory of which the insolvency proceedings have been opened, the effects of the insolvency proceedings on such a contract will be governed exclusively by the law of the Member-State in which the immovable property is situated. The

723 Articles 3, 6 and 7 of the Rome Convention 1980 on the law applicable to contractual obligations [1980] OJ L266/1 and the consolidated text at [1998] OJ C27/34.

724 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 278-279, *contra*: Omar, "New initiatives on Cross-Border Insolvency in Europe", [2000] *Insolvency Lawyer* 211, at 216.

725 According to paragraph 128 of the Virgos-Schmit Report this type of claim falls squarely within Article 4(2)(h) of the Convention, which has now become Article 4(2)(h) of the Regulation.

726 See Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 510.

applicability of the *lex concursus* to this point is excluded altogether. The exception covers contracts such as leases and rentals of real property and contracts for the sale of land. It was judged that the link with the soil and the *lex situs* was stronger than the link with the *lex concursus* and the insolvency. This is to some extent tempered by the realisation that the reference to the *lex situs* includes a reference to the insolvency laws of the *lex situs*.

The Regulation's exception only applies if the immovable property is located in another Member-State. If it is located in a third country the *lex concursus* will still apply in application of Article 4(2)(e) of the Regulation, but in practice it may not make any difference. Many insolvency laws will indeed refer to the *lex situs* as far as immovable property is concerned.⁷²⁷

III.7. Rights subject to registration

Most states keep a public register for interests over immovable property. Similar registers exist for aircraft and ships for example. Such a register and the registration of an asset in it provides a strong link between the asset and the territory of the Member-State under the authority of which the register is kept. For immovables this further strengthens the link with the *lex situs*. Third parties that take an interest in these assets rely also on these registers and should be entitled to continue to do so in case of an insolvency. Article 11 of the Regulation therefore limits the impact of the *lex concursus* in this area. The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register is to be determined by the law of the Member-State under the authority of which the register concerned is kept. A kind of cooperation between the liquidator and the official keeping the register that should result in appropriate entries being made in the register to reflect the insolvency proceedings that are taking place in

⁷²⁷ See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 277.

another Member-State is however envisaged.⁷²⁸ The effect of this process on the rights of the debtor remains nevertheless a matter for the law of the Member-State of registration.⁷²⁹

III.8. Protection of third party purchasers

The starting point for this exception is the fact that, as seen above, third parties may rely on entries in public registers and are entitled to do so. It is also clear that making entries in all these registers as soon as an insolvency proceeding has been opened will take time, especially in those cases where the register is not kept in the state where the insolvency proceedings are opened. A problem may therefore arise if the debtor disposes of certain assets after the insolvency proceedings have been opened, but before the relevant public register has been amended. The application of the *lex concursus* would penalise the third party involved who dutifully checked the register and found no trace of the proceedings. Article 14 of the Regulation tries to remedy this problem by submitting the issue of the validity of the act of disposal to the law of the state within the territory of which the immovable asset is situated or under the authority of which the register is kept, rather than to the *lex concursus*. Article 14 applies to immovable assets, ships or aircraft that are subject to registration in a public register and to securities whose existence presupposes registration in a register laid down by law. The text of the Article also requires that these assets are disposed of for consideration and that the act of disposal takes place after the opening of the insolvency proceedings.

There seems to be a mismatch though between the aims the Article is trying to achieve and its wording, which seems not to have been chosen carefully. Most importantly the aim of the provision suggests that the exception should only apply in those cases where the register involved did not yet contain an entry mentioning the

⁷²⁸ Paragraph 128 of the Virgos-Schmit Report.

⁷²⁹ I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 280.

opening of the insolvency proceedings. Surely there is no reason to exempt third parties that are perfectly aware of the proceedings from the effects of the *lex concursus*. However, this is not the approach taken by Article 14, the text of which does not distinguish between the scenario in which an entry in the register exists already and one where such an entry is still lacking.⁷³⁰ Secondly, the wording of Article 14 uses the term “to dispose of”. In combination with the word “purchasers” that appears in the heading this seems to suggest that Article 14 is not applicable in case the third party only acquired a right in rem. A missing entry in a register referring to the opening of the insolvency proceedings may nevertheless harm an innocent third party in exactly the same way in these circumstances. Leaving the heading on one side, the use of terms such as “disposer à titre onéreux”, “Verfügen” and “beschikken onder bezwarende titel” in other language versions could be seen as an indication that rights in rem were also to be included.⁷³¹ This is further supported by the fact that foreign language versions of the title such as “acquéreur”, “Drittwerber”, “verkrijger” and “adquirentes” are also much wider in scope than the term “purchasers”. A final point concerns the use of the word “State” instead of “Member-State”. This must mean that the law governing the validity issue can also be the law of a third country despite the indications that this extension was by no means intended.⁷³²

III.9. Community intellectual property rights

Community intellectual property rights⁷³³ are a slightly different case. In principle

730 The Virgos-Schmit Report, when commenting on the identical provision in the 1995 Insolvency Proceedings Convention in its paragraph 140, seems to assume that the distinction exists, but this cannot be accepted on the basis of the text of Article 14. De Wulf and Wautelet, “Aspecten van international privaatrecht” in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 173-174.

731 This is also the approach suggested in paragraph 141 of the Virgos-Schmit Report.

732 Article 14 has been copied from the 1995 Insolvency Proceedings Convention and the Virgos-Schmit Report refers in relation to this provision constantly to “a Contracting State” in paragraphs 140 and 141. Such a restriction is not warranted by the text of Article 14.

733 At present only the Community Trade Mark and the Community Plant Variety Right have come into existence. See Council Regulation 40/94/EC on the Community Trade Mark [1994] OJ L11/1 and Council Regulation 2100/94 on Community Plant Variety Rights [1994] OJ L227/1, as amended by

there is no objection to the application to these rights of the *lex concursus*. The Community Trade Mark Regulation even provided for interim measures until the Insolvency Regulation came into force, instead of excluding a Community Trade Mark from the scope of such a Regulation.⁷³⁴ One needs to be clear though about the nature of the intellectual property rights concerned. These rights are granted on a Community wide basis, through a single community office. It would therefore make sense to include them in the main insolvency proceedings, which are by definition community wide in scope. This is indeed the solution adopted by the Regulation.⁷³⁵ It is on the other hand quite hard to see how a single community wide right could usefully be included in secondary insolvency proceedings that are by definition territorially limited in their effects to the territory of a single Member-State. Things are only aggravated by the fact that there may be more than one set of secondary insolvency proceedings. It is surely not possible to include a single community wide right into several territorially limited proceedings, especially if they are liquidation proceedings. Several liquidators would end up trying to sell off a single intellectual property right. Quite sensibly therefore the Regulation stipulates that community intellectual property rights cannot be included in secondary insolvency proceedings.⁷³⁶

One should keep in mind though that the Insolvency Regulation only applies if the debtor's centre of main interests is located in a Member-State. If this is not the case Article 12 will not apply either. For insolvency cases of debtors that are located outside the European Union, but that may be owners of for example a Community Trade Mark, one will have to fall back on the provisions that were inserted in the intellectual property Regulations, here Article 21 of the Trade Mark Regulation⁷³⁷.

Regulation 2506/95/EC [1995] OJ L258/3. The Community Patent and the Community Design Right still only exist in draft and are awaiting adoption. See Commission Proposal for a Council Regulation on the Community Patent COM(2000) 412 final (1st August 2000) and Amended Commission Proposal for a Council Regulation on the Community Design COM(2000) 660 final/2 (23rd November 2000).

⁷³⁴ Article 21(1) of the Community Trade Mark Regulation.

⁷³⁵ Article 12 of the Regulation.

⁷³⁶ *Ibidem*.

⁷³⁷ This provision only applies "until such time as common rules for the Member-States in this field enter into force", but it can be argued that there still are no common rules for cases where the debtor

All these provisions state that a Community intellectual property right can only be included in the first set of insolvency proceedings that is opened. This also solves the problem, but it is clear that this solution would not have been satisfactory in the context of an Insolvency Regulation, as territorially limited proceedings may be opened first. In the context of the latter Regulation Community intellectual property rights belong in the only set of proceedings that is not limited to the territory of a single Member-State, i.e. the main insolvency proceedings.⁷³⁸

III.10. Effects of insolvency proceedings on lawsuits pending

The Member-States of the European Union take very different approaches to the impact of insolvency proceedings on litigation that is pending and to which the debtor is a party. Such a case may be stayed, the liquidator may be allowed to continue the case, the case may be moved to a different court (i.e. the insolvency court)⁷³⁹, etc. A uniform choice of law rule was therefore in order. It was not evident though that the *lex concursus* should apply to this point as well though, mainly because of the strong link between the issue and the procedural rules of the courts. This is normally a matter for the *lex fori*. As a result the Regulation contains a narrowly circumscribed exemption in favour of the *lex fori*.⁷⁴⁰ All remaining issues are left to the *lex concursus*.

The exception in Article 15 will only apply if a number of requirements are met.⁷⁴¹ First, a lawsuit must be pending in a different Member-State than the one in which the insolvency proceedings are pending. Proceedings in third states are not covered and neither are individual enforcement actions. The latter are governed by the *lex concursus* in application of Article 4(2)(f) of the Regulation. Secondly, the lawsuit

has no center of main interests in any of the Member-States.

738 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 280.

739 In application of the *vis attractiva concursus* principle.

740 Article 15 of the Regulation.

741 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 282.

that is pending in another Member-State must concern an asset or a right of which the debtor has been divested. Assets that are excluded from the effects of the insolvency in application of the *lex concursus* are not taken into account. If these conditions are met the effects of the insolvency proceedings on the lawsuit will be governed exclusively by the law of the Member-State in which the lawsuit is pending. The application of the *lex concursus* is excluded. The law of the Member-State concerned, i.e. its procedural laws and its insolvency laws, will determine the effect of the opening of the insolvency proceedings in another Member-State on the lawsuit. It should be clear though that the law so determined will only deal with the effects of the opening of the insolvency proceedings on lawsuits that are pending within its own jurisdiction.⁷⁴² Lawsuits pending in other Member-States are not affected as they are to be dealt with under a different law in application of the same Article 15.

III.11. Detrimental acts

Paragraph (m) of Article 4(2) of the Regulation is expressly prevented from applying in certain circumstances.⁷⁴³ This represents the final limitation placed on the principle that the *lex concursus* is the applicable law under the Regulation. In those circumstances the standard rule that the *lex concursus* supplies the avoidance rule is displaced in favour of the rule of another state.

Article 4(2)(m) itself puts in place a harmonised choice of law rule concerning avoidance to deal with the difficulty that Member-States dealt in very different ways indeed with avoidance, be it on the point of the potential impeachment of the insolvent debtor's pre-bankruptcy transactions or on the point of acts carried out once proceedings had been opened.⁷⁴⁴ That harmonised rule leads to the application

⁷⁴² Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 513.

⁷⁴³ Article 13 of the Regulation.

⁷⁴⁴ I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 268.

of the *lex concursus*, but the diversity on this point between Member-States was such that it was felt necessary to limit the Community wide exportation of foreign avoidance systems in special circumstances,⁷⁴⁵ where it would upset legitimate legal expectations.

Article 13 of the Regulation sets out first of all the requirements for these special circumstances to exist. The detrimental act, which is detrimental to all creditors and the avoidance of which is sought, must be subject to the law of a Member-State that is different from the Member-State in which the insolvency proceedings have been opened. The exception does not apply if the applicable law is the law of a third country. In those cases the exception provides for a limited cumulative application of the *lex concursus* and the law governing the detrimental act. This limited cumulative application can only take place if an additional requirement is met. The law governing the detrimental act must “not allow any means of challenging that act in the relevant case”,⁷⁴⁶. The detrimental act must therefore be valid and unobjectionable from every legal point of view, not just from the point of view of the rules on avoidance of the *lex causae*. If all these conditions are met both laws apply cumulatively and as the *lex causae* does not offer an opportunity to challenge the detrimental act it will effectively work as a defence against the application of the *lex concursus* and the sanction it would normally impose.⁷⁴⁷

Article 13 is subject to strict requirements and is therefore unlikely to apply in many cases. The impact of the exception on the principle in Article 4(2)(m) will therefore remain limited. This is to be welcomed as the express prohibition of the cumulative application of various laws to the issue of avoidance and the adoption of a uniform choice of law rule in favour of the *lex concursus* on this issue is to be seen as one of the major steps forward achieved by the Regulation.⁷⁴⁸

745 Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 512.

746 Article 13 of the Regulation, *in fine*.

747 See Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 512.

748 I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 268-269.

IV. Recognition of Foreign Insolvency Proceedings

IV.1. Recognition of insolvency proceedings

The main principle of the Regulation is the immediate and universal recognition in all Member-States of insolvency proceedings that have been opened in accordance with the provisions contained in Article 3 of the Regulation.⁷⁴⁹ Automatic recognition⁷⁵⁰ is the rule and no procedure or formalities are required. In other words, any judgment opening insolvency proceeding will automatically be recognised across the Community from the time when it becomes effective in the Member-State in which the proceedings are opened. The opening judgment must be effective in its home Member-State, but it must not necessarily be a final judgment. In practice the opening of the insolvency proceedings will become effective across the Community at the same moment in time. This is a major improvement brought about by the Regulation, which avoids many difficulties and possible abuses caused previously by delays in the old recognition procedures. For example, the equality amongst creditors would be seriously undermined if creditors lost the power to act individually at different times in different Member-States and if the debtor lost his power to dispose of and control over the assets at different times in different Member-States, as happened in the past.⁷⁵¹

The automatic character of the recognition is further emphasised by the fact that it will also apply if on account of his capacity insolvency proceedings could not be brought against the debtor in the Member-State where the automatic recognition has

749 Article 16(1) of the Regulation. This does mean though that the proceedings must be proceedings that come within the scope of the Regulation (Judgment from an EU State and in conformity with the annexes to the Regulation). For example, a judgment from a court in the UK appointing a provisional liquidator will not be covered. I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 283-284.

750 See also Idot, "La 'faillite' dans la Communauté: Enfin une convention internationale?" (1995) 21 D.P.C.I. 34 (issue 1), at 50.

751 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 283.

its effects. In other words, foreign insolvency proceedings against a non-trader for example will also be recognised automatically in those Member-States under the laws of which no insolvency proceedings can be brought against such a debtor.⁷⁵²

The effects of this automatic recognition of a judgment opening insolvency proceedings are dealt with in Article 17 of the Regulation. Article 17 works on the basis of the expansion model.⁷⁵³ The opening of the insolvency proceedings and its effects are expanded in terms of their territorial scope from the territory of the Member-State in the courts of which the proceedings were opened to the territory of all the Member-States, i.e. the territory of the Community as a whole. Article 17 applies this model to the main insolvency proceedings and stipulates that a judgment opening main insolvency proceedings shall instantly “produce the same effects in any other Member-State as under th[e] law of the State of the opening of the proceedings”⁷⁵⁴. In practice the effects of the main insolvency proceedings are exported, which means that they will have the effects at Community level and therefore in every single Member-State which they are having in the Member-State where they were opened.⁷⁵⁵ These effects are defined by the *lex concursus*, the law of the State where the proceedings are opened, rather than by the law of the recognising Member-States. As there is no harmonisation of substantive insolvency laws this second best solution will not be without problems in practice. Insolvency proceedings opened in other Member-States and automatically recognised in a particular Member-States may well have different effects than similar insolvency proceedings that were opened in the local courts. For example, the powers of the liquidator may be different. Every Member-State will therefore be obliged to know and apply the national insolvency laws of the other Member-States.⁷⁵⁶ This will obviously not be the easiest part of the Regulation in terms of correct and smooth

752 Article 16(1) of the Regulation, *in fine*.

753 De Wulf and Wautelet, “Aspecten van international privaatrecht” in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 153-155.

754 Article 17(1) of the Regulation.

755 See Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 514.

756 See paragraph 151 of the Virgos-Schmit Report.

implementation.

The principle of automatic recognition applies to all types of insolvency proceedings.⁷⁵⁷ Somehow though the interaction between main proceedings and secondary proceedings will also have to be dealt with at this level. The starting point in this respect is that recognition of the judgment opening the main proceedings will not preclude the opening of secondary insolvency proceedings. When such secondary proceedings are opened the effects that result from the automatic recognition of the main insolvency proceedings are suspended in the Member-State in which the secondary insolvency proceedings are opened. The effects of any secondary insolvency proceedings are territorially limited in scope to the territory of the Member-State in which they have been opened. But with that restriction in mind the judgment opening these secondary proceedings is also entitled to automatic and instant recognition in all other Member-States. We will return to this point at a later stage. Suffice it to make two points at this stage. First, automatic recognition of the judgment opening secondary insolvency proceedings in all other Member-States obviously means that the effects of such secondary insolvency proceedings may not be challenged in the courts of those other Member-States, since they are under an obligation to recognise them automatically.⁷⁵⁸ Secondly, at the other side of the spectrum territorial limitations also mean that any restriction in the creditors' rights, and in particular a stay or a discharge, will also be limited to the territory of the Member-State where the secondary proceedings concerned have been opened, unless the creditors have agreed otherwise.⁷⁵⁹

The Regulation only provides one ground that can be relied upon to refuse the automatic recognition of a judgment opening insolvency proceedings. This is the public policy defence contained in Article 26 of the Regulation. This defence is only established if the effects of the recognition of the judgment would be manifestly

757 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 284.

758 Article 17(2) of the Regulation, first sentence.

759 Article 17(2) of the Regulation, second sentence.

contrary to the public policy of the Member-State concerned. The use of the term “manifestly” means that this is supposed to be the case only in very exceptional circumstances. What are examined by the court in such a case are the consequences in the jurisdiction of the recognition, rather than the foreign judgment as such and only the public policy of the recognising Member-State can be used as a yardstick in such an examination. Any concept of a European public policy cannot be used, but the Regulation specifies that the Member-State’s fundamental principles and the constitutional rights and civil liberties of the individual form part of its public policy.⁷⁶⁰ Consequences that flow directly from express provisions of the Regulation cannot therefore offend against the public policy of any Member-State.⁷⁶¹ Any attempt to reopen the substantive aspects of the case must be resisted⁷⁶² and is not allowed by the Regulation and any challenge to the jurisdiction of the court is to be brought in the courts of the Member-State in which the judgment originates, rather than at the recognition stage⁷⁶³. This public policy clause is a standard clause in modern private international law instruments, but it is nevertheless one of the weaker points of the Regulation as an unduly wide interpretation covering many of the sensitive areas that are related to insolvency cases by one or more Member-States could substantially undermine the impact of the Regulation. This would especially be the case if Member-States start abusing Article 26 to defend their own peculiar views in this area whenever the Regulation would lead to a different result. A restrictive interpretation of Article 26 is therefore imperative.

Up to now we have primarily looked at the automatic recognition of judgments that opened the insolvency proceedings. The system applies to a wider range of judgments and issues though. There really are three categories to consider. The first

760 See De Wulf and Wautelet, “Aspecten van international privaatrecht” in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 155-156. Enjoyment of property under the European Convention on Human Rights as transposed into national law in the United Kingdom by the Human Rights Act 1998 might be an example.

761 Balz, “The European Union Convention on Insolvency Proceedings” (1996) 70 A.B.L.J. 485, at 519.

762 See also paragraph 202 of the Virgos-Schmit Report.

763 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 289 and paragraph 202

category involves judgments through which insolvency proceedings were opened, the appointment of the liquidator and the powers of the liquidator. The second category involves decisions concerning the conduct and the termination of insolvency proceedings. And the third category involves judgments that are directly related to or follow from the insolvency proceedings.

The first category really deals with the primary consequences of the insolvency. This includes substantial and procedural issues such as the appointment of a liquidator and the impossibility for creditors to bring individual actions. As discussed above the automatic recognition principle applies and for example the liquidator will be able to exercise its powers under the *lex concursus* in all other Member-States too. Article 18 adds that this will be so “as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken further to a request for the opening of insolvency proceedings in that State”⁷⁶⁴. This means in particular that the liquidator will also have the power to remove the debtor’s assets from the Member-State in which they are situated.⁷⁶⁵ The liquidator in secondary insolvency proceedings will be able to use its access to the courts for example to reclaim assets that were removed from the jurisdiction after the insolvency proceedings were opened or to bring an avoidance action.⁷⁶⁶ Any liquidator, when exercising its powers, will have to comply with the local law of the place where these powers are exercised, especially when realising assets. The *lex concursus* may entitle the liquidator to use coercion or to resolve disputes, but this does not extend to other Member-States, nor does the power to access the debtor’s mail and telecommunications as this is a typical example of coercion.⁷⁶⁷ Any measures involving coercion will therefore still be subject to the approval of the local court by means of an exequatur.⁷⁶⁸ The imposition upon the liquidator of this

of the Virgos-Schmit Report.

⁷⁶⁴ Article 18(1) of the Regulation.

⁷⁶⁵ *Ibidem*.

⁷⁶⁶ Article 18(2) of the Regulation.

⁷⁶⁷ Article 18(3) of the Regulation.

⁷⁶⁸ See De Wulf and Wautelet, “Aspecten van international privaatrecht” in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 158.

extra cost, both in terms of finances and time, and the fact that the liquidator may have to deal with several unknown legal systems, their procedural oddities and different language regimes is clearly a setback on the road to the achievement of the Regulation's main aim. The fact that no further progress could be made on this point is clearly a weak point in terms of the evaluation of the Regulation.

A further example of the relative ease with which the liquidator is to be allowed to operate in the whole of the Community is found in Article 19.⁷⁶⁹ This article dispenses with the need to have the liquidator's appointment approved by the court of the territory where he is to exercise his powers. All that is needed now as evidence of the liquidator's appointment is a certified copy of the original decision by which he was appointed or any other certificate issued by the court that has jurisdiction. The sole additional requirement that can be imposed is a translation in one of the official languages of the Member-State where the liquidator wishes to act. Legalisation of the document or any other formalities are explicitly ruled out. This should greatly enhance the speed and ease with which the liquidator can operate to act on the automatically recognised insolvency judgment.⁷⁷⁰ The Regulation's provisions are in this sense a mixture of recognition rules and substantive harmonised rules.

The second category of decisions to which the automatic recognition regime applies deals with the conduct and the termination of the insolvency proceedings.⁷⁷¹ Any judgment in this context that is delivered by the bankruptcy-insolvency court the opening judgment of which is recognised will also benefit from the automatic recognition regime.⁷⁷² Examples of such judgments include the confirmation of a composition or a plan, a decision of discharge and an order enjoining the debtor or a creditor from certain acts.⁷⁷³ The enforcement of such judgments is made subject to

769 See also Fletcher, "A New Age of International Insolvency – The Countdown Has Begun" [2000] *Insol. Int.* 57 at 60 (Vol 13 / Issue 8).

770 Article 19 of the Regulation.

771 See Bogdan, "The EU Bankruptcy Convention" 6 (1997) *Int. Insolv. Rev.* 114, at 122.

772 Article 25(1) of the Regulation.

773 See De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtig Akkoord: Het Nieuwe Recht*, Kluwer (1998),

the rules contained in Articles 31 to 51 of the Brussels Convention 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.⁷⁷⁴ Importantly though the application of Article 34(2) of the Brussels Convention has been excluded.⁷⁷⁵ This Article refers to Articles 27 and 28 in terms of grounds on which recognition can be refused.⁷⁷⁶ These did indeed have to be excluded for the purposes of the insolvency Regulation, as the latter operates on the basis that there is only one defence on the basis of which recognition can be refused, i.e. public policy⁷⁷⁷.

The third category involves judgments that are directly related to or follow from the insolvency proceedings, despite the fact that they do not concern the opening, conduct or termination of the insolvency proceedings.⁷⁷⁸ An example of such a judgment is a judgment deciding whether a claim should be included in the insolvency or not, and if so which ranking it should get. Such judgments are not necessarily delivered by the insolvency courts, let alone by the court opening the proceedings. The main reason for their inclusion in the Regulation's automatic recognition system is the fact that they are excluded from the scope of the Brussels Convention 1968 and it was thought to be entirely undesirable for there to be any gap in scope between the Regulation's recognition rules and those contained in the

132, at 157 and Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 518.

774 The 1968 Brussels Convention, as amended, is in the process of being replaced by Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1. The provisions of the latter will take over when it enters into force on 1st March 2002 (Denmark will for the time being remain bound only by the Brussels Convention though, see Article 1(3) of the Regulation).

775 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 288.

776 Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 is slightly different in this respect. The grounds for refusal of recognition/enforcement are found in Articles 34 and 35. Enforcement shall take place at the request of the interested party, without recourse to Articles 34 and 35. The latter can only be raised when the decision to allow enforcement is appealed. See Articles 41 and 45 of Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is therefore still important that the Insolvency Regulation departs from these provisions in favour of its own more limited approach to grounds for refusal of recognition/enforcement.

777 See Article 26 of the Regulation.

778 Article 25(1) of the Regulation.

Brussels Convention 1968.⁷⁷⁹ Similarly judicial preservation measures taken after the request for the opening of the insolvency proceedings are included in the scope to the automatic recognition regime of the Regulation.⁷⁸⁰

All other judgments fall outside the scope of the automatic recognition regime put in place by the Regulation. If they come within the scope of the Brussels Convention 1968, as amended, the latter's recognition rules will be applicable.⁷⁸¹

The automatic recognition regime put in place by the Regulation also applies to secondary insolvency proceedings, even if this may seem bizarre in combination with their restricted territorial scope.⁷⁸² Only assets located in the territory of the Member-State in which secondary insolvency proceedings have been opened at that time are affected. This severely limits the practical importance of the rule, even though Article 17(2) adds the important principle that the effects of secondary insolvency proceedings may not be challenged in other Member-States.⁷⁸³

IV.2. Other effects of the recognition of insolvency proceedings

As a result of the automatic nature of the recognition of insolvency proceedings, without there being an immediate need for publicity, there is distinct possibility that creditors will obtain payment on their claims in territories outside the opening state, either by action of the debtor or through the enforcement of a judgment in their favour, or through any other means. This flies in the face of the stay imposed in the main insolvency proceedings and could be seen as a negative consequence that is

779 See De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 157 and Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 518.

780 Article 25(1) of the Regulation, *in fine*.

781 Article 25(2) of the Regulation.

782 Article 16(1) of the Regulation.

783 See De Wulf and Wautelet, "Aspecten van international privaatrecht" in H. Braeckmans, E. Dirix and E. Wymeersch (eds), *Faillissement en Gerechtelijk Akkoord: Het Nieuwe Recht*, Kluwer (1998), 132, at 158.

enhanced by the automatic nature of the recognition regime. The Regulation balances this by means of a substantive law obligation imposed on the creditor to return to the liquidator in the main proceedings the value of what he obtained.⁷⁸⁴ Creditors who realised payment on a collateral situated outside the opening Member-State are exempt from this obligation.⁷⁸⁵ A slightly different case is presented by the creditor who received a partial payment in the course of any EU insolvency proceedings. Such a payment need not be returned, but it will mean that such a creditor will only be able to benefit from the realisation of assets in other EU insolvency proceedings when and insofar as other creditors of the same class have obtained an equivalent dividend.⁷⁸⁶ This restores the equality amongst creditors to a large extent, whilst recognising the fact that both the main and all secondary insolvency proceedings are separate proceedings that may be coordinated, but that do not form one single set of proceedings.⁷⁸⁷ Obviously this solution relies heavily on the rule that the creditor can file his entire claim in every single set of insolvency proceedings and that the claim stands as it is as long as the creditor does not receive more than the full amount that is due to him.

The publicity issue has also been addressed further. The liquidator in any insolvency proceedings has the opportunity to publish officially the opening of the insolvency proceedings and/or the appointment of a liquidator outside the State in which the insolvency proceedings have been opened.⁷⁸⁸ In addition Member-States in the territory of which the debtor has an establishment may require in their laws the publication of the opening of main insolvency proceedings in another Member-State.⁷⁸⁹ In most cases liquidators are well advised to seek publicity, as it ensures that all creditors are aware of the proceedings and may come forward, whilst at the same time removing any good faith protection that may exist for creditors that are

784 Article 20(1) of the Regulation.

785 *Ibidem*, *in fine*. See also Recital 25 to the Regulation.

786 Article 20(2) of the Regulation. This is the equivalent of the hotchpot rule under English insolvency law.

787 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 289-290 and paragraphs 174-176 of the Virgos-Schmit Report.

788 Article 21(1) of the Regulation.

789 Article 21(2) of the Regulation.

unaware of the insolvency proceedings⁷⁹⁰. It is important to note though that any compliance or non-compliance with the publicity rules will have no effect on the automatic recognition regime or on the effects of any insolvency proceedings on the rights and obligations of any of the parties, irrespective of whether they are creditors, debtors or third parties. This rule is subject to one exception.⁷⁹¹ This exception arises when a third party makes payments to the debtor outside the territory of the Member-State in which the insolvency proceedings have been opened. Such a third party will only validly be discharged of his obligations before publication takes place, as in that situation the third party can be presumed to be unaware of the proceedings. The liquidator can rebut the presumption by proving that the third party had knowledge of the proceedings. After publication there will be no valid discharge unless the third party can show that it was not aware of the proceedings despite the publication.⁷⁹²

A similar set of rules⁷⁹³ exists for the registration of the opening of the insolvency proceedings in national public registers, such as the land register or the trade register.⁷⁹⁴ For the time being there is no central insolvency register for the EU. This was thought to be too costly and complex and its creation was left to the private sector.⁷⁹⁵

Yet again, this shows the fact that substantive provisions have been added to pure private international law rules to achieve the result that is desired.⁷⁹⁶

790 See I Fletcher, *Insolvency in Private International Law: National and International Approaches*, Oxford Monographs in Private International Law, Clarendon Press (1999), at 286-287.

791 See Article 24(1) of the Regulation.

792 Article 24(2) of the Regulation.

793 Article 23 of the Regulation deals with the issue of the cost of publication and registration. Any costs incurred shall be seen as "costs and expenses incurred in the proceedings".

794 Article 22 of the Regulation.

795 See Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 A.B.L.J. 485, at 517-518.

796 See Omar, "New initiatives on Cross-Border Insolvency in Europe", [2000] *Insolvency Lawyer* 211, at 215.

Chapter V - The UNCITRAL Model Law on Cross-Border Insolvency

I. Introduction

One of the key features of the EU Insolvency Proceedings Regulation is the fact that its scope is limited to the European Union, as it is inherently an instrument to regulate the operation of the single market. In practice this means that the detailed rules on how to deal with cross-border insolvency cases will only apply if the debtor has its centre of main interests in a Member-State, as far as the main insolvency proceedings are concerned, and that in addition any secondary or independent territorially limited proceedings can only be brought if the debtor has an establishment in the Member-State concerned. This leaves us with the problem how to deal with cross-border insolvency proceedings in those cases where the debtor has the centre of its main interests or where there is an establishment, for which the opening of secondary proceedings would be appropriate, outside the territory of the European Union. The Regulation refers on these points back to the national insolvency and private international laws of the Member-States. This is not necessarily a satisfactory conclusion though in the absence of a uniform approach amongst countries worldwide. Suffice it for our present purposes to refer back to the potential clash when foreign territorial proceedings are to be reconciled with the attempts by a liquidator in the unitary and universalist insolvency proceedings who tries to have its powers recognised. Further coordination and co-operation was urgently needed. The model law agreed by UNCITRAL in 1997 is an attempt to fill this gap.⁷⁹⁷ The model law does not go as far as the EU Regulation, but its slightly weaker and less ambitious provisions can nevertheless be extremely helpful for the EU Member States to fill the gaps left by the Regulation as a result of the latter's EU centred scope. At the time of writing the

⁷⁹⁷ The text of the UNCITRAL Model Law on Cross-Border Insolvency is available from the UNCITRAL website (www.uncitral.org/english/texts/insolven/insolvency.htm) and the Model Law was recommended for adoption by the Member States in General Assembly Resolution 52/158 of 15 December 1997 of the General Assembly of the United Nations.

Model Law had not yet been implemented by any of the Member States of the European Union. The United Kingdom has explicitly built in the possibility of implementing the Model Law though in the Insolvency Act 2000. In these circumstances we will limit ourselves to a brief overview of the key provisions of the Model Law.

Before we turn to the analysis of the provisions of the Model Law, a brief word needs to be said about the choice of a model law as an instrument. It was felt that an international treaty would be too cumbersome. It would need a lengthy process of ratification and it would only enter into force once a sufficient number of countries had ratified it. The model law can be adopted by states on an individual basis and as far as that state is concerned it can enter into force immediately. It also offers a far greater freedom to the enacting state. Some of the provisions can be modified or even left out to accommodate the special circumstances, for example in relation to the national court and procedural system, in each state involved.⁷⁹⁸

II. The scope of the Model Law

The first important point to take into account is the scope of the Model Law. The Model Law by no means envisages a full-scale harmonisation of national insolvency laws. On the contrary, these laws are left untouched in terms of substance. The Model Law comes in addition to the substantive insolvency laws of the states that will implement it and it aims to deal with the special difficulties that are associated with a number of cross-border insolvency situations.⁷⁹⁹ These can be summarised in four scenarios.⁸⁰⁰ The first one is where an inward-bound request for recognition of a foreign insolvency proceeding is received. In the second one the alternative situation arises where there is an outward-bound request from a court, administrator or

798 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 319.

799 See Harmer, "UNCITRAL Model Law on Cross-Border Insolvency" 6 (1997) *INSOL Int. Insolv. Rev.* 145, at 147.

800 See Article 1 of the Model Law and Paragraph 22 of the UNCITRAL Guide to Enactment of the

liquidator in the state enacting the Model Law for the recognition abroad of insolvency proceedings that have been initiated under the laws of the enacting state. Thirdly, there is the thorny issue of the co-ordination of concurrent proceedings in two or more states. And finally, there is the issue of the participation of foreign creditors in insolvency proceedings that are taking place in the state enacting the Model Law. Like the EU Regulation, the Model Law will not apply to certain entities, such as banks and insurance companies⁸⁰¹, but unlike the Regulation the Model Law leaves it to the enacting states to define which entities are subject to special insolvency proceedings and are therefore excluded from the scope of the Model Law.⁸⁰² Consumers are on the other hand not excluded from the scope of the Model Law. And additionally debtors do not necessarily have to be traders.⁸⁰³ In contrast with the EU Insolvency Regulation it is important to note though that the Model law does not deal with choice of law and nor does it include an attempt to harmonise the rules on international jurisdiction in this area.⁸⁰⁴

In all cases insolvency proceedings of some nature are involved. It was important for the Model Law to remove in as far as possible any doubts as to which insolvency proceedings would be covered by its provisions. Only insolvency proceedings that possess a number of attributes will be covered by the Model Law. The foreign proceedings must be based on the insolvency related laws of the state in which they originate. They must involve creditors collectively⁸⁰⁵ and there must be supervision by a court or another official body of the assets and affairs of the debtor. And the purpose of the proceedings must be the reorganisation or the liquidation of the debtor's assets and affairs.⁸⁰⁶ Any proceedings that meet these parameters come within the scope of

UNCITRAL Model Law on Cross-Border Insolvency.

801 See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 334.

802 Article 1(2) of the Model Law.

803 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 326-327.

804 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 333.

805 According to Harmer that excludes receiver type administration, as it operates in many common law jurisdictions. See Harmer, "UNCITRAL Model Law on Cross-Border Insolvency" 6 (1997) *INSOL Int. Insolv. Rev.* 145, at 149.

806 Article 2(a) of the Model Law.

the Model Law.⁸⁰⁷ Such insolvency proceedings can be compulsory or voluntary, corporate or individual, for the purpose of reorganisation or for the purpose of winding-up and they even include those proceedings where the debtor retains some degree of control over its assets under court supervision (e.g. suspension of payments, "debtor in possession").⁸⁰⁸

III. Foreign assistance for an insolvency proceeding taking place in the enacting state

This assistance can be sought either by the court that is dealing with the insolvency proceedings in the state that has enacted the Model Law or by the liquidator or any other person that has been appointed to administer any such insolvency proceedings.

Many existing insolvency laws do not explicitly grant courts the power to seek assistance abroad when they are dealing with a cross-border insolvency case. The addition of this option by the Model Law may help those courts that were unable or unwilling to take this step in the absence of enabling statutory provisions.⁸⁰⁹ Overall, this will clearly facilitate the international response to a cross-border insolvency.⁸¹⁰

Even if the courts do not need to seek assistance abroad, the local liquidator or administrator may have to do so to deal with assets that are located abroad. It is therefore vital that the Model Law also empowers the liquidator or administrator to seek recognition for the insolvency proceedings from foreign courts or to seek the latter's assistance for these proceedings.⁸¹¹

807 See paragraph 23 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

808 See paragraph 24 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and see also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 334.

809 See paragraph 26 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

810 Article 25 of the Model Law.

811 Article 5 of the Model Law.

IV. Access to the courts by a foreign representative

The international co-ordination of cross-border insolvency proceedings will only be possible if all involved can be present or represented in all relevant fora. One of the key principles of the Model Law is therefore that the foreign representative is to be given access to the courts in the state that has enacted the Model Law.⁸¹² Expeditious and direct access⁸¹³ is achieved by doing away with cumbersome and time-consuming tools such as rogatory letters and other forms of diplomatic or consular communications. Access to the courts is not even made subject to the preliminary recognition of the insolvency proceedings in which the foreign representative was appointed.⁸¹⁴

This main principle is backed up by a series of detailed provisions.⁸¹⁵ First of all, it is not enough to allow a foreign representative to have direct access to the courts to seek recognition of and relief for foreign proceedings if what follows is a long and cumbersome procedure. Article 15 of the Model Law addresses this concern by establishing simplified proof requirements for seeking recognition of and relief for foreign insolvency proceedings. Any use of the legalisation technique, involving notarial or consular procedures is set aside.

Secondly, there is a risk that an action for the recognition of a foreign insolvency judgment could be seen as submitting to the overall jurisdiction of the court before which that recognition is sought. Article 10 of the Model Law eliminates that risk and states that the mere fact of the recognition application does not give the courts any further jurisdiction over the foreign representative or all the assets and affairs of the debtor.

812 See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 348.

813 Article 9 of the Model Law.

814 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 349-351.

815 See paragraph 29 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

Thirdly, the foreign representative may want or need to do more than to rely on the proceedings through which he was appointed. The foreign representative is therefore also given procedural standing to commence an insolvency action in, and under the laws of, the state that has enacted the Model Law.⁸¹⁶ This right to start proceedings is given to foreign representatives even if they represent non-main proceedings. This is in contrast with the EU Insolvency Regulation under the provisions of which the liquidator in the main proceedings has this right and in addition the right is only granted to any other person if the national law of the Member-State where the proceedings are to be opened gives that other person, including potentially the liquidator in secondary (non-main) proceedings, such a right. The EU system involves much more of a restriction on sovereignty and a desire to limit the number of secondary (non-main) insolvency proceedings. Outside the EU area such a restriction was clearly not acceptable.⁸¹⁷ Returning therefore to the provisions of the Model Law, the substantive requirements for opening insolvency proceeding remain as they are under the national law of the state concerned though.⁸¹⁸ If such proceedings are already ongoing the foreign representative is given the opportunity to participate⁸¹⁹ in such proceedings, as soon as his own foreign proceedings have been recognised.⁸²⁰ That locus standi rule is also expanded to foreign creditors of the debtor, who will have the right of access to the court to request the opening of insolvency proceedings, as well as the right to participate in proceedings that have already been opened.⁸²¹

Fourthly, the foreign representative is explicitly given the power to intervene in proceedings pending in the state that enacted the Model Law if such proceedings concern individual actions affecting either the debtor or its assets.⁸²²

816 Article 11 of the Model Law.

817 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) Tulane Journal of International and Comparative Law 309, at 341.

818 See paragraph 98 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

819 This is deemed to involve acts such as making petitions, requests or submissions. Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) Tulane Journal of International and Comparative Law 309, at 342.

820 Article 12 of the Model Law.

821 Article 13 of the Model Law.

Once recognition of the insolvency proceedings has been achieved this is followed up by the authorisation for the foreign representative to intervene, i.e. to take part, in any proceedings to which the debtor is a party.⁸²³ This Article of the Model Law is concerned with individual proceedings, and even then only with those that have not been stayed in application of the other Articles of the Model Law. Its practical impact risks therefore being de minimis.⁸²⁴ Nevertheless, the foreign representative is given locus standi, a detail that is often overlooked by existing national laws.⁸²⁵ It is clear though that Article 24 does not go beyond rectifying that potential oversight. Any other requirements that may be imposed by the local law remain applicable.

This applies in general. Access to the courts does not mean that the local procedural laws need not be observed. It may therefore for example well follow that a foreign representative will need to be represented by a local lawyer.⁸²⁶

Additionally, when the foreign proceedings have been recognised the foreign representative is also given the right of standing to initiate actions the aim of which is to avoid acts that would be detrimental to creditors. In terms of non-main foreign proceedings the foreign representative will have to show that the action relates to assets that should, under the law of the court to which the application is made, be administered in the foreign non-main proceeding.⁸²⁷ This is an important tool for the representative to protect the assets in the interests of the creditors as a whole and it is telling that a similar right is not given to the creditors as an entity and even less to individual creditors.⁸²⁸

822 Article 24 of the Model Law.

823 Article 24 of the Model Law.

824 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) Tulane Journal of International and Comparative Law 309, at 378.

825 See paragraph 168 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

826 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) Tulane Journal of International and Comparative Law 309, at 338.

827 Article 23 of the Model Law.

828 See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 347.

V. Recognition of foreign proceedings

International co-operation and coordination in the area of cross-border insolvency will always depend heavily on the willingness of states to recognise foreign insolvency proceedings. This is therefore also a key issue for the purposes of the Model Law.⁸²⁹

In a first stage one necessarily had to deal with the circumstances in which foreign judgments will be recognised. The Model Law contains a set of criteria to determine whether or not a foreign proceeding will be recognised.⁸³⁰ These criteria involve an evaluation whether the jurisdictional grounds on which the proceedings were originally instituted were such that the proceedings should be recognised as "main" or as "non-main" foreign insolvency proceedings. The characterisation as "main" proceedings depends on whether the proceedings have been commenced in the state where the debtor has the centre of its main interests. If this is the case the proceedings will be "main" foreign insolvency proceedings.⁸³¹ The concept of the debtor's centre of main interests has been borrowed from the EU Insolvency Proceedings Convention 1995, that in turn preceded the EU Insolvency Regulation. The fact that both the Model Law and the Regulation now use the same concept in this area can only further enhance the harmonisation that is taking place. The Model Law does not deal with the procedural aspects of the recognition process. This is left entirely to the laws of each state that enacts the Model Law and in which recognition of a foreign insolvency proceedings is subsequently sought. In terms of recognition a "non-main" proceeding can only be recognised if it was opened on the basis that the debtor has an establishment in the jurisdiction.⁸³² An establishment is in turn defined as a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or

829 See paragraphs 30-37 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and see Harmer, "UNCITRAL Model Law on Cross-Border Insolvency" 6 (1997) *INSOL Int. Insolv. Rev.* 145, at 149-150.

830 Articles 15-17 of the Model Law.

831 Article 17(2) of the Model Law.

832 Article 17(2)(b) of the Model Law.

services.⁸³³ Apart from the addition of services, which is in practice of little importance⁸³⁴, this definition of establishment corresponds to the one found in the EU Insolvency Regulation. This means that for the purposes of recognition the Model Law operates a slightly higher threshold, i.e. the presence of an establishment, than for the purposes of opening a local insolvency proceeding. On the latter point the court will have jurisdiction as soon as the debtor has assets in the jurisdiction. We will return to this point later in some more detail, but one can already conclude at this stage that proceedings that have been opened on the basis of the mere presence of assets in the jurisdiction will not be entitled to recognition under the provisions of the Model Law.⁸³⁵

Any application for recognition can be filed by the foreign representative⁸³⁶ in respect of the proceedings in which he has been appointed.⁸³⁷ Such an application is only subject to the simplified requirements that are listed in the Model Law. In practice a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative is normally required. Alternatively, a certificate of the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative can be submitted or any other evidence that shows the existence of the foreign proceedings and the appointment of the foreign representative and that is acceptable to the court.⁸³⁸ The foreign representative also has to inform the court of any other foreign proceedings in respect of the debtor of which he is aware. A statement to this effect is to be joined to the application for recognition.⁸³⁹ The court to which the documents are submitted may request their translation into any of the official

833 Article 2(f) of the Model Law.

834 It is hard to imagine a case where there would be services, but no goods. Even if this may be possible, it remains hard to see why non-main proceedings could then assist, as there will be nothing to liquidate. See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 333-334.

835 Article 17 of the Model Law, see also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 336.

836 But not by a creditor in these proceedings. See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 350-351.

837 Article 15(1) of the Model Law.

838 Article 15(2) of the Model Law.

839 Article 15(3) of the Model Law.

languages of the state in which it is established.⁸⁴⁰ This may delay the proceedings, but it seems inevitable that the court needs to be able to read and understand these documents.

Once the court is dealing with the recognition application, it is vital that a decision is reached as soon as possible.⁸⁴¹ In order to facilitate the achievement of this aim the Model Law has put in place a series of presumptions, which the court may use to avoid reopening the discussion on a number of issues.⁸⁴² The first issue to which this applies is that of the type of proceeding and the type of foreign representative. If the documents that are submitted to the court indicate that either of these enter within the scope of the Model Law's definitions set out in Article 2 (a) and (d) the court is entitled to accept this without further verification of the issue.⁸⁴³ Similarly the court is entitled to presume that any document that is submitted in support of the application for recognition is authentic. Legalisation is not an issue in this respect.⁸⁴⁴ This presumption is fully in line with the Model Law's desire to cut down on time-consuming formalities.⁸⁴⁵ It should be stressed though that the court is given an entitlement and that for various reasons it may still decide to examine the matter *de novo*⁸⁴⁶, as it retains its discretion.⁸⁴⁷ And finally in the absence of proof to the contrary there is a presumption that the debtor's registered office, or his habitual residence if he is an individual, is the debtor's centre of main interests.⁸⁴⁸

Whilst the decision on recognition is pending interim relief, including certain collective measures⁸⁴⁹, may also be granted if there is an urgent need to protect the

840 Article 15(4) of the Model Law.

841 This principle is recognised in Article 17(3) of the Model Law.

842 Article 16 of the Model Law.

843 Article 16(1) of the Model Law.

844 Article 16(2) of the Model Law and see also paragraph 115 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

845 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 354.

846 Paragraph 114 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

847 Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 351.

848 Article 16(3) of the Model Law.

849 See paragraph 137 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on

assets of the debtor or the interests of the creditors.⁸⁵⁰ The court has a discretion in this respect and the Model Law does not distinguish between relief that can be granted in respect of main insolvency proceedings or in respect of non-main insolvency proceedings.⁸⁵¹ Such relief may include a stay of all individual actions concerning the debtor's assets, a stay of any execution against these assets⁸⁵² or entrusting the administration or realisation of the assets to the foreign representative or any other person appointed by the court for that very purpose to protect perishable or potentially quickly devaluating assets. It is likely that courts will be reluctant to entrust the foreign representative with this task before recognition of the foreign proceedings has been achieved. Hence the possibility to appoint another person. In any case this form of relief is far-reaching and therefore restricted to a limited number of very specific cases.⁸⁵³

The application for recognition has to show that a number of requirements are met if the foreign proceedings are to be recognised.⁸⁵⁴ First of all, the proceeding and the foreign representative have to come within the definitions set out in Article 2(a) and (d) respectively. On this point the view of the original court giving the decision and the presumption contained in Article 16 of the Model Law can facilitate things greatly. Secondly, all the supporting documents required by Article 15(2) of the Model Law need to be present. And thirdly, the application must have been submitted to the court to which Article 4 of the Model Law grants jurisdiction in this respect. These requirements will normally be met easily and the Model Law clearly aims at facilitating the recognition of foreign insolvency proceedings, whilst only retaining marginal and almost entirely formal checks on top of the public policy defence.⁸⁵⁵

Cross-Border Insolvency.

850 Article 19 of the Model Law, see also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 340.

851 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 359.

852 This may include a stay of the commencement or continuation of individual actions or individual proceedings. Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 359-360.

853 Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 360.

854 Article 17 of the Model Law.

855 See the reference to Article 6 in the first line of Article 17 of the Model Law. Article 6 is

Speed is of the essence in these matters and any attempt by the court to evaluate the merits of the case de novo has been blocked.⁸⁵⁶ The decision whether certain proceedings were main or non-main proceedings is taken by the recognising court.⁸⁵⁷ The views of the court in which the proceedings were opened are not determinative in this respect.⁸⁵⁸

In a second stage it is necessary to consider what effects will be given to foreign insolvency proceedings that have been recognised. It is important to note that the Model Law works on the basis that recognition will bring with it all the effects that are contained in the law of the recognising state. There is no harmonisation of the applicable law, such as in the EU Insolvency Regulation where the law under which the proceedings were opened will apply to issues such as for example the ranking of claims. The Model Law is more modest in its aims in this respect and leaves all these issues to the law of the recognising state.⁸⁵⁹ If the foreign proceedings were "main" proceedings the key effect is a stay of enforcement proceedings concerning the assets of the debtor, coupled with a stay of actions of individual creditors against the debtor and the suspension of the debtor's right to transfer or encumber its assets⁸⁶⁰. These consequences flow mandatorily and automatically from the decision to recognise the foreign insolvency judgement and any local order that may under local law be necessary to bring them into effect is bound to be given.⁸⁶¹ It should be noted however that the automatic nature of these effects means in practice that they are temporary

discussed in more detail later on.

856 Paragraph 125 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, see also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 337 and 341.

857 See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 357-358.

858 The idea is that each state will recognise a single set of proceedings as main proceedings and the risk that different state may differ in opinion on this point is accepted as a small disadvantage of this course of action that cannot be avoided. Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 355-356.

859 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 364.

860 Any act performed in defiance of the suspension to dispose of assets is evidently subject to sanctions. The Model Law is silent though on this point and leaves it to the national laws of the states involved. See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 366.

until the court modifies or terminates them.⁸⁶² Apart from anything the stay will give the necessary breathing space for positive measures leading to the realisation or reorganisation of the debtor's assets to be put in place. Until then all movements are frozen and the possibility that assets are allowed to disappear is ruled out. Any legitimate exceptions to the scope of the stay or suspension measures are left to the law of the state that recognises the foreign insolvency proceedings.⁸⁶³ Such exceptions may include things like rights in rem, set-offs and secured claims that also found their counterparts in the EU Insolvency Regulation. It is therefore perfectly possible that the automatic effects under the local law effectively go further than the effects under the insolvency law under which the insolvency proceedings had originally been opened. This logical consequence of the Model Law's provisions is not undesirable, as it is also a logical consequence of the debtor's original decision to trade in the jurisdiction, which implies accepting the legal risks and regulations involved.⁸⁶⁴ It also avoids the courts researching the detail of foreign insolvency laws that may be rather different in terms of approach.

These mandatory stays and suspensions apply only in respect of the recognition of "main" foreign insolvency proceedings. In addition the Model Law has provisions that authorise the courts to grant discretionary relief for all types of foreign insolvency proceedings once the latter have been recognised.⁸⁶⁵ Such relief can include stays of proceedings or suspensions of the right to encumber assets, as well as the facilitation of access to information concerning the assets and liabilities of the debtor, the appointment of a person to administer all or some of these assets and any other relief available under the laws of the state of the court that is granting the relief. In respect of the suspension of the debtor's right to transfer or encumber assets one should however note that this does not mean that someone else can necessarily dispose of the assets. The foreign representative, for example, will not automatically have the right to

861 Article 20(1) of the Model Law.

862 Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 364.

863 Article 20(2) of the Model Law.

864 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 342.

865 Article 21 of the Model Law.

administer or realise the assets. For this purpose a separate court decision or court order will be required. And even if Article 21(2) does grant the foreign representative the power to administer and realise the assets, this does not include the right to distribute the assets. Yet again an additional separate court order will be required.⁸⁶⁶ The court will in this respect take the adequate protection of the interests of creditors in its own territory into account.⁸⁶⁷ It is to this point of adequate protection that we will now turn in a slightly wider context.

In the course of this recognition process creditors and other interested persons may need protection. This is especially so for the local creditors of the debtor. Any granting of relief is therefore made subject to the court being satisfied that the interests of the creditors and any other interested persons, including the debtor, have been protected adequately. If necessary any conditions, such as demanding a security or guarantee, that are considered to be appropriate may be imposed and any relief can be terminated or modified at the request of any affected party.⁸⁶⁸ The Model Law does not deal with procedural aspects such as the notification that is to be given to interested parties in the course of the recognition proceedings. This is left to the national laws of the state where the recognition is sought. In this context of protection of interests, the public policy exception in Article 6 of the Model Law is not to be overlooked. All the provisions of the Model Law are subject to it and in essence the recognising state shall not be obliged to take any action if such action would be manifestly incompatible with its public policy.⁸⁶⁹ This is by now the standard public policy exception, which is also found in the EU Insolvency Regulation. Article 22 is however much more useful in those circumstances where the public policy exception does not apply. In such a case the automatic recognition process will be left untouched. Article 22 does not undo it, nor its automatic effects. It simply allows the court in a second stage to impose

866 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 345.

867 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 369-370.

868 Article 22 of the Model Law.

869 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 336.

conditions and to make changes to protect the legitimate interests involved.⁸⁷⁰

VI. Cross-border co-operation

As shown in cases such as the BCCI insolvency proceedings, cross-border co-operation between the courts involved in the case is of the essence⁸⁷¹ if cross-border insolvency cases are to be dealt with effectively and successfully.⁸⁷² In practice such co-operation often does not take place because judges find it hard to set up effective co-operation in the absence of legal guidelines for it. Often the real scope of any existing legislative authority is in addition vague.⁸⁷³ The Model Law therefore specifically empowers courts to engage in this kind of cross-border co-operation in areas that are covered by the Model Law.⁸⁷⁴ Similarly there is an enabling provision for co-operation between the court and the foreign representative and between a local liquidator or administrator and the foreign court, liquidator and/or administrator.⁸⁷⁵ Any time consuming formalities, such as rogatory letters and intervention by diplomatic and consular channels, are to be avoided and direct communication is to be preferred, as in all these cases urgent action is of the essence.⁸⁷⁶

The Model Law does not contain an exhaustive list of the possible ways of co-operation. Article 27 simply gives examples such as the appointment of a person of body to act at the direction of the court, the coordination of the administration and supervision of the debtor's assets and affairs and the communication of information.

870 See *ididem*, at 374.

871 I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 354.

872 See paragraphs 38-41 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

873 See Harmer, "UNCITRAL Model Law on Cross-Border Insolvency" 6 (1997) *INSOL Int. Insolv. Rev.* 145, at 150-151.

874 Article 25 of the Model Law and see also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 354.

875 Article 26 of the Model Law and see also Article 7 of the Model Law.

876 See paragraph 179 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

The Model Law goes further on this point though than playing an enabling role. Despite the fact that the exact format of the co-operation is very much left to the parties involved⁸⁷⁷, the Model Law further mandates co-operation in any form by providing that the court and the administrator or liquidator "shall cooperate to the maximum extent possible".⁸⁷⁸ This again underlines the importance of co-operation in order to bring an international cross-border insolvency case to an acceptable solution, whilst at the same time guaranteeing that the courts do not disregard any existing national provisions that place restrictions on the level of co-operation, for example for reasons of data protection or privacy of the debtor. This level of discretion to decide on the appropriate amount of co-operation that is given to the courts is important. In certain circumstances no co-operation will be required, whilst in others full co-operation will be more suitable.⁸⁷⁹

VII. Co-ordination of concurrent proceedings

This is another vital point if the Model Law is to live up to its expectations of facilitating the handling of cross-border insolvencies.⁸⁸⁰ A first step could be the limitation of the jurisdiction of the courts in the recognising state to commence or continue insolvency proceedings. The Model Law imposes hardly any restrictions though. This is completely in line with the Model Law's general approach not to limit insolvency jurisdiction. Article 28 of the Model Law leaves the courts free to open insolvency proceedings on the basis that the debtor has assets in the jurisdiction even if they have previously recognised foreign "main" proceedings. The only restrictive element is that those new proceedings are in principle limited to the local assets of the debtor. It is particularly striking to note in this respect that the Model Law only

877 This degree of flexibility may be required and is warmly welcomed by most judges, see paragraph 178 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

878 Articles 25 and 26 of the Model Law and see also paragraph 174 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

879 See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 355.

880 See Harmer, "UNCITRAL Model Law on Cross-Border Insolvency" 6 (1997) *INSOL Int. Insolv. Rev.* 145, at 151.

requires the presence of assets.⁸⁸¹ States can opt for the higher criterion of the presence of an establishment, as is the case under the EU Insolvency Regulation, but the Model Law does not encourage them to do so.⁸⁸² One should add though that the preference for assets makes sense. In the EU model there will be an option to open universal main proceedings in the Member-State where the debtor has the centre of its main interests. Those proceedings will cover all assets, irrespective of their location. Any other insolvency proceedings can then be based on the establishment criterion, which is a better way to guarantee the existence of a strong local interest. The Model Law system does not necessarily guarantee that there will be main proceedings that are fully effective in all states concerned. In the absence of an equally rigid system it was preferable to put the bottom threshold for the opening of insolvency proceedings as low as the mere presence of assets in the jurisdiction. There is now at least a guarantee that no assets will be able to escape. The opening of proceedings is further facilitated by the rule that the recognition of the foreign proceedings is deemed to amount to proof that the debtor is insolvent for the purposes of opening local proceedings⁸⁸³, another rule also found in the EU Insolvency Regulation. Any delay during which the debtor can make assets disappear is thus avoided.⁸⁸⁴

All these developments may lead to more rather than less insolvency proceedings being opened. It is therefore becoming even more vital that the various insolvency proceedings are coordinated properly. Most importantly there needs to be coordination between local and foreign proceedings concerning the same debtor.⁸⁸⁵ Secondly, a state may be confronted at the recognition stage with two or more sets of foreign proceedings concerning the same debtor. Coordination needs also to be facilitated at

881 For a stringent criticism of this very low threshold, see Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 384.

882 See paragraphs 184-187 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

883 Even if the foreign law under which proceedings were opened does not require insolvency as a condition for the commencement of insolvency proceedings. Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 393.

884 Article 31 of the Model Law.

885 Article 29 of the Model Law.

this stage.⁸⁸⁶ Coordination between the various proceedings may well be the only way to achieve the ultimate aims of any insolvency proceedings, be it in terms of the maximisation of the value of the debtor's assets in the course of their liquidation or be it in terms of the most advantageous restructuring of the enterprise.

The Model Law distinguishes between the situation where local insolvency proceedings are already pending when the recognition of the foreign proceedings is applied for and the situation where the local proceedings are only opened after the application for the recognition of foreign proceedings has been received.⁸⁸⁷ In the first situation the local proceedings are given preference, irrespective of whether they are main or non-main insolvency proceedings⁸⁸⁸. Any relief granted in respect of the foreign proceedings must be consistent with the local proceedings.⁸⁸⁹ In addition the rule that mandates the stay of individual actions or enforcement proceedings against the debtor and a suspension of the debtor's right to transfer or encumber assets⁸⁹⁰ is prevented from operating in this case if the foreign proceeding is a main insolvency proceeding.⁸⁹¹

In the situation where the local proceedings come second a slightly different rule applies. Here the relief that has already been granted in support of the foreign proceedings must be reviewed and it must be modified or terminated if it is not consistent with the local proceedings.⁸⁹² If the foreign proceedings are main insolvency proceedings the same test is to be applied to any stay or suspension that has been granted on the basis of Article 20 of the Model Law.⁸⁹³

886 Article 30 of the Model Law.

887 The existence of foreign proceedings does not stop local proceedings from being opened and vice versa (also in terms of recognition). See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 358.

888 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 388.

889 Article 29(a)(i) of the Model Law.

890 Article 20 of the Model Law.

891 Article 29(a)(ii) of the Model Law.

892 Article 29(b)(i) of the Model Law.

The key concept involved is that preference is given to the local proceedings, irrespective of whether they are main or non-main insolvency proceedings⁸⁹⁴, but that the presence of local proceedings does not prevent or terminate the recognition of foreign proceedings.⁸⁹⁵ No rigid hierarchy is imposed either. This is necessary for proper coordination and to allow relief to be granted in respect of foreign insolvency proceedings. The overall result is a much more satisfactory solution for a complex cross-border insolvency scenario.

Further coordination issues arise when the court is confronted with more than one set of foreign insolvency proceedings, for each of which recognition is sought. Article 30 of the Model Law then calls for tailoring relief in such a way that will facilitate the coordination of the proceedings and if one of the foreign proceedings is a main insolvency proceeding any relief must be consistent with that main proceeding. Apart from this preference for the main proceedings though the Model Law does not prescribe how exactly this coordination should be achieved. Article 30 applies whether or not a local insolvency proceeding has been opened. If one has been opened both Articles 29 and 30 will apply at the same time.⁸⁹⁶

The coordination effort is further enhanced by the presence of a hotchpot style rule. If claiming in more than one insolvency proceeding creditors will not be allowed to receive more⁸⁹⁷ than the proportion of payment that is obtained by other creditors of the same⁸⁹⁸ class.⁸⁹⁹ This means that creditors cannot unduly take advantage of the co-

893 Article 29(b)(ii) of the Model Law.

894 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 388.

895 See paragraph 189 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

896 See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) *Tulane Journal of International and Comparative Law* 309, at 391.

897 A creditor is allowed though to keep whatever he received in a proceeding, even if it amounts to a higher percentage of his claim than the percentage received by other creditors in a similar situation. The only effect of the hotchpot rule is that the first creditor will not receive anything in subsequent proceedings until the other creditors have received a similar percentage of their claims.

898 The class and ranking that are to be taken into account are those that apply under the law of the insolvency proceedings in which the creditor is seeking additional payment. See I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 360.

899 Article 32 of the Model Law.

existence of various sets of insolvency proceedings⁹⁰⁰. Secured claims or rights in rem have been exempted from this rule. The rule also does not affect the ranking of claims.⁹⁰¹

VIII. Implementation of the Model Law in the United Kingdom and Belgium

The obvious starting point for this discussion is the fact that the United Kingdom has not yet implemented the Model Law. All that has been achieved so far is the inclusion of Section 14 in the Insolvency Act 2000. This Section enables the eventual implementation of the Model Law. The need to introduce primary legislation has been dispensed with and instead the Secretary of State, with the Agreement of the Lord Chancellor, can introduce measures to implement the Model Law by Statutory Instrument⁹⁰². This also includes the power to amend related provisions of existing domestic insolvency law.⁹⁰³ This is a major step forward in the direction of the adoption of the Model Law. It is to be hoped that that final step, despite all the difficulties in transcribing the Model Law that are associated with it, will now follow soon. It would indeed be a shame if a useful instrument such as the UNCITRAL Model Law on Cross-Border Insolvency came in practice to nothing, simply because no state was prepared to implement it first without insisting on reciprocity.⁹⁰⁴ A situation in which everyone is waiting for the others to implement first is to be avoided at all cost.

The same obvious starting point applies to Belgium. The Model Law has not yet been implemented. There are indications though that Belgium is moving towards a partial

900 No creditor will also be allowed to receive more than 100 per cent of his claim. See Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" 6 (1998) Tulane Journal of International and Comparative Law 309, at 395.

901 See paragraphs 198-200 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

902 An affirmative resolution procedure in which the regulations to be introduced can only be made once a draft has been laid before and approved by a resolution of each House of Parliament will need to be followed.

903 Prior, "The International Implications of the Recent Insolvency Bill 2000" 16 (2000) Insolvency Law & Practice 108-109.

904 See also I. Fletcher, *Insolvency in Private International Law: National and International Approaches*, Clarendon Press (1999), at 362.

implementation of the Model Law. The government is at present drafting a proposal for a law that amends Belgian bankruptcy law in the light of the coming into force of the European Insolvency Regulation. That proposal is likely to be debated in Parliament in the autumn of 2002. Well-informed sources in the judiciary believe that this proposal will include a partial implementation of the UNCITRAL Model Law. In the absence of any change of policy in the near future this would be an encouraging development, which may encourage other Member-States to go down the route of implementing the provisions of the Model law.

Conclusion

In recent history we have seen a significant increase in cross-border insolvency cases. This does not entirely come as a surprise; as such cases are bound to be linked to the globalisation of trading patterns. The globalisation of trade and the increasingly international nature of business are bound to go hand in hand with a similar increase in the number of business failures and hence also with the number of cross-border insolvency cases.

Taken on its own such an increase in numbers warrants extra attention and a review of existing practices in the area of cross-border insolvencies. It is submitted though that there is also a change in the nature of business operations that warrants an even more comprehensive review and a change in strategy.

The Belgian situation shows clearly the historical situation that is increasingly subject to change. Before globalisation really took off, there were two relevant international business patterns. In the first pattern different companies, subsidiaries, were set up by a trader in the various countries. From a legal point of view this puts this pattern outside the scope of cross-border insolvency rules. Separate legal entities with their own legal personality have to be dealt with separately, also for the purposes of insolvency and bankruptcy. The insolvency of one of these associated or affiliated companies will only affect the assets of that company, wherever they are located, and the other companies are not affected. This pattern therefore falls outside the scope of the rules dealing with cross-border insolvencies. It has to be admitted though that issues of private international law may creep in again via the back door because in those cases these companies will often have given cross-guarantees, which can lead to cross-claims and eventually the collapse of all companies in the group. This will then give rise to separate insolvency proceedings for each company, but there will obviously be a substantial overlap between these proceedings even if in theory they are separate proceedings. Furthermore, the liquidation of the holding company might well see the

liquidator launch insolvency proceedings in relation to the subsidiary companies if the latter owe the holding company money. Returning though to the main argument, it is only the second pattern mentioned above that is relevant for the purposes of cross-border insolvencies. In this second pattern there is one trader only and, if there is any at all, there is one legal entity, i.e. one company. This single entity possesses assets in various jurisdictions. These may be branches of the business or just various forms of property. In most cases there is an additional simplifying factor in that most such debtors will only have assets in a limited number of jurisdictions. There would typically still be a very strong focus on a single jurisdiction, where the majority of the assets would be located.

In these circumstances it is not very hard to see what would be the most sensible legal approach to cross-border insolvencies. The adoption of the principles of unity and universality makes a lot of sense. Since there is clearly a predominant jurisdiction in which the debtor and most of the assets are located, the sensible thing to do is to have one set of insolvency proceedings in that jurisdiction and to use this single set of insolvency proceedings to appoint a single liquidator who will deal with all aspects of the insolvency. Almost as spill-over effects this will also include the limited amount of assets the debtor has abroad. This seems to be the most efficient, fast, cost effective and above all simple and transparent way of dealing with the matter⁹⁰⁵.

Additionally, in most cases the creditors would also be found essentially in that single jurisdiction. The vast majority of creditors would also be located in the jurisdiction in which the debtor and the majority of the assets were located. This re-inforces the logic under-pinning the single universal insolvency proceeding approach.

The limited assets abroad would not warrant the opening of separate insolvency proceedings. Such an approach would be unduly heavy and costly and it would to a large extent be mere duplication of proceedings. The far more effective way forward would seem to involve the recognition abroad of the original single set of insolvency

905 Questions can already be asked about the ultimate suitability of this model though when the

proceedings and of the appointment of the liquidator. That liquidator could then realise the foreign assets and incorporate the proceeds in the single insolvency proceedings in which all creditors could introduce their claims. The procedure seems ever so simple and effective. One should also keep in mind that the often-cited modern risk of assets disappearing quickly before any recognition procedure can intervene would not necessarily be present in such an obvious way in this scenario. There would therefore not necessarily be the urgent need to open a local secondary insolvency proceeding to stop the assets from disappearing that is often perceived to be there in the more recent cases. Most assets would be immoveable goods and other material goods and with communication channels that were still relatively slow these could not be moved instantly. Clearly the risk is much larger nowadays with better communications and a predominance of immaterial assets and on-line trading.

The application of the principles of unity and universality did therefore make sense in the presence of such an economic and business reality. From whichever angle one looked at it there was a clear emphasis on a single jurisdiction. This leads clearly to a preference for a single insolvency proceeding with an all-embracing scope. Such a proceeding appears as a fast, transparent and efficient approach to deal with a cross-border insolvency case. Any spill-over effect in third countries could then be dealt with through the recognition procedures. The way in which Belgian law deals with cross-border insolvency cases is a clear example of such an approach.

In practice though such an idealistic approach soon has its problems. It presupposes that all countries adopt the same approach. This is not necessarily the case, but the idealistic approach is unable to cope with foreign territorial proceedings, as they clash with the perceived worldwide powers of the liquidator in the supposedly single set of main insolvency proceedings. The idealistic approach has a second problem associated with it. It can only work on an international level if a single criterion exists to locate the debtor and his insolvency in a single jurisdiction. The single set of insolvency proceedings will then be opened in this jurisdiction. The problem arises when different

jurisdictions use different criteria on this point. It is easily understood that this could lead to more than one jurisdiction exercising jurisdiction to open the supposedly single insolvency proceeding that is worldwide in scope. In reality there is no obvious single criterion. Some countries prefer to rely on domicile and on the seat of the company, whilst others operate more flexible criteria such as the debtor's main centre of interests. And finally, even in those days there were insolvency cases that did not conform to the standard pattern and where there were substantial and potentially volatile assets in several jurisdictions, with creditors spread out over potentially more than one continent.

It is submitted that the nature of the standard pattern that emerges from cross-border insolvency cases has changed radically in recent decades. What was described above as a truly exceptional scenario until a number of years ago has now become the rule. Assets are now frequently situated in a vast number of countries and jurisdictions. Creditors in turn can be situated just about anywhere in the world and it is no longer the case that most of them, or at least those representing the majority of the claims, are situated in one single jurisdiction. That brings us to the next new characteristic. Any dominant appearance of centralisation, be it of assets or creditors, has gone. From a legal point of view one may still be able to trace the debtor back to one jurisdiction, but that location does not dominate necessarily. Assets and creditors may be found in a wide variety of jurisdictions and the debtor may even have located its business in the jurisdiction concerned entirely for legal, e.g. tax, reasons.

It is therefore no longer possible to identify a single jurisdiction as the obvious place to open a single insolvency proceeding on the basis that it is the predominant location involved that can easily handle the majority of the claims and assets all within the same jurisdiction.

The fact that it is increasingly easy to move assets and to move them fast is another factor that needs to be taken into account and that pleads increasingly against the use of a single unitary insolvency proceeding.

As a result of all this a single liquidator, appointed in a single proceeding in one jurisdiction, will find it increasingly difficult to coordinate all aspects of a cross-border insolvency case in this single proceeding. Suffice it to point here to the fact that a stay abroad will not be achieved automatically and that this may allow the debtor to move assets quickly, as well as this, it may allow certain creditors to take action on an individual basis. This is clearly not the aim of any effective cross-border insolvency proceeding and it is in conflict with the need for fast and effective (collective) action in such proceedings. In practice this shows the need for local proceedings that can be opened rapidly and that will first of all provide the necessary stay and that may in a second stage assist in the effective realisation of what are now normally sizable local assets, as well as in the protection of local creditors.

What remains though is the fact that any multiplication of the number of proceedings adds another layer of complexity and costs. The way forward does therefore not consist in the abandonment of the "main" universal proceedings, only for it to be replaced by a myriad of uncoordinated local proceedings. One should keep the "main" proceedings and its advantage of transparency and cost effectiveness. Other proceedings need only be added where needed to realise the assets effectively and/or to protect the local creditors. In order to do so these other proceedings do not need to be universal in scope. They can easily be limited in terms of their territorial scope. What emerges is therefore a combination system with single "main" universal proceedings and various territorially limited local proceedings.

In such a system there needs to be some form of hierarchy. The reason justifying additional proceedings clearly argues in favour of these proceedings being secondary proceedings. The "main" proceedings should therefore be given preference. That does not go far enough though on its own. Further coordination is also required. The liquidator in the main proceedings must be given locus standi to intervene in the secondary proceedings, whilst the secondary proceedings must be given priority when it comes to realising local assets. The distribution of assets amongst creditors must be coordinated, e.g. hotchpot style rules and a transfer of all remaining assets to the main

proceedings at the end of the local proceedings, should be established. Such a coordinated system can only work well if it finds its basis in harmonised jurisdiction rules that allow the right proceedings to be opened at the right time in the right jurisdiction. Perfect coordination also presupposes the same applicable law, the principles of which will then apply across the board or at least a uniform choice of law rule.

Even so, in relation to cross-border insolvency cases time and speed are of the essence. Things can be enhanced greatly in this respect by cutting out time-consuming legalisation procedures for documents and equally time-consuming recognition procedures in respect of the opening of the insolvency proceedings abroad and the appointment of the liquidator. What is required is a system of automatic and instant recognition of both the foreign insolvency proceedings and the appointment of the foreign liquidator as part of those proceedings. That will allow the liquidator to act without delay at the international level.

The picture that emerges is one of added complexity. Complexity that appears first of all in the facts and that requires the legal response to a cross-border insolvency to be equally more complex and sophisticated. That additional complexity in legal terms needs to be kept under control to make sure that the system remains transparent, fast, fair and efficient. It is submitted that this requires the hierarchical system described above in which the main universal insolvency proceeding dominates and is assisted by local secondary and territorially limited proceedings. Such a system requires in terms of private international law rules a harmonised set of rules on jurisdiction, a harmonised choice of law rule and automatic rules on recognition of the insolvency judgment delivered abroad, as well as of the foreign decision through which the liquidator was appointed. What is achieved in this way is that the private international law rules allow the system to cope with the cross-border aspects of the insolvency in a coherent and efficient way, whilst at the same time recognising that in the end there is a single (cross-border) insolvency case. That case is dealt with through a single system in a streamlined approach in which all main and local proceedings are brought together

towards the single solution of the case.

Individual national systems are almost by definition not able to bring about such a system. Suffice it to think about the fact that each national law will put in place its own system of private international law in this area. These systems will by definition have their differences, which makes the perfect co-ordination and streamlining that is required an unachievable aim. Maybe the Belgian approach would be the better one. But only in a perfect world, a world where all states have adopted exactly the same approach and where procedural co-operation is smooth, fast and efficient. The complexities of most cross-border insolvencies and political and legal realism make it easy to conclude that such a paradise is beyond reach. In the absence of full harmonisation the Belgian approach shows its problems. Ancillary proceedings are in practice required, but the theoretical approach can hardly handle them. Complex cases with many substantial assets in many jurisdictions are therefore extremely hard to handle. And until recently certain debtors could simply slip through the net. Even now the solution to that problem in terms of jurisdiction looks odd from a conceptual and theoretical point of view. At first sight the English solution looks far more pragmatic and maybe therefore more suitable. A closer analysis shows that this is not the case. In terms of jurisdiction there is some uncertainty about the precise scope of the extremely wide heads of jurisdiction. What kind of link with the jurisdiction is exactly required? Just as in the Belgian system that seems to be a problem that can still be ironed out. The remaining issue is that these heads of jurisdiction are unduly wide. Just about any real link with the jurisdiction will do. In the modern English private international law environment the *forum non conveniens* principle is therefore an obvious next step to eliminate all improper cases. Whilst that principle does now have its application in relation to cross border insolvency cases, it is still very ill at ease with the reality that insolvency cases necessarily involve and affect outside third parties and that therefore traditionally the courts felt obliged to take any case coming within the ground of jurisdiction on the basis that the (outsider-)petitioner has a right to an order. Further problems arise in relation to the recognition of foreign proceedings. This is an essential point if national systems are to co-operate smoothly, but the present English law is far

from clear. The grounds for recognition are vague and unclear and those points that are clear, such as the *Grimshaw v Galbraith* principle, obstruct rather than enhance matters. The real scope of useful co-operation provisions such as that found in section 426 of the Insolvency Act 1986 is far too limited in term of the countries whose courts can invoke it.

In short, the national systems, whether based on unity and universality or a more pragmatic approach, have their problems and are on their own unable to deal with the growing complexity of cross-border insolvency cases. More harmonised and streamlined provisions are needed. Even then, private international law harmonisation in the traditional sense will no longer be sufficient. Insolvency has some of the characteristics of an octopus in the sense that it touches upon many different and sensitive issues. In relation to those matters a more thorough harmonisation is required.

It is submitted that the EU Insolvency Proceedings Regulation goes a long way in achieving a system that is capable of dealing with the modern economic and business reality, even if the main limitation of the Regulation to cross-border insolvency cases in the internal market is a serious and, ideally speaking, undesirable limitation on the effectiveness of the system contained in the Regulation. A more global approach along these lines would be even better.

Even more importantly, one has to recognise that the perfect system described above is based on an idealistic scenario. It is unlikely that the majority of countries will be prepared anywhere in the near future to move towards such a system. Bankruptcy and insolvency touch on a lot of issues, including tax and social security issues, on top of sensitive economic and social issues. Many of these are seen to be part of a country's public policy and there is therefore an extreme reluctance to move towards relinquishing control via the operation of a single choice of law rule, harmonised jurisdiction rules and above all the automatic recognition of foreign insolvency proceedings. Especially as the latter may well contain elements that are radically different and have radically different effects in the jurisdiction. For most countries this

scenario goes way too far. Even in an ever more closely knit society such as the European Union it took thirty years to arrive at such a system and even there exceptions have been built in. It will no doubt take many more years before countries that are far less close to one another will be able to move in the same direction. At global level a less ambitious approach is therefore needed.

Such a less ambitious approach is provided by the UNICTRAL Model Law on cross-border insolvency. The emphasis here is more on what is realistically feasible, i.e. in how far are states prepared to relinquish some of their sovereign prerogatives, than on an ideal solution. Such a pragmatic approach leaves out difficult questions such as the harmonisation of rules on jurisdiction and choice of law and starts from the accepted reality that in cross-border insolvency cases there are likely to be several proceedings or at least foreign proceedings, as well as several liquidators involved. The Model Law really deals with the interaction between the various proceedings and between the various liquidators. This means that from a private international law point of view the difficult point of the recognition of foreign proceedings, including the appointment of foreign liquidators needs to be addressed head on. The Model law's pragmatic rules start from the vital point that in any cross-border insolvency case speed is of the essence. It is therefore important that the appointment of the foreign liquidator does not need to be confirmed by a decision in the recognising state before the liquidator can take action in that jurisdiction to preserve assets. The Model Law addresses this by giving the liquidator *locus standi* and by not insisting necessarily on the legalisation of documents etc. Cooperation between the liquidator and the recognising court is also encouraged, as is cooperation between the various courts involved. This brings us to the point that there may well be more than one set of proceedings. The Model Law has rules concerning the coordination of these proceedings and provisions on the much simplified procedure for the recognition of foreign proceedings.

Overall, the Model Law comes in addition to the substantive insolvency laws of the states that will implement it and it aims to deal with the special difficulties that are associated with a number of cross-border insolvency situations. These can be sum-

marised in four scenarios, which were already alluded to above. The first one is where an inward-bound request for recognition of a foreign insolvency proceedings is received. In the second one the alternative situation arises where there is an outward-bound request from a court, administrator or liquidator in the state enacting the Model Law for the recognition abroad of insolvency proceedings that have been initiated under the laws of the enacting state. Thirdly, there is the thorny issue of the co-ordination of concurrent proceedings in two or more states. And finally, there is the issue of the participation of foreign creditors in insolvency proceedings that are taking place in the state enacting the Model Law.

Together, these rules are clearly an important step in the right direction and it is therefore hoped that the Model Law will in the near future be adopted by a sizable number of states. Nevertheless, the Model law is only a first step. Many of its rules do not go far enough. It leaves the door wide open for states to take jurisdiction and unless jurisdiction is taken solely on the basis of the presence of assets in the jurisdiction these proceedings will be recognised by all other states that have adopted the Model Law in their legislation. Such a wide open jurisdiction system would require stringent rules on the hierarchy between proceedings, but the Model Law only manages to offer coordination and a blunt preference for the local proceedings. This effectively puts the emphasis on the sovereignty of the states involved and is no doubt in line with what is feasible, but it is not exactly a recipe for smooth and fair solutions to cross-border insolvency cases. Similar limitations appear in the powers given to the foreign liquidator. Assets can be managed and preserved, but any distribution of assets is subject to a separate court order. The application of a diversity of laws in the absence of a single choice of law rule is bound to make things even worse.

What is clear though is that the UNCITRAL Model Law is an important first step forward, building on the very limited unilateral provisions which some states had already included in their own domestic insolvency legislation. The latter were entirely dependent on goodwill and recognition abroad under the local insolvency legislation and under the local private international law rules. Cooperation, coordination and the

recognition of each other's insolvency proceedings must therefore be a step in the right direction. This is at present, or should one say in the near future as adoption of the Model Law is still awaited, the best achievable situation, with the addition in the European Union of a much more far reaching and much more ambitious system contained in the EU Insolvency Proceedings Regulation.

One should also not forget that the implementation of the Model law, in combination with the application of the Regulation in the EU Member-States, will also require Member-States to look again at their own domestic laws, both in the area of insolvency law and in the area of private international law. Certain rules may not fit anymore, they may no longer serve or achieve any purpose or new rules may be needed to deal with the issues left open by the changes at the international level. A clear example is found in the scenario where Belgian law will have to deal, in the absence of the centre of the debtor's main interests in the European Union, with an insolvency case where the foreign debtor has nevertheless some assets or activities in Belgium and where the foreign court adopts a strictly territorial approach. The old, unity oriented instruments of domicile, seat and main place of business to take jurisdiction are then even less suitable. It may be necessary to have a debate as to whether the appropriate answer is still to refuse to deal with the case or whether there is, in the changed international circumstances that will prevail, a need to devise new appropriate rules to deal with such a scenario.

It is submitted though that this cannot be the final stage. Much more work is needed in the years and decades to come to arrive at a fully satisfactory solution for cases of cross-border insolvency. In a final stage closely related countries such as the European Union should be able to move towards a far-reaching substantive harmonisation of their insolvency laws in order to be able to remove some of the restrictions that are still in place under the Regulation. Substantive harmonisation must still be the first best solution, whereas any private international law solution must remain a second best solution. At the global level an attempt should be made to improve upon the provisions of the Model Law. It is submitted that such an

improvement will necessarily go in the direction of the present EU Regulation. More harmonised rules on jurisdiction are needed, as is a single uniform choice of law rule. This should enable states to agree on a hierarchy between proceedings, which, in combination with the existing rules on issues such as cooperation, coordination and recognition, will allow for a speedy, fair, efficient and transparent solution for all cross-border insolvency cases. At present this cannot be more than a dream, but the ever growing pressure to address cross-border insolvency issues from the business reality in this era of globalisation will hopefully help us not to leave it as a dream that can never be realised.

Appendices

Appendix I :

Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
Official Journal L 160 , 30/06/2000 p. 0001 - 0013

Text:

Council regulation (EC) No 1346/2000
of 29 May 2000
on insolvency proceedings

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,
Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,
Having regard to the opinion of the European Parliament(1),
Having regard to the opinion of the Economic and Social Committee(2),
Whereas:

- (1) The European Union has set out the aim of establishing an area of freedom, security and justice.
- (2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.
- (3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.
- (4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).
- (5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.
- (6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.
- (7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are

excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters⁽³⁾, as amended by the Conventions on Accession to this Convention⁽⁴⁾.

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression "court" in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

(13) The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also

apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

(22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the *lex situs* in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and

financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems(5). For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Article 2

Definitions

For the purposes of this Regulation:

- (a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;
- (b) "liquidator" shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;
- (c) "winding-up proceedings" shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;
- (d) "court" shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;
- (e) "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;
- (f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;
- (g) "the Member State in which assets are situated" shall mean, in the case of:
 - tangible property, the Member State within the territory of which the property is situated,
 - property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
 - claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);
- (h) "establishment" shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:
- (a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or
 - (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".
2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:
 - (a) against which debtors insolvency proceedings may be brought on account of their capacity;
 - (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
 - (c) the respective powers of the debtor and the liquidator;
 - (d) the conditions under which set-offs may be invoked;
 - (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
 - (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
 - (g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
 - (h) the rules governing the lodging, verification and admission of claims;
 - (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
 - (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
 - (k) creditors' rights after the closure of insolvency proceedings;
 - (l) who is to bear the costs and expenses incurred in the insolvency proceedings;
 - (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
2. The rights referred to in paragraph 1 shall in particular mean:

- (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
 - (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
 - (c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
 - (d) a right in rem to the beneficial use of assets.
3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.
4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6

Set-off

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.
2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7

Reservation of title

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.
2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.
3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8

Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9

Payment systems and financial markets

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.
2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law

applicable to the relevant payment system or financial market.

Article 10

Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11

Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12

Community patents and trade marks

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13

Detrimental acts

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

Article 14

Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

- an immovable asset, or
 - a ship or an aircraft subject to registration in a public register, or
 - securities whose existence presupposes registration in a register laid down by law,
- the validity of that act shall be governed by the law of the State within the territory of which the immovable asset is situated or under the authority of which the register is kept.

Article 15

Effects of insolvency proceedings on lawsuits pending

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II

RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18

Powers of the liquidator

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

Article 19

Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

Article 20

Return and imputation

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.
2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Article 21

Publication

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).
2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22

Registration in a public register

1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.
2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

Article 23

Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24

Honouring of an obligation to a debtor

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.
2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the

absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25

Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26 (6)

Public policy

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

CHAPTER III

SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the

secondary proceedings are opened.

Article 29

Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

- (a) the liquidator in the main proceedings;
- (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Article 30

Advance payment of costs and expenses

Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security.

Article 31

Duty to cooperate and communicate information

1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.
2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.
3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

Article 32

Exercise of creditors' rights

1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.
2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.
3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33

Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main

proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.

2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:

- at the request of the liquidator in the main proceedings,
- of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Article 34

Measures ending secondary insolvency proceedings

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.

3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

Article 35

Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36

Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Article 37 (7)

Conversion of earlier proceedings

The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings

if this proves to be in the interests of the creditors in the main proceedings.
The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38

Preservation measures

Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV

PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39

Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.
2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41

Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42

Languages

1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading "Invitation to lodge a claim. Time limits to be observed" in all the official languages of the institutions of the European Union.
2. Any creditor who has his habitual residence, domicile or registered office in a

Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading "Lodgement of claim" in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

CHAPTER V

TRANSITIONAL AND FINAL PROVISIONS

Article 43

Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44

Relationship to Conventions

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:

- (a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;
- (b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;
- (c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;
- (d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;
- (e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;
- (f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;
- (g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;
- (h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;
- (i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;
- (j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;
- (k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard

to proceedings opened before the entry into force of this Regulation.

3. This Regulation shall not apply:

(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45

Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46

Reports

No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Article 47

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. Costa

(1) Opinion delivered on 2 March 2000 (not yet published in the Official Journal).

(2) Opinion delivered on 26 January 2000 (not yet published in the Official Journal).

(3) OJ L 299, 31.12.1972, p. 32.

(4) OJ L 204, 2.8.1975, p. 28; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1.

(5) OJ L 166, 11.6.1998, p. 45.

(6) Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

(7) Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

ANNEX A

Insolvency proceedings referred to in Article 2(a)

BELGIË-/BELGIQUE

- Het faillissement//La faillite
- Het gerechtelijk akkoord//Le concordat judiciaire
- De collectieve schuldenregeling//Le règlement collectif de dettes

DEUTSCHLAND

- Das Konkursverfahren
- Das gerichtliche Vergleichsverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

ΕΛΛΑΔΑ

- Η πτώχευση
 - Η ειδική εκκαθάριση
- Η προσωνυμία αχείριση εταιρείας Η διόκιση και η διαχείριση των πιστωτών
 Η παγωγή επιχείρησης υπό επίτροπο με σκοπό τη σύναψη συμβιβασμού με τους πιστωτές

ESPAÑA

- Concurso de acreedores
- Quiebra
- Suspensión de pagos

FRANCE

- Liquidation judiciaire
- Redressement judiciaire avec nomination d'un administrateur

IRELAND

- Compulsory winding up by the court
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors' voluntary winding up (with confirmation of a Court)
- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution
- Company examinership

ITALIA

- Fallimento
- Concordato preventivo
- Liquidazione coatta amministrativa
- Amministrazione straordinaria
- Amministrazione controllata

LUXEMBOURG

- Faillite
- Gestion contrôlée
- Concordat préventif de faillite (par abandon d'actif)
- Régime spécial de liquidation du notariat

NEDERLAND

- Het faillissement
- De surséance van betaling
- De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

- Das Konkursverfahren
- Das Ausgleichsverfahren

PORTUGAL

- O processo de falência
- Os processos especiais de recuperação de empresa, ou seja:
- A concordata
- A reconstituição empresarial
- A reestruturação financeira
- A gestão controlada

SUOMI-FINLAND

- Konkurssi//konkurs
- Yrityssaneeraus//företagssanering

SVERIGE

- Konkurs
- Företagsrekonstruktion

UNITED KINGDOM

- Winding up by or subject to the supervision of the court
- Creditors' voluntary winding up (with confirmation by the court)
- Administration
- Voluntary arrangements under insolvency legislation
- Bankruptcy or sequestration

ANNEX B

Winding up proceedings referred to in Article 2(c)

BELGIË-/BELGIQUE

- Het faillissement//La faillite

DEUTSCHLAND

- Das Konkursverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

ΕΛΛΑΔΑ

- Η πτωχεύση
- Η ειδική εκκαθάριση

ESPAÑA

- Concurso de acreedores
- Quiebra
- Suspensión de pagos basada en la insolvencia definitiva

FRANCE

- Liquidation judiciaire

IRELAND

- Compulsory winding up
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors' voluntary winding up (with confirmation of a court)
- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

ITALIA

- Fallimento
- Liquidazione coatta amministrativa

LUXEMBOURG

- Faillite
- Régime spécial de liquidation du notariat

NEDERLAND

- Het faillissement
- De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

- Das Konkursverfahren

PORTUGAL

- O processo de falência

SUOMI-/FINLAND

- Konkurssi//konkurs

SVERIGE

- Konkurs

UNITED KINGDOM

- Winding up by or subject to the supervision of the court
- Creditors' voluntary winding up (with confirmation by the court)
- Bankruptcy or sequestration

ANNEX C

Liquidators referred to in Article 2(b)

BELGIË-/BELGIQUE

- De curator//Le curateur
- De commissaris inzake opschorting//Le commissaire au sursis
- De schuldbemiddelaar//Le médiateur de dettes

DEUTSCHLAND

- Konkursverwalter
- Vergleichsverwalter
- Sachwalter (nach der Vergleichsordnung)
- Verwalter
- Insolvenzverwalter
- Sachwalter (nach der Insolvenzordnung)
- Treuhänder
- Vorläufiger Insolvenzverwalter

ΕΛΛΑΔΑ

- Ο σύνδικος

- Ο προσωρινός διαχειριστής. Ηδικοί κούσα επιτροπή των πιστωτών
- Ο ειδικός εκκαθαριστής
- Ο επίτροπος

ESPAÑA

- Depositario-administrador
- Interventor o Interventores
- Síndicos
- Comisario

FRANCE

- Représentant des créanciers
- Mandataire liquidateur
- Administrateur judiciaire
- Commissaire à l'exécution de plan

IRELAND

- Liquidator
- Official Assignee
- Trustee in bankruptcy
- Provisional Liquidator
- Examiner

ITALIA

- Curatore
- Commissario

LUXEMBOURG

- Le curateur
- Le commissaire
- Le liquidateur
- Le conseil de gérance de la section d'assainissement du notariat

NEDERLAND

- De curator in het faillissement
- De bewindvoerder in de surséance van betaling
- De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

- Masseverwalter
- Ausgleichsverwalter
- Sachwalter
- Treuhänder
- Besondere Verwalter
- Vorläufiger Verwalter
- Konkursgericht

PORTUGAL

- Gestor judicial
- Liquidatário judicial
- Comissão de credores

SUOMI-/FINLAND

- Pesähoitaja//boförvaltare
- Selvittäjä//utredare

SVERIGE

- Förvaltare
- God man
- Rekonstruktör

UNITED KINGDOM

- Liquidator
- Supervisor of a voluntary arrangement
- Administrator
- Official Receiver
- Trustee
- Judicial factor

Appendix II :

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

UNCITRAL Model Law on Cross-Border Insolvency

PREAMBLE

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Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Chapter I. General provisions

Article 1. Scope of application

1. This Law applies where:

- (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) Assistance is sought in a foreign State in connection with a proceeding under *[identify laws of the enacting State relating to insolvency]*; or
- (c) A foreign proceeding and a proceeding under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor are taking place concurrently; or
- (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under *[identify laws of the enacting State relating to insolvency]*.

2. This Law does not apply to a proceeding concerning *[designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law]*.

Article 2. Definitions

For the purposes of this Law:

- (a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. [Competent court or authority]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts, authority or authorities competent to perform those functions in the enacting State]*.

Article 5. Authorization of [insert the title of the person or body administering reorganization or liquidation under the law of the enacting State] to act in a foreign State

A *[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a *[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]* to provide additional assistance to a foreign representative under other laws of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Chapter II. Access of foreign representatives and creditors to courts in this state

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under *[identify laws of the enacting State relating to insolvency]* if the conditions for commencing such a proceeding are otherwise met.

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under *[identify laws of the enacting State relating to insolvency]*.

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]*.

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

1. Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also be given

to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) Indicate a reasonable time period for filing claims and specify the place for their filing;

(b) Indicate whether secured creditors need to file their secured claims; and

(c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Chapter III. Recognition of a foreign proceeding and relief

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:

(a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;

(b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;

(c) The application meets the requirements of paragraph 2 of article 15; and

(d) The application has been submitted to the court referred to in article 4.

2. The foreign proceeding shall be recognized:

(a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and

(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person

designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

2. *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]*

3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding,

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article]*.

3. Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 23. Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation]*.

2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]*.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

1. In matters referred to in article 1, a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;

(f) *[The enacting State may wish to list additional forms or examples of cooperation]*.

Chapter V. Concurrent proceedings

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding under *[identify laws of the enacting State relating to insolvency]* may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under *[identify laws of the enacting State relating to insolvency]* are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

(ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

(b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

(ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;

(c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under *[identify laws of the enacting State relating to insolvency]*, proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under *[identify laws of the enacting State relating to insolvency]* regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

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