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THE EUROPEAN UNION CONVENTION ON INSOLVENCY PROCEEDINGS: AN OVERVIEW AND COMMENT, WITH U.S. INTEREST IN MIND[†]

*Ian F. Fletcher**

I. INTRODUCTION: LOGICAL AND LEGAL BASES FOR THE CONVENTION

For those already well familiar with the principal characteristics of a cross-border insolvency and the typical problems confronting the insolvency practitioner, the European Union (formerly known as the European Community)¹ introduces a further range of issues and complexities. There are numerous ways in which the fundamental principles of the Union, which are based upon the concept of a unified internal market, may be transgressed during the course of an international insolvency. Typical problems include the incompatibility of different national systems of insolvency law; legal and procedural obstacles to recognition of the office-holder's standing to represent the collectivised interests in the insolvent estate, and to assert claims to the debtor's foreign assets; and the numerous possibilities for exploitative behaviour by creditors and debtors alike. Into this latter category fall such practices as the ring-fencing of assets for the exclusive advantage of a restricted sub-group of creditors linked to a specific country; the utilisation of so-called "bankruptcy havens" for the purpose of defeating attempts to gather and administer property on a collective basis; and the potential for discriminatory treatment of creditors because of their location in different jurisdictions. In addition to the doctrinal disagreements regarding the admissibility of parallel or concurrent insolvency proceedings for the same debtor, there are the associated problems of fairness in coordinating concurrent proceedings, including the application

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1. In this paper, the abbreviations "EU" and "EC" are employed, together with the convenient forms of reference to "the Union" and "the Community."

of the "hotchpot" principle,² and of rules against double proof by creditors in relation to what is in essence the same claim.

The authors of the original Treaty of Rome³ foresaw the need to address these problems and thus, they were made the subject of a special provision in Article 220, which provides:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals;

....

....

- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.⁴

Non-insolvency matters were resolved separately—and relatively quickly by EU standards—by the Brussels Convention of 1968.⁵ In contrast, there has been the protracted and uneven saga of the "Bankruptcy Project," still tantalisingly unresolved at the time of this writing.⁶ The work thus far may be broadly divided between Phase I (to 1980); and Phase II (April 1990-November 1995). As a bridging event between these two phases, we may note the significance of the Council of Europe Convention on Certain International Aspects of Bankruptcy (Istanbul Convention).⁷ This paper will confine

2. See IAN F. FLETCHER, *THE LAW OF INSOLVENCY* 713 (2d ed. 1996); see also *infra* text accompanying note 113.

3. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II). This treaty, also known as the Treaty of Rome, entered into force on January 1, 1958 and is still in force, though much amended, as part of the complex series of treaties which currently link 15 European states as members of the EU. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]; see also TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 719 (1992).

4. EC TREATY, *supra* note 3, art. 220.

5. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32. For the consolidated, current text incorporating the amendments made in 1978 and 1982, see 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention].

6. The position stated in the text is as at April 30, 1997.

7. European Convention on Certain International Aspects of Bankruptcy, June 5, 1990, Europ. T.S. No. 136 [hereinafter Istanbul Convention]. The text of

itself to a discussion of the text which finally emerged as the culmination of Phase II of the EU project, and which is now poised to become the concluded EU Insolvency Convention (the Convention), possibly at some time during 1997.⁸

II. NATURE, SCOPE, AND IMPACT OF THE INSOLVENCY CONVENTION AS CONCLUDED BETWEEN REPRESENTATIVES OF THE FIFTEEN STATES THAT ARE CURRENTLY MEMBERS OF THE EU, MEETING WITHIN THE COUNCIL

A. *Subject Matter*

The Convention operates as a mechanism for controlling questions of jurisdiction to open insolvency proceedings.⁹ It also regulates, by means of uniform rules for choice of law, the law applicable to such proceedings and to matters affected by a party's insolvency (i.e., third parties' rights in rem; set-off; reservation of title; contracts relating to immovable property; payment systems and financial markets; contracts of employment; registrable rights in immovable property, ships or aircraft; patents and trademarks; the validity of transactions pre- and post-commencement of insolvency proceedings that have detrimental consequences for the general body of creditors; and

the Istanbul Convention, which is not yet in force, is reprinted (in English only) in 12 CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS (THE ABERYSTWYTH INSOLVENCY PAPERS) 297-313 (Ian F. Fletcher ed., 1990) (obtainable from the British Institute of International and Comparative Law, London).

8. There is currently no officially published version issued by the EU itself of the final text of the EU Insolvency Convention on Insolvency Proceedings, although an authentic version in English of the text as opened for signature is in circulation and has been put in the public domain. See European Union Convention on Insolvency Proceedings, Nov. 23, 1996, 35 I.L.M. 1223 [hereinafter EU Insolvency Convention]. The full text of the Convention is set forth in an appendix to the article in this issue by Nick Segal, at p. 75. The text is also contained in a Consultative Document published in February 1996 by the Insolvency Service of the Department of Trade and Industry (U.K.) [hereinafter Consultative Document] (on file with author). This Consultative Document also contains, in Annex B, the original version of the Explanatory Report on the Convention, drafted in far from perfect English. For a greatly improved, revised version of the Explanatory Report, see MIGUEL VIRGOS & ETIENNE SCHMIT, REPORT ON THE CONVENTION ON INSOLVENCY PROCEEDINGS, EU Council Doc. 6500/96, DRS 8 (CFC) (May 3, 1996) [hereinafter EXPLANATORY REPORT] (on file with the *Brooklyn Journal of International Law*). This document is likely to be published in due course in the EU *Official Journal*.

9. See EU Insolvency Convention, *supra* note 8, preamble, para. 3, 35 I.L.M. at 1225.

the effects of insolvency proceedings on pending lawsuits that involve rights or assets of the debtor).¹⁰ All these matters are the subject of provisions in Chapter I.¹¹ The Convention next addresses the recognition of insolvency proceedings opened in any Contracting State whose courts have jurisdiction pursuant to article 3. The issue of recognition includes vital questions regarding its effects, as well as the powers of the office-holder¹² and the formalities required to establish the liquidator's status for the purpose of acting abroad.¹³ These matters fall within Chapter II.¹⁴ Next, provisions in Chapter III concern opening secondary insolvency proceedings at the behest of various interested parties.¹⁵ Chapter IV contains useful, if limited, provisions concerning the right of all creditors to receive information from the liquidator, and to lodge claims in the insolvency proceedings.¹⁶ Further, Chapter V delineates an important provision that confers jurisdiction on the European Court of Justice (ECJ) to issue interpretations of the Convention at the request of national courts.¹⁷ Finally, Chapter VI concludes the convention with a series of important provisions dealing with ratification, entry into force, revision, duration, and accession.¹⁸ Chapter VI also regulates this Convention's relationship to other conventions entered into by any Contracting State.¹⁹

B. Principal Features

This Convention follows the precedent set by the Brussels Convention²⁰ in that it is designed as a "double" or "direct" convention, generating mandatory rules of jurisdiction for all

10. *See id.* arts. 1-15, 35 I.L.M. at 1225-29.

11. *See id.* The choice of law rules of the Convention are discussed in the separate paper contributed by Nick Segal. *See* Nick Segal, *The Choice of Law Provisions in the European Union Convention on Insolvency Proceedings*, 23 BROOK. J. INT'L L. 57 (1997).

12. Referred to throughout the Convention as the "liquidator."

13. *See* EU Insolvency Convention, *supra* note 8, arts. 16-26, 35 I.L.M. at 1229-31.

14. *See id.*

15. *See id.* arts. 27-38, 35 I.L.M. at 1231-33.

16. *See id.* arts. 39-42, 35 I.L.M. at 1234.

17. *See id.* arts. 43-46, 35 I.L.M. at 1234-36.

18. *See id.* arts. 47-55, 35 I.L.M. at 1236-38.

19. *See id.* art. 48, 35 I.L.M. at 1236-37.

20. Brussels Convention, *supra* note 5.

cases falling within its scope. This is in stark contrast to the Istanbul Convention, which is the more familiar type of "indirect" convention, containing rules of recognition and enforcement without imposing a mandatory set of jurisdictional rules.²¹

The types of proceedings covered and the categories of debtor to which the Convention applies are specified in article 1, which provides that it shall apply to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator."²²

However, an important series of excepted cases is created by article 1(2), which states that the convention 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."²³ These exclusions relating to entities operating within the financial services sector come as a result of separate EU initiatives, currently in progress, to introduce harmonisation in the financial services sector by means of certain directives.²⁴ These directives will include standardised provisions governing the insolvency of such enterprises.

Article 2 of the Convention contains eight paragraphs, lettered (a) to (h), which supply the definitions of key concepts and terms.²⁵ The list is by no means exhaustive, however, and it is certain that many crucial matters will require judicial interpretation with the guidance, ultimately, of the ECJ. In particular, paragraph (a) states that "insolvency proceedings" means the collective proceedings referred to in article 1(1), as listed in Annex A to the convention.²⁶ For each country destined to become a party to the Convention, Annex A provides a list of the proceedings found in the law of that country and which are considered to fall within the letter and spirit of

21. See generally Istanbul Convention, *supra* note 7.

22. EU Insolvency Convention, *supra* note 8, art. 1(1), 35 I.L.M. at 1225.

23. *Id.* art. 1(2).

24. See *EU/Financial Services: Parliament and Council Directive on Investor Compensation*, Reuter Textline, Feb. 21, 1997, available in LEXIS, Eurcom Library, Ecnews File.

25. EU Insolvency Convention, *supra* note 8, art. 2(a)-(h), 35 I.L.M. at 1225-

26.

26. *Id.* art. 2(a), 35 I.L.M. at 1225.

article 1(1), thus qualifying for inclusion in the Convention's operational ambit.²⁷ The proceedings are listed in the language of the country to whose law they pertain. For the United Kingdom, for example, Annex A lists winding-up by the court (compulsory winding-up); bankruptcy/sequestration; administration of estates of deceased insolvents; creditors' voluntary winding-up (with confirmation by the court); administration; and voluntary arrangements under the Insolvency Act 1986 or the Insolvent Partnerships Order 1994.²⁸ It is notable that all these procedures involve a role for the court either in the inauguration of proceedings or, at least, in their confirmation at an early stage. The inclusion of creditors' voluntary liquidations, which in practice are the most frequently used type of liquidation procedure for insolvent companies, was made possible only through the inclusion of a proviso that there be confirmation by the court. Such a step is nowhere required under the existing legislation of the United Kingdom, but could be quite readily accomplished under the widely framed, permissive terms of section 112 of the Insolvency Act 1986. These terms enable the voluntary liquidator to apply to the court to determine any question arising in the winding-up of a company, and empower the court to make "such . . . order on the application as it thinks just."²⁹ It would seem that a "confirmation order" might be sought under this provision whenever it transpires that the case may necessitate action of some kind under the Convention. If the case is purely domestic in nature, no such steps need be taken.

The repeated references in articles 1 and 2 to the "collective" nature of the proceedings under the Convention suggest one powerful reason that the procedure known as administrative receivership (formerly known as "floating charge receivership")³⁰ has been omitted from the Annex A list of proceedings relating to the United Kingdom and to Ireland.³¹ Although the procedure plays an important role in the practical operation of the insolvency laws of both the United Kingdom and Ireland,

27. *Id.* Annex A, 35 I.L.M. at 1240-42.

28. *See id.* Annex A, 35 I.L.M. at 1242.

29. Insolvency Act, 1986, ch. 45, § 112 (Eng.).

30. *See* FLETCHER, *supra* note 2, at 26 n.21.

31. *See* EU Insolvency Convention, *supra* note 8, Annex A, 35 I.L.M. at 1241 (Ireland), 1242 (United Kingdom).

the procedure is essentially a remedy designed to advance the interests of one particular type of secured creditor, with whom resides the sole initiative as to its use. Hence, it cannot readily be reconciled with the concept of "collectivity" that infuses the Convention. A further aspect of administrative receivership is that it commences through a direct act of appointment by the creditor without recourse to a court. Thus, because the Convention does not provide to administrative receivers the same recognition and assistance that it does to office-holders in other types of insolvency proceedings, one may wish to choose a procedure other than administrative receivership when considering the best way to rescue an ailing U.K. or Irish company with significant assets and interests in other EU countries. Although receivership can, in appropriate circumstances and in the right hands, be a very swift and effective vehicle for achieving a business rescue, a receiver can encounter severe difficulties in a case where it is necessary to enlist the cooperation of foreign courts. Therefore, it may prove to be tactically advantageous to opt for one of the forms of rescue procedure, such as an administration order or a voluntary arrangement, that attract the automatic benefits imparted by the convention.

A further important technical term is defined by article 2(c), which states that "winding-up proceedings" means insolvency proceedings that involve realisation of the debtor's assets, including proceedings that have been closed by a composition or other measure terminating the insolvency, or by reason of insufficiency of the assets.³² Proceedings which come within this definition are listed in Annex B.³³ For the United Kingdom, the proceedings are winding-up by the court (compulsory winding-up); bankruptcy/sequestration; and administration of estates of deceased insolvents.³⁴ This is a far shorter list than the one appearing in Annex A and inevitably means that a far more restricted range of options is available wherever the Convention requires that proceedings shall be "winding-up proceedings," as in the case of articles 3(3), 16(2), and 27 relating to the opening of secondary bankruptcies.³⁵ However, article 54 enables the Annexes to be amended at any time on the

32. EU Insolvency Convention, *supra* note 8, art. 2(c), 35 I.L.M. at 1225.

33. *Id.* Annex B, 35 I.L.M. at 1242-43.

34. *See id.*

35. *Id.* arts. 3(3), 16(2), 27, 35 I.L.M. at 1226, 1229, 1231; *see infra* Part VII.

initiative of any of the Contracting States by means of a circular notification of the proposed amendment.³⁶ If none of the other states objects within three months, the amendment is adopted.³⁷ Potentially therefore, the concept of "winding-up proceedings" could become broader in the future.

III. TIMETABLE FOR ENTRY INTO FORCE OF THE CONVENTION

A. *Preconditions to Entry into Force*

The first precondition for entry into force is that the Convention must be signed and ratified by all fifteen Member States of the European Union.³⁸ As a convention under the Treaty of Rome, there must be unanimity among the current membership at the time of adoption of the Convention.³⁹ Further, article 49(3) expressly provides that the Convention shall not enter into force until it has been ratified, accepted, or approved by all the member states of the European Union as constituted on the date on which it is closed for signature.⁴⁰ States which join the EU at a later date are committed to negotiating terms of accession to the Convention, but in the meantime it will remain in force among the members of the EU as previously constituted.⁴¹

Signature is a first step, which by May 1996 had already been taken by fourteen of the fifteen member states.⁴² The United Kingdom is the only member state not to have committed its signature, having previously reserved its final decision until the text of the Explanatory Report had been thoroughly studied.⁴³ The final date for signature permitted under the timetable imposed in November 1995, when the Convention was opened for signature, was May 23, 1996.⁴⁴ This coincided with the beginning of the U.K. policy of non-cooperation in EU affairs, pending resolution of the "beef crisis" triggered by the Bovine Spongiform Encephalopathy epidemic.⁴⁵ It is now un-

36. See EU Insolvency Convention, *supra* note 8, art. 54, 35 I.L.M. at 1238.

37. See *id.*

38. See *id.* art. 49(3), 35 I.L.M. at 1237.

39. EC TREATY, *supra* note 3, art. 220.

40. EU Insolvency Convention, *supra* note 8, art. 49(3), 35 I.L.M. at 1237.

41. See *id.* art. 49(2).

42. See *id.* at 1239-40.

43. EXPLANATORY REPORT, *supra* note 8.

44. See EU Insolvency Convention, *supra* note 8, art. 49(2), 35 I.L.M. at 1237.

45. See Peter Riddell, *An Escapologist Out of Luck*, TIMES (London), June 24,

certain whether the timetable can be reinstated, with a new deadline for completion of signatures by all fifteen States, in the near future. It would be open to the fifteen states to revive the convention by unanimous agreement, and to put in place a new timetable for acceptance. Less satisfactory would be a resolution among the fourteen states that have signed up to go ahead without U.K. participation. But this would deprive the Convention of its status as an article 220 instrument, and the ECJ could not be involved in its interpretation. The text of the Convention is considered to be finalised when it is initialled by all fifteen party states. There is, in theory, some scope for adjustment of the final text of the Explanatory Report, if such adjustment could secure final acceptance by the full complement of fifteen.

Following signature, each state must complete the appropriate internal processes, according to its own constitutional requirements, to enable ratification to take place. In the case of the United Kingdom, ratification would entail an Act of Parliament, as with the Brussels Convention⁴⁶ and the Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention).⁴⁷ The ratification process could occupy several years, pending completion by all fifteen states. Realistically, therefore, the entry into force of the EU Convention could be some years away. Nevertheless, it must now be accepted that there is a real likelihood that the Convention will enter into force. Consequently all who may be potentially affected by the Convention's operation should take into account the possible impact of its provisions. For example, transactions involving entities which might, should an insolvency occur, come within the framework of the Convention.

The U.K. Insolvency Service published a Consultative Document in February 1996, seeking views on the Convention in its concluded form and on the then-current draft of the Explanatory Report.⁴⁸ On 26 March 1996, the House of Lords

1996, available in LEXIS, News Library, Curnws File.

46. Brussels Convention, *supra* note 5; see Civil Jurisdiction and Judgments Act, 1982, ch. 27 (U.K.) (implementing the Brussels Convention).

47. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1, reprinted in 19 I.L.M. 1492 (1980) [hereinafter Rome Convention]; see Contracts (Applicable Law) Act, 1990, ch. 36 (U.K.) (implementing the Rome Convention).

48. See Consultative Document, *supra* note 8.

Select Committee on the European Communities published its Seventh Report for Session 1995-96,⁴⁹ drawing on the information it had received in February. In paragraph 40 of the Report, the Committee stated:

The Committee was more than surprised to learn that the text of the Report might not be finalised before the expiry of the six month period permitted for Member States' signature of the Convention. The Committee believes that the opportunity should be taken to improve the Report. Every effort should therefore be made by the current Presidency and the Commission to settle the text of the Explanatory Report as soon as possible. . . . The Committee believes that all States are entitled to know, with a reasonable degree of certainty, to what it is they are being asked to sign their names. . . . The Government should not sign the Convention in advance of their being satisfied, following consultation and consideration, that technical uncertainties have been removed.⁵⁰

As it turned out, the Committee's wish in this respect was fulfilled since, as explained above, the United Kingdom failed to meet the May 23 deadline for appending its signature. Thus, the revised version of the Explanatory Report⁵¹ has become available for study although this version may not be final. It should be noted that the revised version is, in many respects, considerably more detailed and precise than the explanatory reports that have accompanied the Brussels⁵² and Rome⁵³ Conventions accepted by all the EU member states, including the United Kingdom. In principle, therefore, one might expect the United Kingdom to atone for its failure to sign the Insolvency Convention as soon as domestic political circumstances, together with an amelioration in the state of relations with its Union partners, enable this to take place.

49. *Seventh Report of the House of Lords Select Committee on the European Communities*, Mar. 26, 1996 (H.L. Paper 59, HMSO) (on file with author).

50. *Id.* para. 40.

51. EXPLANATORY REPORT, *supra* note 8.

52. P. JENARD, REPORT ON THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, 1979 O.J. (C 59) 1; see also MARTINO DE ALMEIDA CRUZ ET AL., REPORT ON THE CONVENTION, 1990 O.J. (C 189) 35.

53. MARIO GIULIANO & PAUL LAGARDE, REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS, 1980 O.J. (C 282) 1.

B. Time of Entry into Force

Article 49(3) provides that the Convention shall enter into force on the first day of the sixth month following the deposit of the ratification instrument by the last signatory state to ratify.⁵⁴ Article 47 declares that the Convention shall apply only to insolvency proceedings opened after its entry into force.⁵⁵ It further states that “[a]cts done by a debtor before the entry into force of this Convention shall continue to be governed by the law which was applicable to them at the time they were done.”⁵⁶ There is a potential for confusion and uncertainty here regarding which previous events qualify as “acts done by the debtor.” The Explanatory Report goes some way towards determining valid issues in transitional cases by stating that “the determination of the acts done by the debtor and the time at which they are done are governed by the applicable law.”⁵⁷ The basic intention behind the rule is to ensure that relations to which the debtor is party remain subject to the law which governed the debtor’s acts at the time of acting.⁵⁸

IV. INTERNATIONAL JURISDICTION

The essential aim of the Convention is to establish a hierarchical scheme of primary and subsidiary jurisdictional competence in relation to a debtor who meets the specific, qualifying criterion, namely, that the *centre of the debtor’s main interests* is situated within the territory of a Contracting State.⁵⁹ In the case of such a debtor, the opening of insolvency proceedings is precluded, save in those Contracting States on whose courts the Convention confers jurisdiction. This will be true regardless of whether the debtor might elsewhere fulfil any locally evolved rules for taking jurisdiction.

From a United States standpoint, however, it should be noted that there is no attempt to regulate or interfere with the taking of jurisdiction under national laws in respect of any

54. EU Insolvency Convention, *supra* note 8, art. 49(3), 35 I.L.M. at 1237.

55. *Id.* art. 47, 35 I.L.M. at 1236.

56. *Id.* (emphasis added).

57. EXPLANATORY REPORT, *supra* note 8, para. 306.

58. *See id.* paras. 303-05.

59. EU Insolvency Convention, *supra* note 8, art. 3(2), 35 I.L.M. at 1226.

debtor whose centre of main interests lies outside the EU.⁶⁰ Established grounds for exercising jurisdiction, such as a "doing of business" or a "presence of assets" test, can therefore be used in any EU state where the prescribed test for "minimum contacts" happens to be met. However, the Convention contains the important proviso that such proceedings will not qualify for recognition or enforcement in other member states by virtue of the Convention,⁶¹ although they may be recognised on a case-by-case basis according to the rules of private international law of each state separately. It is suggested, with respect, that this is a welcome contrast to the Brussels Convention, which tends to be hostile toward U.S.-based defendants via its article 4. Article 4 enables long-arm jurisdiction to be taken against U.S.-based defendants in one EU state;⁶² the resulting judgment is automatically enforceable in all the others.⁶³

A. Primary Competence

Article 3(1) provides that the courts of the Contracting State within the territory of which is situated the centre of the debtor's main interests shall have jurisdiction to open insolvency proceedings.⁶⁴ It is significant that there is no comprehensive definition of "centre of the debtor's main interests" (COMI), but there is one especially important presumption supplied by article 3(1) itself: "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*."⁶⁵

The presumption is thus a rebuttable one, and moreover is confined to the case where the debtor is a company or legal

60. See *id.* art. 3(1).

61. *Id.*

62. Brussels Convention, *supra* note 5, art. 4, 1990 O.J. (C 189) at 4.

63. See *id.* For trenchant criticism of this and other xenophobic properties of the Brussels Convention, see Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967); Kurt H. Nadelmann, *The Outer World and the Common Market Experts' Draft of a Convention on Recognition of Judgments*, 5 COMMON MKT. L. REV. 409 (1967-1968); Kurt H. Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282 (1969); see also IAN F. FLETCHER, *CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW* 117-20 (1982). See generally *id.* ch. 4.

64. See EU Insolvency Convention, *supra* note 8, art. 3(1), 35 I.L.M. at 1226.

65. *Id.* (emphasis added).

person. Nevertheless, it offers a useful point of departure for those wishing to locate the correct forum for commencement of insolvency proceedings involving a company. Moreover, those who seek to have the proceedings dismissed for want of jurisdiction must sustain the burden of proving that the company's COMI is in another country. Significantly, however, the Convention is silent as to the nature of the requisite "proof" that must be furnished in order to rebut the presumption established by article 3(1). The Convention also does not contain any provision for resolving the possibility of either a "positive" conflict of jurisdiction between the courts of two Contracting States, each of which concludes on the evidence before it that the debtor's COMI lies within its territory, or a "negative" conflict, where the converse situation arises. An example of the way in which such conflicts could occur in practice is provided by the case of *Re Bank of Credit & Commerce International S.A. (No. 10)* (BCCI),⁶⁶ where the bank's state of incorporation was Luxembourg, but the English courts quite reasonably concluded that its main operational base was in England.⁶⁷ One could imagine that, were a similar case to arise under the Convention, both courts could readily persuade themselves that the COMI of BCCI was located within their jurisdictions, for the purposes of article 3(1). In practice, the ultimate outcome might depend on which court one approaches first, and on whether that court makes its determination in a manner that truly reflects the spirit of trust and good faith that is meant to infuse the working of the EU's conventions.⁶⁸ In a difficult case of first impression, a reference seeking the interpretative guidance of the ECJ ought to be made. However, an urgent situation may necessitate taking some initiatives aimed at preserving assets and maintaining the value of the insolvent estate, in the general interest of all affected parties.

B. Subsidiary Competence

Article 3(2) states that where the COMI is situated within the territory of a Contracting State, the courts of another Con-

66. [1997] 2 W.L.R. 172 (Ch. 1996).

67. This case is further discussed by Nick Segal in his paper. See Segal, *supra* note 11, at 66-67.

68. See EC TREATY, *supra* note 3, art. 220.

tracting State have jurisdiction to open insolvency proceedings *only if* the debtor possesses an *establishment* in the territory of that other Contracting State.⁶⁹ Here we may note that the effects of such proceedings are restricted to the *local assets* of the debtor.⁷⁰ Moreover, where insolvency proceedings have already been opened at the forum of primary competence, any proceedings opened elsewhere on the basis of an establishment can only be *secondary proceedings*⁷¹ as defined in Chapter III.⁷² Also, territorial proceedings based on the existence of an establishment can only be opened prior to main insolvency proceedings under article 3(1) in circumstances where special preconditions within article 3(4) are met.

The meaning to be ascribed to the term "establishment" is thus of crucial importance in controlling the exercise of jurisdiction to open territorial proceedings—and especially those which are to be classed as "secondary proceedings"—with respect to a debtor whose COMI lies in a different Contracting State. "Establishment" is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."⁷³ The mere presence of assets, such as a bank account or even immovable property, does not necessarily enable local, territorial proceedings to be opened. What is required, in the words of the Explanatory Report, is a place of operations through which the debtor carries out "economic activities . . . on the market (i.e., externally), whether the said activities are commercial, industrial or professional."⁷⁴ The Explanatory Report further comments that "[a] purely occasional place of operations cannot be classified as 'an establishment.' A certain stability is required. . . . The decisive factor is how the activity appears externally, and not the intention of the debtor."⁷⁵ One might observe that the novel concept of "establishment," even with the help of the definition and explanatory comments provided (or perhaps even, because of these), will in some cases prove to be elusive and controversial. Like some other troublesome terms, which also carry

69. EU Insolvency Convention, *supra* note 8, art. 3(2), 35 I.L.M. at 1226.

70. *See id.*

71. *See id.* art. 3(3).

72. *See id.* arts. 27-38, 35 I.L.M. at 1231-33.

73. *Id.* art. 2(h), 35 I.L.M. at 1226.

74. EXPLANATORY REPORT, *supra* note 8, para. 71.

75. *Id.*

heavy legal significance—"obscurity," for example—we may instinctively believe we know what is meant, but then encounter ever-increasing difficulty when having to relate that intuitive sense to concrete situations in which a great deal may be at stake. It seems inescapable that the ECJ will at some stage—and perhaps at several stages—be required to provide interpretative guidance on this matter.

V. APPLICABLE LAW⁷⁶

The basic principle of the Convention is that "the law applicable to insolvency proceedings . . . shall be that of the Contracting State within whose territory the proceedings are opened,"⁷⁷ the so-called *lex fori concursus* principle. However, this principle is expressly stated to be subject to any provision to the contrary contained within the Convention itself, with regard to any particular issue.⁷⁸ A long list of the matters, which are determined by the law of the State of the opening of proceedings, is provided in article 4.⁷⁹ Matters for which the Convention creates special rules allowing for the determination of particular issues in accordance with a law other than that of the state of the opening of proceedings include: (1) "rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets belonging to the debtor which are situated within the territory of another Contracting State at the time of the opening of proceedings;"⁸⁰ (2) the right of creditors to claim set-off where this is permitted by the law applicable to the insolvent debtor's claim;⁸¹ (3) the rights of an unpaid seller, exercisable under a reservation of title where, at the time of the opening of proceedings, the asset in question is situated within the territory of a Contracting State other than the state in which the proceedings are opened;⁸² (4) the rights of a purchaser to complete the acquisition of title,

76. The choice of law rules in the Convention are the special subject of Nick Segal's paper, and are mentioned here in outline only. See Segal, *supra* note 11, at 57.

77. EU Insolvency Convention, *supra* note 8, art. 4(1), 35 I.L.M. at 1226.

78. See *id.*

79. *Id.* art. 4(2)(a)-(m), 35 I.L.M. at 1226-27.

80. *Id.* art. 5(1), 35 I.L.M. at 1227.

81. See *id.* art. 6(1).

82. See *id.* art. 7(1).

despite the opening of insolvency proceedings against the seller after the asset has been delivered, provided the asset is situated in a Contracting State other than that of the state of the opening of proceedings;⁸³ (5) the "effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property;"⁸⁴ (6) the effects of insolvency proceedings on the "rights and obligations of the parties to a payment or settlement system or to a financial market;"⁸⁵ (7) the "effects of insolvency proceedings on employment contracts and relationships;"⁸⁶ (8) the effects on the rights of the debtor in "immovable property, a ship or an aircraft subject to registration in a public register;"⁸⁷ (9) a legal act detrimental to the interests of the general body of creditors, and which would be impeachable under the law of the state of the opening of proceedings, but which the person who benefited from the act proves to be subject to the law of a different Contracting State, whose law does not allow any means of challenging that act in the relevant case;⁸⁸ (10) where, by an act *concluded* after the opening of insolvency proceedings, the debtor disposes, for consideration, of (a) an immovable asset; (b) a ship or aircraft subject to public registration; or (c) registerable securities, the validity of that act (and thus the extent of the third party's protection) is governed by the law of the state where the immovable asset is situated, or under the authority of which the register is kept;⁸⁹ and (11) the effects of insolvency proceedings on a pending lawsuit that involves a debtor's divested asset or right.⁹⁰

VI. RECOGNITION OF INSOLVENCY PROCEEDINGS

The basic principle of recognition is supplied by article 16(1), which states that "[a]ny judgment opening insolvency proceedings handed down by a court of a Contracting State which has jurisdiction pursuant to Article 3 shall be recognized

83. *See id.* art. 7(2), 35 I.L.M. at 1228.

84. *Id.* art. 8. The law of the *situs* governs exclusively. *See id.*

85. *Id.* art. 9.

86. *Id.* art. 10.

87. *Id.* art. 11.

88. *See id.* art. 13.

89. *See id.* art. 14, 35 I.L.M. at 1229.

90. *See id.* art. 15.

in all other Contracting States *from the time that it becomes effective in the State of the opening of proceedings.*⁹¹

Two further, vital principles are established under the next two articles. Article 17 provides that the judgment opening the main proceedings under article 3(1) “shall, *with no further formalities*, produce the same effects in any other Contracting State as under the law of the State of opening of proceedings, unless the Convention provides otherwise and as long as no [secondary] proceedings . . . are opened in that other Contracting State.”⁹² Article 18 provides that the liquidator appointed by a court having jurisdiction under article 3(1)

may exercise *all the powers conferred on him by the law of the State of the opening of proceedings in another Contracting State*, as long as no [secondary] insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there [pursuant] to a request for the opening of [secondary] proceedings in that State.⁹³

The liquidator may, in particular, “remove the debtor’s assets from the territory of the Contracting State in which they are situated,”⁹⁴ but in exercising his powers he must comply with the law of the Contracting State within whose territory he intends to take action.⁹⁵

A further advantage for the office-holder is conferred by article 19, which mandates that the liquidator’s appointment “be evidenced by a certified copy of the original decision appointing him, or any other certificate issued by the court which has jurisdiction.”⁹⁶ Although a translation into the official language of the applicable Contracting State may be necessary, no further legalisation or other similar formality is required.⁹⁷ This provision obviates the need for obtaining an *exequatur* as a precondition to taking essential action in certain civil law countries. The provision also has a significant effect upon the

91. *Id.* art. 16 (emphasis added).

92. *Id.* art. 17(1) (emphasis added).

93. *Id.* art. 18(1) (emphasis added).

94. *Id.* The liquidator’s powers in this instance are, however, subject to the provisions in articles 5 and 7. *Id.* arts. 5, 7, 35 I.L.M. at 1227; *see supra* text accompanying notes 83, 85-86.

95. *See id.* art. 18(3), 35 I.L.M. at 1230.

96. *Id.* art. 19.

97. *See id.*

liquidator's ability to quickly and effectively handle foreign assets when they are located in other Contracting States. Finally, the provision could greatly reduce the costs necessary to obtain a judicial order of enforcement from a foreign court, especially where local creditors resist the application.

VII. SECONDARY INSOLVENCY PROCEEDINGS

Chapter III of the Convention enables secondary proceedings to be opened where jurisdiction arises from a debtor's establishment in the Contracting State.⁹⁸ Thus, there is no need for independent satisfaction of the local law's test for determining the debtor's insolvency; it is irrelevant that the debtor's local establishment is trading normally and does not meet any applicable test that would enable insolvency proceedings to be opened under local insolvency laws.

Secondary proceedings can only be winding-up proceedings of the types listed in Annex B for each Contracting State.⁹⁹ This may impede effective implementation of main proceedings, which are aimed at rescue and rehabilitation rather than liquidation of the debtor's business. Article 33 enables the liquidator in the main proceedings to obtain a stay of the secondary proceedings by application to the court which opened them. However, it is unclear whether the court has an obligation to grant the stay. In any event, the order can be obtained for only three months at a time, although they are renewable after the three-month period.¹⁰⁰

Secondary proceedings can affect only those assets of the debtor that are situated within the Contracting State where the secondary proceedings are taking place.¹⁰¹ Secondary proceedings are, however, governed by the law of the Contracting State in which they are opened.¹⁰² Hence, the primary value of secondary proceedings is to satisfy local expectations about entitlement to dividends, to the extent that the locally-situated assets are sufficient for this purpose. Alternatively, secondary proceedings can ensure that a locally perfected security inter-

98. *Id.* arts. 27-38, 35 I.L.M. at 1231-33.

99. *See id.* art. 3(3), 35 I.L.M. at 1226; *see also id.* art. 2(2), 35 I.L.M. at 1225 (defining "winding-up proceedings").

100. *See id.* art. 33, 35 I.L.M. at 1232.

101. *See id.* arts. 3(2), 27, 35 I.L.M. at 1226, 1231.

102. *See id.* art. 28.

est retains full validity and priority as conferred under the local law. Notably, article 29 permits the opening of secondary proceedings upon the request of either the liquidator in the main proceedings or "any other person or authority empowered to request the opening of insolvency proceedings" under the law of the state in which their opening is requested.¹⁰³

There will be situations in which the *situs* of assets at a particular moment in time will be crucial to the outcome of competing claims arising under rival proceedings, either primary or secondary, or under the operation of the special choice-of-law rules.¹⁰⁴ Some definitional rules to determine the meaning of *situs* with respect to certain types of assets are supplied by article 2,¹⁰⁵ but many types of intangible, movable property are not covered by these rules. This omission may give rise to divergent rulings by national courts as to the approach to be employed in determining the *situs* of property whose very "existence" may be dependent on whatever conclusion is reached through the combined application of two potentially variable processes. The first of these processes is the particular classification method employed; a certain classification method may be utilised by the courts of one country in a way which differs from the approaches followed in other jurisdictions. The second process is the choice-of-law rules and methodology that are used for matters of contract.¹⁰⁶ Although choice-of-law rules are now supposed to be harmonised for all EU states through the Rome Convention,¹⁰⁷ the problems caused by conflicts of classification and methodological diversity are yet to be fully resolved. The ECJ may be able to address these issues when it becomes empowered to interpret the Rome Convention, and it will face similar challenges in its task of interpreting the Insolvency Convention in due

103. *Id.* art. 29, 35 I.L.M. at 1232.

104. *See id.* arts. 4-15, 35 I.L.M. at 1226-28.

105. *See id.* art. 2(g), 35 I.L.M. at 1226.

106. For examples of the complex problems encountered by courts when trying to determine the "conceptual *situs*" of intangible property, see, for example, *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981); *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868 (2d Cir. 1976); *cf. Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728 (1987) (Eng.).

107. Rome Convention, *supra* note 47.

course.¹⁰⁸ It is to be hoped that a consistency and symmetry between the two conventions can be established through the coordinating jurisdiction of the ECJ. There is a heavy onus upon national courts, however, to play a fully supportive role through a sensitive and sympathetic approach to cases falling within their sphere of responsibility. This can best be performed by respecting fully the so-called "principle of Community trust" that has evolved as part of the general principles of EC/EU law.¹⁰⁹

Other important principles regarding the administration of assets under the system of primary and secondary proceedings are established by article 32, and also by article 20. Any creditor "may lodge a claim in the main proceedings and in any secondary proceedings,"¹¹⁰ liquidators in either main or secondary proceedings are to lodge in the parallel proceeding claims which have already been lodged in the initial proceeding.¹¹¹ This reaffirms the principle of collective treatment for all creditors' claims, but may engender considerable administrative complexity in cross-accounting and record keeping. The proposition that no creditor should gain an advantage over others of coordinate rank, either by means of any private acts of diligence or through participation in extraterritorial insolvency proceedings, is respected and applied by article 20.¹¹² This provision effectively embodies the hotchpot principle, which mandates that such recoveries must be reported to the liquidator in any proceedings in which the creditor seeks to participate; the creditor can begin to share in distributions only when creditors of the same ranking or category have obtained an equivalent dividend.¹¹³

If, by some chance, the liquidation of assets in the secondary proceedings results in the full satisfaction of all claims allowable under those proceedings, any surplus assets remaining are to be transferred to the liquidator in the main proceedings.¹¹⁴ In practice, no doubt, the limited pool of assets comprising the available estate in the secondary bankruptcy will,

108. See *infra* Part IX.

109. See EXPLANATORY REPORT, *supra* note 8, para. 202.

110. EU Insolvency Convention, *supra* note 8, art. 32(1), 35 I.L.M. at 1232.

111. See *id.* art. 32(2).

112. *Id.* art. 20, 35 I.L.M. at 1230.

113. See *id.* art. 20(2).

114. See *id.* art. 35, 35 I.L.M. at 1233.

in many cases, be exhausted when payment has been made to those creditors whose claims enjoy preferential status according to local insolvency law. Where the process of distribution reaches the level of the non-preferential claims, primary and secondary liquidators should resolve between themselves how best to administer the distributional process in the interest of maximum efficiency. Thus, loss of value might be avoided if the balance of funds available in the secondary estate were used to meet claims of local, non-preferential creditors; this could be accomplished by matching the proportion of dividend which the primary liquidator pays to creditors of the same degree whose claims are channelled via the main administration. Of course, both liquidators must act with vigilance to ensure that no claim is processed separately in the two administrations, thus ensuring that no creditor violates the principle against double recovery.

VIII. CREDITORS' RIGHT TO LODGE CLAIMS

Chapter IV of the Convention contains a limited, but useful, set of provisions aimed at improving the position of creditors in an international insolvency case.¹¹⁵ When creditors are obliged to participate in foreign-based proceedings, they can experience disadvantages, either because of explicit provisions of the local law (direct discrimination), or because of more subtle—even logistical and informational—factors (indirect discrimination). Both kinds of discrimination receive some corrective attention.

Significantly, article 39 declares: "Any creditor who has his habitual residence, domicile or registered office in a Contracting State other than the State of the opening of proceedings, *including the tax authorities and social security authorities of Contracting States*, shall have the right to lodge claims in the insolvency proceedings in writing."¹¹⁶ In terms of the traditional principles embodied in the law of the United Kingdom, this provision overrides the effect of the rule in *Government of India v. Taylor*¹¹⁷ for the benefit of the tax and social security authorities of other EU member states. The wording of this

115. *Id.* arts. 39-42, 35 I.L.M. at 1234.

116. *Id.* art. 39 (emphasis added).

117. [1955] A.C. 491 (H.L.) (appeal taken from Eng.).

provision makes it clear that the benefits conferred under the Convention are reserved for the exclusive advantage of EU-based creditors. The treatment of creditors from outside the frontiers of the Union is unregulated, and so is governed by the laws and practices of the state where the proceedings open.

There are further provisions in articles 40 through 42 whereby the liquidator is under a duty immediately to inform all known creditors who have their habitual residence, domicile, or registered office in the other Contracting States.¹¹⁸ This must be done as soon as insolvency proceedings are opened.¹¹⁹ The notification is to bear the heading: "Invitation to lodge a claim. Time limits to be observed."¹²⁰ This heading must be printed in all the twelve official languages of the EU, but the notice itself need be only in the official language of the state of the opening of proceedings.¹²¹ Conversely, creditors are permitted to lodge their claims in the official language of the Contracting State of their habitual residence, domicile, or registered office; however, they may be required, at the liquidator's discretion, to provide a translation into an official language of the state where proceedings open.¹²²

Creditors from other Contracting States can benefit from the provisions of Chapter IV; creditors' eligibility is based upon the "functional" factors of habitual residence, domicile or—in the case of a company—the location of the registered office.¹²³ It is noteworthy that there is no reference in the provisions of Chapter IV to the factor of nationality. For the purposes of the Convention's operation, therefore, it is of no consequence whether a creditor or a debtor is a national of any of the Contracting States, nor is it relevant to the enjoyment of any rights or privileges arising thereunder. Equally significant is the corollary to this, namely, that it is irrelevant, for the purpose of determining standing, to invoke or take benefit from provisions of the Convention, that the party who does so happens to be a citizen of a non-member state of the EU. What matters is simply whether that party currently has the requi-

118. EU Insolvency Convention, *supra* note 8, art. 40(1), 35 I.L.M. at 1234.

119. *See id.*

120. *Id.* art. 42(1).

121. *See id.*

122. *See id.* art. 42(2).

123. *See id.*

site "functional" connection with one of the member states, by meeting at least one of the three stated criteria.

IX. INTERPRETATION BY THE COURT OF JUSTICE

Chapter V gives the ECJ jurisdiction to rule on the interpretation of the Convention, including the annexes thereto.¹²⁴ Such rulings may not be requested by courts of first instance in any of the Contracting States; the right to request a preliminary ruling is restricted to the supreme courts of the member states—which for the United Kingdom is the House of Lords and other courts from which no further appeal is possible¹²⁵—and also to the courts of Contracting States when acting as appeals courts.¹²⁶ Moreover, the court making the request must conclude "that a decision on the question to be referred is necessary to enable it to give judgment."¹²⁷

Since the permissive word "may" is employed in the opening words of article 44, it is always a discretionary matter for the national court to request a preliminary ruling. Further, article 45 allows "the competent authority of a Contracting State" to submit requests for interpretative rulings by the ECJ.¹²⁸ The purpose of this provision is to enable a uniform interpretative approach in the future, in case the national courts give irreconcilable and contradictory interpretations of the Convention without a reference having been made to the ECJ in the course of the proceedings.¹²⁹ The ECJ ruling does not affect the actual judgments themselves, but at least the point may be clarified prospectively, to avoid the establishment of an unfortunate precedent.¹³⁰

124. *See id.* art. 43(1).

125. *See id.* art. 44(a), 35 I.L.M. at 1235.

126. *See id.* art. 44(b).

127. *Id.* art. 40.

128. *Id.* art. 45(1).

129. *See* EXPLANATORY REPORT, *supra* note 8, para. 293.

130. *See id.* paras. 293-97.

X. GENERAL OBSERVATIONS AND REFLECTIONS, FROM THE U.S. PERSPECTIVE

A. *Prospects for Uniform International Approaches*

The Convention's basic scheme for allocation of jurisdiction, and for creating an expeditious and virtually automatic system of recognition and enforcement of insolvency proceedings, is by no means unsatisfactory or threatening for parties based in non-member states such as the United States. It is reassuring to note that the Convention imposes restrictions on the taking of jurisdiction over "foreign" debtors whose COMI is located elsewhere, but whose contacts and involvement with the "ineligible" forum may nonetheless be substantial.¹³¹ Only in the case of primary proceedings, opened in the state which contains the COMI itself, is this coupled with the full panoply of effects, including union-wide enforceability. It is obvious that such a tightly-designed set of *dirigiste* rules as the one established by this Convention is acceptable and workable only between participating states whose legal systems and economic cultures are inextricably intertwined. Only under such circumstances is it realistic to envision the prevailing climate of "community trust" on which the Convention's operation is heavily reliant. Absent these fundamentals, the potential for manipulation by both creditors and debtors is all too self-evident. It would thus be wrong in principle, as well as totally impractical and ineffectual, for the Convention to purport to visit its effects upon parties and property not directly subject to the jurisdiction of any of the member states. Happily, this principle of self-denial has been respected.

If it be asked whether the Convention provides a model or blueprint for adoption by other groupings of states, a word of caution seems advisable. What is considered to be almost a matter of necessity for such a closely coordinated and coalescent group of sovereign states as those comprising the EU may well seem totally impractical to states less deeply committed to the principles of supranational integration. A degree of coordination in matters of cross-border insolvency may perhaps prove advantageous in a context such as that of the North American Free Trade Agreement,¹³² but this must be ad-

131. See *supra* text accompanying notes 64-68.

132. North American Free Trade Agreement, done Dec. 17, 1992, Can.-Mex.-

addressed as a quite distinct project upon its own terms. For the present, there can be no case for the United States to relinquish the benefits of the powerful judicial discretion that is currently available to U.S. courts under section 304 of its Bankruptcy Code.¹³³ For example, the Bankruptcy Code is indispensable when a U.S. court is deciding whether to order turnover of assets to a foreign administrator who may have gained his appointment under legal processes applicable in the country where the debtor's "centre of main interests" is said to be located.

It is perhaps open to debate whether it is useful for the concept of COMI to be introduced as a specific factor to be taken into account when a U.S. court is operating under section 304. Arguably, it is already open to the court, when assessing the matters listed in section 304(c), to take account of the strength of the claim to jurisdictional competence on the part of the foreign court, since this can have a direct bearing upon those issues. A further possibility which may affect U.S. courts is that a liquidator appointed by an EU court enjoying jurisdiction to open secondary proceedings may find it necessary to seek the assistance of the U.S. court. For example, where an asset that allegedly belongs to the pool claimable for the secondary proceedings has somehow been removed to the United States or is the subject of some U.S. action whose continuation the secondary liquidator seeks to enjoin, assistance from a U.S. court may be necessary. There would clearly be a need for the U.S. court to recognise that, according to the framework of rules under which the foreign administrator has been appointed, he enjoys a legitimate claim, and one, moreover, whose validity will be acknowledged right across the EU, to the assets in respect of which he takes proceedings in the U.S. court. The concept of "establishment" is therefore one which the U.S. court will need to confront and evaluate in relation to cases emanating from the EU.

In the context of considering the above question, it is interesting that the expressions "centre of the debtor's main interests" and "an establishment of the debtor" seem likely to be included in the proposed UNCITRAL Model Legislative

U.S., 32 I.L.M. 296.

133. 11 U.S.C. § 304(c) (1994).

Provisions on Cross-Border Insolvency currently being elaborated.¹³⁴ This should lend added force to the arguments in favour of promoting uniform international approaches to the interpretation and application of such phrases, which tend to be used in an identical fashion in international instruments which manifestly share a common purpose.

B. Relationship Between Primary and Secondary Proceedings

A further aspect of the basic framework of the Convention that has transatlantic ramifications is the relationship between Primary and Secondary Bankruptcies. Understanding the implications of the concurrent proceedings in relation to the same debtor, running under the insolvency laws of two or more different EU member states, will be of vital importance in such areas as transactional design and the strategic planning of commercial relationships with EU-based parties, especially where these are likely to extend over a considerable period of time. The U.S.-based party will need to know precisely where primary insolvency proceedings involving the other party are capable of being opened. It is also essential to be aware if the possibility exists for the debtor to be amenable to secondary proceedings elsewhere, and to know what assets would then be comprised in those proceedings. Therefore, it may be prudent to engineer the agreement in such a way that the EU-based party must make full and proper disclosure of material facts bearing upon that party's amenability to the insolvency jurisdiction of courts that are subject to the EU Convention. A further disclosure requirement may be necessary in case the debtor's *modus operandi* subsequent to the commencement of the agreement alters or extends the jurisdictional "catchment" extant at the time the agreement was concluded. Indeed, lenders may deem it advisable to provide for default if the debtor does anything that could bring about a change in jurisdiction

134. Draft article 6 of the UNCITRAL provisions details several variants under consideration as of April 1996. See *Report of the Working Group on Insolvency Law on the Work of Its Nineteenth Session*, U.N. GAOR Comm'n on Int'l Trade L., 29th Sess., at 17-20, U.N. Doc. A/CN.9/422 (1996). For comments and documentation relating to this project, see *Cross-Border Insolvency Colloquium*, 4 INT'L INSOLVENCY REV. 1 (1995); *Joint Project of UNCITRAL and INSOL International Cross-Border Insolvencies*, 5 INT'L INSOLVENCY REV. 139 (1996); *UNCITRAL/INSOL Judge's Colloquium*, 5 INT'L INSOLVENCY REV. 162 (1996).

without giving the creditor advance notification and obtaining authorization from the creditor to proceed.

Similar considerations apply to any act of the debtor that produces a change in the location of key assets—especially those affected by real security—where such a change could materially alter the potential outcome for a party in interest. The change may be effected by bringing into play any provision of the convention that could trigger the application of a different system of law from the one which may have been reasonably anticipated by that party. Even though the Convention presently seems to be some years away from entering into force,¹³⁵ it is important to note that there will be long-term agreements whose lifespan could extend into the period when the Convention will apply to any insolvency proceedings which open in an EU state. Although article 47 ensures that “acts” of the debtor done before the Convention enters into force shall continue to be governed by the law which was originally applicable to them,¹³⁶ it is not easy to calculate the precise extent of the protection thus afforded to the interests of the other party. This is particularly so if the act involved an asset whose *situs* has subsequently been relocated to another state, and, under the law of the new state, further “acts” have taken place in favour of other parties whose claims or security rights might take precedence according to the law of the new state.¹³⁷

C. Choice-of-Law Rules

The choice-of-law rules contained in the various parts of the Convention¹³⁸ are of relevance to U.S.-based parties having dealings with a debtor who is subject to the insolvency

135. See *supra* Part III.

136. EU Insolvency Convention, *supra* note 8, art. 47.

137. The insolvency proceedings that accompanied the 1991 fall of Robert Maxwell's multinational publishing empire present plentiful examples of multiple or successive pledges of the same asset in favour of parties in diverse jurisdictions, resulting in horrendous complexities for the lawyers and accountants to wrangle over, with an enormous net loss of value to the creditors involved in the battle. See generally Barry L. Zaretsky, *Transnational Bankruptcy*, N.Y. L.J., Sept. 19, 1996, at 3; Barbara Franklin, *Berlitz's Mystery Shares*, N.Y. L.J., Feb. 6, 1992, at 5; Edward A. Adams, *The Maxwell Legacy*, N.Y. L.J., Dec. 26, 1991, at 5. Such practices are by no means unique to the Maxwell saga, although the scale of the misappropriations in that case was somewhat exceptional. See *id.*

138. EU Insolvency Convention, *supra* note 8, arts. 4-15, 35 I.L.M. at 1226-29.

jurisdiction of any EU member state. Given that primary proceedings opened in any of the Contracting States will enjoy EU-wide effect, a creditor based in a third state, such as the United States, must come to terms with the change in advantage which has hitherto tended to favour the agile and well-advised foreign creditor. Previously, a foreign creditor could sooner be out of the blocks in the race of diligence with the liquidator, who is seeking to trace and retrieve assets located abroad. In theory, the Convention will put an end to the phenomenon known as the "bankruptcy haven," and to unprincipled "ring fencing" of assets for the advantage of a privileged clique of creditors throughout the EU.

To be properly aware of the realities of his or her situation, a creditor needs to give full consideration to the impact of the Convention's basic rule whereby the law of the state where proceedings open governs most matters of substance and all matters of procedure. Equally vital, however, is an appreciation of the situations in which the Convention provides for the application of a system of law different from that of the state where proceedings open. A creditor must also project the effects of that law's application to the known or anticipated circumstances of the case in hand. These situations are covered most notably by articles 5-15,¹³⁹ and they include the case where creditors and third parties enjoy rights in rem—including any of the various kinds of real security—in relation to assets of the debtor situated in another Contracting State at the time of opening proceedings. As has been intimated above, secured creditors will need to be proactive in devising suitable strategies to counteract the possibilities that flow from the rule of deference to the law of the current *situs* embodied in article 5.¹⁴⁰

From the standpoint of international financial transactions, the provision of the Convention with the greatest potential significance is article 6, which is concerned with set-off.¹⁴¹ This article provides a special exception to the basic provision of article 4, which mandates that the law of the state where proceedings open shall determine the conditions under

139. These articles are outlined *supra* Part V, and are discussed in detail in the paper by Nick Segal. See Segal, *supra* note 11, at 57.

140. EU Insolvency Convention, *supra* note 8, art. 5, 35 I.L.M. at 1227.

141. *Id.* art. 6.

which set-offs may be invoked.¹⁴² Where the *lex concursus* allows for set-off, the article likely will not thwart the reasonable expectations of the non-insolvent party. However, where the *lex concursus* does not allow set-off, article 6 may accommodate pre-existing expectations founded upon the provisions of a different system of law. This accommodation, however, is confined to the situation where a right of set-off is conferred under the law applicable to the *insolvent debtor's claim* (the so-called "passive claim"). A choice-of-law exercise must thus be carried out to discover what law that is. Since all EU states are either currently or prospectively parties to the Rome Convention,¹⁴³ the result of this exercise should be uniform, regardless of which member state constitutes the forum of the bankruptcy proceedings. However, it is important to recognise that if the law applicable to the insolvent debtor's claim also excludes the right of set-off, the position of the non-insolvent party cannot receive a benefit simply because a right of set-off would be available under the law applicable to the claim in respect of which that party is in the position of a creditor (the so-called "active claim").¹⁴⁴ Given the variations in the EU states' laws of set-off, it is essential for parties with a large exposure to loss to monitor carefully the impact of the Rome Convention's choice-of-law rules as they apply to *both* sets of contracts with the debtor. By so doing, a party with a large risk of loss can assess how much of that exposure could be mitigated through the operation of set-off.

XI. CONCLUSION

Although the EU Convention may not enter into force for at least five years, practitioners must now be alerted to the Convention's possible impact on any client who plans to embark upon a long-term, commercial relationship with an EU-based party. As soon as there are indications that the EU states are serious about reviving the project, exponents of the art of transactional engineering will have to take the Convention's potential impact fully into account.

142. *Id.* art. 4(2)(d).

143. See Rome Convention, *supra* note 47.

144. Further information about the workings of article 6 of the Convention is available in EXPLANATORY REPORT, *supra* note 8, paras. 107-11.

It has already been suggested that the Convention's provisions dealing with jurisdiction and recognition are very closely linked to the "community/union" context in which the Convention's provisions are destined to operate. This entails sacrificing much of the discretionary power traditionally enjoyed by courts in approaching cross-border issues; any proposals for the adoption of a similar regime in a non-EU state, such as the United States, would probably not attract any support. It is difficult to imagine whether a *quid pro quo* sufficient to compensate for the loss of judicial autonomy could be negotiated.

On the other hand, the choice-of-law provisions in the Convention, and the key concepts such as "centre of main interests" and "establishment," merit further investigation by those within the United States who have a serious interest—whether practical or academic—in the evolution of the subject of cross-border insolvency. Not only will these rules be of direct relevance to U.S. parties who find themselves embroiled in insolvency proceedings opened in an EU member state, but the rules themselves may be seen as forming part of the global movement to develop a standardised framework for processing cross-border insolvency issues. Uniform or "model" legislative provisions are currently being promoted with considerable vigour, born of a mix of practical necessity and enlightened self-interest.¹⁴⁵ To avoid the futility that would result from the promulgation of multiple sets of incompatible rules, it is desirable for a coherent synthesis to be attempted at the earliest possible date, before too many of these projects become virtually "set in stone."

Finally, let us acknowledge, and acclaim, the operating limits applicable to the EU Convention. It is deliberately designed *not* to apply to cases where the debtor's COMI is located outside the territorial limits of the EU's combined membership. Nor can its effects reach directly into the territory and legal systems of non-EU member states so as to affect assets or parties properly subject to the local laws of those jurisdictions. Courts and legislators in those states will perforce need to give heed to the policy and response to be followed in relation to primary or secondary EU-based proceedings. Given the very

145. See *supra* note 137 and accompanying text.

restrictive terms of the jurisdictional scheme of the Convention, this should provide a confidence-boosting factor for outside courts when invited to assist a foreign representative appointed by virtue of the Convention's provisions. Thus, in a case such as *Maxwell*,¹⁴⁶ were it to arise at a future time with the Convention in force, the opening of administration proceedings in England, the state of incorporation of Maxwell Communications Corporation plc, would accord with the requirements of article 3(1). This should be a factor reinforcing the already demonstrated willingness of U.S. bankruptcy courts to engage in a collaborative strategy with the English-appointed representative, in the interest of preserving value. In no sense would that appear to undermine the undoubted prerogative of the U.S. court to exercise its powers according to its own perception of how local parties' interests should be best protected, and local assets best administered, in a way consistent with justice and fairness.

146. See *supra* note 140.

