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The European Insolvency Regulation 2000: A Paradigm of International Insolvency Cooperation

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Abstract
[extract] It may be said with some conviction that the Regulation [European Council Regulation on Insolvency Proceedings] is an important part of the long history of international insolvency initiatives. As the most important of all the initiatives thus far, the Regulation may be seen as especially deserving of success, perhaps because of the very fate of its predecessors, the European Insolvency Convention 1995 and the related Council of Europe Convention 1990. Together with related initiatives dealing with cross-border insolvencies in the financial and insurance sectors and other likely proposals, the Regulation is said to mark the beginnings of a comprehensive European legal order in insolvency law. Although this legal order is still at an early stage of development, it is likely that the lead given by the Regulation and its provisions will influence many of the future proposals in this field.

Keywords
insolvency, European Union, jurisdiction, European Council Regulation on Insolvency Proceedings

THE EUROPEAN INSOLVENCY REGULATION 2000: A PARADIGM OF INTERNATIONAL INSOLVENCY CO-OPERATION

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Introduction

The phenomenon of cross-border insolvency is well known from the earliest times. Attempts at providing it with a framework for dealing with the effects of insolvencies occurring across national boundaries has known a rich and varied history. In Europe, as elsewhere, bilateral and limited multilateral treaties are known from an early period. The late 20th century has known a number of wider multilateral initiatives reach the treaty table and it seems as if the agenda of such initiatives is acquiring a global flavour with the work of international governmental and non-governmental bodies operating in the insolvency field. For the moment, however, the multilateral text is the favoured form of treaty instrument, particularly by groups of countries with strong economic and trading links between themselves. In Europe in particular, the Council of Europe and the European Community (later Union) have been active in concluding texts seeking to regulate a phenomenon that has increased greatly in the 1980s and 1990s. One of these texts is the European Council Regulation on Insolvency Proceedings ('Regulation') of 29 May 2000, which entered into effect on 31 May 2002.[1] The Regulation project began its life almost 40 years ago as a proposal for a convention to supplement the treaty framework creating a common legal system within Europe following the foundation of the European Community in 1957. The original purpose of the Treaty of Rome 1957 was to set out fundamental principles providing for the free movement of goods, services, employees and capital. These freedoms required, as part of the initiative to remove structural impediments to the free flow of commerce and the creation of the single market, the supplementary development of measures allowing for the settlement of disputes and the promotion of enforcement measures across the member states of the community The extension of the treaty framework has been effected by further treaties between the member states, especially in the private international arena, where these conventions have been designed to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments.[2]

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1 Council Regulation (EC) No 1346/2000 on Insolvency Proceedings of 29 May 2000, published in OJ 2000 L160/1.

2 Article 293 (formerly 220), EC Treaty (the title of the revised version of the Treaty of Rome).

As part of the initial efforts towards the first such convention, the Brussels Convention 1968 ('Brussels Convention') covering broad civil and commercial law, the working party came to the conclusion that the nature of insolvency law and the lack of consensus on essential principles made its inclusion in a broad brush treaty impossible.[3] As a result, excluded from the remit of the convention by Article 1 are a number of areas of law, principally personal law, administrative law and insolvency law. The idea was that insolvency law would form the basis of a separate convention as the only practical solution towards achieving harmony in this area of the law.

In fact, work on an insolvency convention first began in 1963 with a draft being produced by 1970.[4] As designed, this convention affected, because of its all-inclusive wording, even insolvencies without a discernible cross-border element. It thus attracted considerable opposition, many of the difficulties stemming from a failure to take into account strongly held national views and the importance to certain jurisdictions of maintaining close scrutiny and control over the use of insolvency law as an economic tool. This became especially true as member states began adopting laws that promoted the rescue of companies as a priority. A later draft in the early 1980s did not seem to alter the position with respect to the complexities faced by successive working parties trying to find a draft acceptable to member states and a hiatus occurred for some years while work on the convention seemed to fizzle out.[5] Work in fact began on a rival text supported by the Council of Europe that reached the convention table in 1990, unfortunately not knowing any success, as ratifications by member states of that organisation were not forthcoming. It is notable however that the existence of this text seemed to spur the European Community into resuming work in the early 1990s and a draft that represented a different conception of the purpose of such a treaty was produced which met with substantial agreement.[6] This draft was readied for signature in November 1995 and was welcomed as providing the first realistic prospect of a framework for dealing with what had by then become a very noticeable phenomenon of cross-border insolvencies in the corporate and financial sectors.[7] By a stroke of considerable misfortune, the European Insolvency Convention, as it was termed, fell foul of a British Government that had withdrawn co-operation from European institutions in the wake of unresolved

3 See Muir Hunter, 'The Draft Bankruptcy Convention of the EEC' (1972) 21 ICLQ 682 and 'The Draft EEC Bankruptcy Convention: A Further Examination' (1976) 25 ICLQ 310.

4 See Lew, 'EEC Draft Convention on Bankruptcy' (1975) 125 New LJ 628; Ganshof, L'élaboration d'un droit européen de la faillite dans le cadre de la CEE (1971) CDE 146.

5 See Ganshof, 'Le projet de convention CEE rélative à la faillite' (1983) CDE 163.

6 See Lowry, 'The Harmonisation of Bankruptcy Law in Europe: The Role of the Council of Europe' (1985) *JBL* 73; Balz, The European Community (1995) 4 IIR 60 at 62.

7 See Borch, 'EU Convention on Insolvency Proceedings: A Major Step Forward' (1996) 24 *IBL* 224.

issues over a crisis in the agricultural sector, leading to the Government failing to sign up to the text while the disagreements persisted. As the signatures on the document were incomplete within the convention timeframe, the instrument failed to enter into force.[8] Although a number of options were canvassed to restore the proposals to active status, commentators held out little hope of there being any further initiative in this sector.[9] In fact, after a period in which it seemed as if the project would simply join the long list of failed proposals, the project received a new lease of life through an initiative jointly proposed by Finland and Germany in mid-1999. The text resulting from the initiative was published in August 1999 and its terms took up those of the Convention with the addition of a number of clauses in an extended preamble stating the legal basis for the initiative and many of the key principles it contained.[10] The proposals were adopted in the form of a Regulation with minor differences to the original text. The use of the regulation form, which is a form of institutional legislation as opposed to the convention form that reflects an inter-governmental initiative, was permissible because of changes to the structure of the EC Treaty through the inclusion of a new Title IV, which authorises the adoption of measures in the field of judicial cooperation in civil matters so as to 'establish progressively an area of freedom, security and justice.'[11] This definition includes, by virtue of Article 65 of that title, measures in the field of judicial cooperation having cross-border implications, insofar as these would be necessary for the proper functioning of the internal market and would include the recognition and enforcement of decisions in civil and commercial cases and promotion of the compatibility of rules concerning conflict of laws and jurisdiction.

Purpose of the Initiative

The Regulation seeks to introduce rules for dealing with insolvencies with a cross-border element. These rules do not differ greatly from those contained previously in the 1995 text that resulted in the European Insolvency Convention. In fact, there appears to have been a conscious effort at preserving the numerical order of the articles in the main body of the text, subject to the updating necessary due to subsequent expansions in the membership of the European Community. [12] Thus much of the commentary that was produced for that text remains of potential

8 See Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70 *ABLJ* 485; Fletcher, 'The European Union Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind' (1997) 23 *BJIL* 25.

9 See Rajak, 'Whither the Euro Bankruptcy Convention?' (1998) 6 *IL&P* 317 (editorial).

10 OJ 1999 C 221/8.

11 Article 61 of the EC Treaty.

12 The exception being the Convention provisions on interpretation by the European Court of Justice which formed Chapter V and the normal protocols regarding ratification, accession and revision of the Convention.

application.[13] Some of the reasoning employed to justify the Regulation with a view to its adoption appears in the preamble, containing thirty-three separate paragraphs forming a composite of views on insolvency law and its purpose within the framework of community law. In looking at the material in the preamble, there is an opportunity of assessing whether the Regulation has coherence in terms of its fundamental policy objectives and is able to achieve its intended purpose. The opportunity may also arise of examining whether there could be difficulties in its implementation and whether courts in member states would rely on the stated objectives to resolve any ambiguities in its application. The preamble refers to the stated aim of the European Union is to create a single legal area based on the ideals of freedom, security and justice.[14] These ideals have underpinned the process of European economic integration leading to the creation of the Single Market. In order to ensure the proper functioning of the internal market, improvements to the framework for dealing with insolvency and the speeding up of insolvency proceedings where there are cross-border implications are necessary. For that reason, the Regulation is intended to achieve these objectives and is set firmly within the structure for judicial co-operation in civil matters outlined in Title IV of the EC Treaty.[15] What lies at the heart of the Regulation is the recognition that cross-border activities by what are termed undertakings have a profound effect on the economic basis of the community and are therefore to be regulated by common rules across the Single Market. This approach has formed the foundation for many of the initiatives behind the creation of a legal framework for competition and harmonisation of company law rules.

It is believed that insolvency and its macro-economic function as a systemic regulator affects the success of the internal market and that the proper workings of the internal market are enhanced or impeded by the scale of failures of undertakings. Accordingly, the Regulation puts into legislative form the need for an instrument permitting the efficient co-ordination of measures to be taken regarding an insolvent debtor and assets within the insolvency across member states.[16] Proper and effective co-ordination of measures taken with respect to any debtor will require the avoidance of incentives for parties in financial difficulty to transfer assets between member states, in light perhaps of more favourable or protective regimes. Similarly, in a bid to discourage forum shopping, the Regulation states that resorting to judicial proceedings for an insolvent debtor or its creditors should not be allowed to depend on the existence of a more favourable legal position elsewhere than in the most appropriate jurisdiction to hear the

13 The Virgos and Schmit Report (1995) accompanying the Convention contains a detailed commentary on the provisions and the rationale behind their adoption.

14 Recital no. 1. This is the statement common to Title IV and the Third Pillar on Justice and Home Affairs as amended by the Treaty of Amsterdam.

15 Recital no. 2.

16 Recital no. 3.

claim.[17] Only a measure that co-ordinates proceedings at the supranational level can have the impact necessary to harmonise the objectives of a level playing field by removing unequal domestic barriers to the exercise of rights.[18] The type of co-ordination sought in the Regulation rests on harmonising provisions governing jurisdiction for opening insolvency proceedings and is limited, by application of the principle of proportionality, to these rules and to rules governing the issue of judgments forming the basis of insolvency proceedings or directly connected to these proceedings. Proportionality, particularly important in the sphere of economic law and the rule by which the imposition of obligations is tested against the purpose of the measure, is stated to underpin the Regulation, particularly how it is to govern the recognition of judgments in insolvency and the law to apply to matters connected to insolvency proceedings.[19] The recitals repeat the original exclusion from the Brussels Convention 1968 of insolvency and insolvency-related proceedings as grounds for the adoption of the Regulation.[20] The use of the Regulation form is felt to be necessary in order to accelerate the introduction of rules governing cross-border insolvency proceedings, besides being the most appropriate form to ensure that these provisions are binding and directly applicable in member states.[21]

Scope of the Regulation and Definitions

The Regulation applies to the insolvency of debtors where divestment of assets may occur, whether wholly or partially, subsequent to the appointment of a liquidator as defined in the Regulation.[22] There are four conditions for insolvency proceedings intended to fall within the scope of the Regulation. These are that they must be collective in nature and must preclude the scope for individual action by creditors, they must be based on the debtor's 'insolvency,' a term defined by reference to national criteria for deciding when the debtor has in fact entered the state of insolvency. Furthermore, they must entail the total or partial divestment

17 Recital no. 4. See *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) [1999] I ECR 1459; [1999] 2 CMLR 551, illustrating the risk inherent in strict interpretation of the availability of European rights at the expense of national consumer and public-protection aims, leading to the possible abuse of incorporation rights in a favourable jurisdiction and the phenomenon of the Delaware effect.

18 Recital no. 5. There is the question of whether co-ordination without substantive harmonisation of domestic rules can be truly effective.

19 Recital no. 6. See Article 5 of the EC Treaty.

20 Recital no. 7. See *Gourdain v Nadler* (C-133/78) [1979] ECR 733; [1979] 3 CMLR 180 for limits to the Brussels Convention exclusion.

21 Recital no. 8. The main disadvantage of the directive form and the use of conventions is, of course, the need for legislation to translate the impact of new rules into domestic terms.

22 Article 1(1). This definition may not cover simplified insolvency proceedings in countries where an administrator is not always appointed and the debtor is left in possession.

of power to deal with assets from the debtor and must, in fact, require the appointment of a third party, known as the liquidator.[23] As the Regulation is intended to apply widely to a number of types of proceedings, irrespective of whether the debtor has incorporated status and whether the debt arises in the course of trade, this lack of distinction becomes fundamental to assessing the impact of the Regulation and its reception, given that many jurisdictions are particularly concerned with debts incurred by natural persons, or consumers, and apply special regimes to them. The special treatment accorded this group in the Brussels Convention 1968 seems to be significantly eroded by the lack of differentiation here in the status of the debtor and this is likely to be quite problematic for some jurisdictions.[24]

A choice was made early on in the drafting process for the predecessor Convention to exclude any requirement that the process lead to the realisation of the debtor's assets, thus extending the scope of the Convention to cover both liquidation and rescue procedures. It was stated that there was 'no economic reason to justify the exclusion of reorganisation proceedings from international co-operation.' Nevertheless, a compromise did need to be reached so as to avoid the perceived complication caused by the existence of parallel reorganisation proceedings and the paradigm that limits territorial proceedings to liquidation proceedings is the result.[25] A list of the procedures that are in fact covered is specifically contained in Annexe A, which forms part of the Regulation.[26] The Regulation, however, does not extend to the insolvency of financial establishments, including credit institutions and investment undertakings, which as defined would include pension funds and unit trusts.[27] The rationale behind this exception is that it is intended that special provision be made. Furthermore, in these cases, it is expected that national supervisory authorities will exercise appropriate powers of intervention, avoiding or controlling the outcome of financial crises.[28] The European Parliament originally wanted this recital to state explicitly that the arrangements for special exemption above would only apply to original insurers. This would clarify the situation of reinsurers whom the Parliament felt would come, in any event, under the Regulation. The amendment was not accepted in the final draft. The definition used by the Regulation for the person appointed to conduct insolvency proceedings is the 'liquidator.' The function of the liquidator is stated as being the

23 See the Virgos and Schmit Report [49].

24 See Bogdan, 'Consumer Interests and the New EU Bankruptcy Convention' [1997] 5 Cons LJ 141.

25 See the Virgos and Schmit Report at [51].

26 Article 2(a). In the case of the United Kingdom, Annexe A contains all insolvency procedures except receivership. See Dahan, The European Convention on Insolvency Proceedings and the administrative receiver: a missed opportunity? (1996) 17 Co Law 181.

27 Article 1(2).

28 Recital no. 9. See Directive 2001/17/EC of 19 March 2001 OJ 2001 L110/28 (insurance institutions) and Directive 2001/24/EC of 4 April 2001 OJ L125/15 (credit institutions). Texts to cover the remaining types of bodies are likely at some point.

administration or liquidation of assets belonging to a debtor who has been divested of control or the supervision of the debtor's business.[29] A wide definition of liquidator was used so as to cover any person intervening in the course of insolvency proceedings, including the court itself. This wide definition also enables the person fulfilling the role to enjoy the widest powers to act to preserve and manage the assets of the debtor, so as to allow for the widest range of possibilities of outcomes for the process.[30]

The Regulation further defines six terms of art:

(1). 'winding-up proceedings' to mean any insolvency proceedings resulting in the realisation of the debtor's assets, which also includes any proceedings which have been terminated by a composition and any proceedings which have been closed due to the insufficient nature of the assets;[31] (Annexe B notes the following: winding up by or subject to the supervision of the court as well as bankruptcy and sequestration. The administration of the insolvent estate of a deceased person by an administrator or judicial factor is no longer mentioned, although creditors' voluntary winding up is now included, subject to confirmation being obtained from court.)

(2) 'court' to mean any judicial or other competent body who may open insolvency proceedings;[32] (This is taken to include any person, body or authority empowered by national law to open proceedings or make decisions in the course of proceedings. The requirement for exclusive control by a court was omitted so as to allow for proceedings like the creditors' voluntary winding up.)[33]

(3) 'judgment' to mean any decision by a body which results in the opening of proceedings or the appointment of a liquidator;[34]

(4) 'the time of the opening of proceedings' to mean the moment at which a judgment opening proceedings becomes effective, whether this may be appealed or not;[35]

(5) 'the member state in which assets are situated' to include three situations:[36]

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29 Article 2(b).
30 See the Virgos and Schmit Report [49(d)].
31 Article 2(c).
32 Article 2(d).
33 See the Virgos and Schmit Report [52 and 66].
34 Article 2(e).
35 Article 2(f). This concept is akin to that of the opening judgment (jugement d'ouverture) in French law. The concept is one of some importance because of the further references that are made to it, see in this connexion the Virgos and Schmit Report [68].

(a) in respect of tangible property, the member state where the property is situated;
(b) with reference to property rights and ownership subject to registration in a public register, the member state where a public register is kept; and
(c) as far as claims are concerned, the member state where the person required to meet these has his main interests; and

(This definition is considered important insofar as a number of rights continue to exist independently of and are not affected by proceedings taking place. These rights contained in Articles 5, rights in rem, and 7, retention of title, are considered to be particularly important in the context of raising business finance and interference with them harmful to the capacity of business to contract debt and provide security. In this regard, the Regulation merely articulates traditional private international rules for the determination of the locus of these assets.)[37]

(6) 'establishment,' defined to mean a place where the debtor has carried out economic activity.[38] The definition requires that the economic activity reflect an element of permanence and consist of the marriage of labour and capital, including goods. (The use of the establishment as the basis for jurisdiction was considered to be the minimum acceptable to most states, given that many member states also had rules allowing for the mere presence of assets to ground jurisdiction.)[39]

With respect to the definition of court above, a recital that appeared in the Preamble, despite having no antecedents in the legislative proposal or subsequent debate, relates to the nature of control over proceedings. Explicit in the recital is recognition of the variety of procedures that exist within the Union. It provides that the Regulation will cover proceedings even where these have not been commenced following the intervention of a judicial authority. The term 'court' is consequently to be given a wide meaning to include any party entitled in domestic law to open insolvency proceedings through the use of formalities expressly provided for by law. This wording seems to exclude private law recovery measures resulting from a deed or agreement between debtor and creditor to that effect and is consistent with the position taken not to include receivership-like measures within the scope of the predecessor Convention. Clarifying the definition further, the recital states that the proceedings must have legal recognition and effect in

36 Article 2(g).
37 See the Virgos and Schmit Report [69].
38 Article 2(h).
39 See the Virgos and Schmit Report [7]0. This was the case with both France (assets as evidence of business taking place) and England and Wales (assets subject to benefit for local creditors)

the state of opening and consist of proceedings of a collective nature entailing the partial or total divestment of the debtor.[40]

The Extent of the Regulation

Despite the intended wide scope, the Regulation acknowledges that widely differing laws apply across member states in relation to property. In practice, this makes it almost impossible to introduce insolvency proceedings with universal scope covering the totality of a debtor's assets in member states because of the difficulty in securing homogeneous treatment of assets. Drawing a line between the extreme positions of universality and territoriality, the Regulation recognises that strict application of the law of any member state where proceedings are opened to these assets would lead to insuperable problems and likely conflicts. The example cited in support of the framework the Regulation will introduce is that of security interests. This differs from the terminology cited in the original proposal that looked to preservation measures over assets in support of claims as an example of legal distinctions between legal systems. The distinction to be made with regard to select groups of creditors, principally those with preferential claims, remains of fundamental importance. For that reason, in situations of particular conflict, these will be managed by special references to the relevant governing law. This will be the case of certain significant rights and legal relationships, rights in rem and contracts of employment being cited as examples. The Regulation acknowledges the continuing competing principles and the attractiveness of territoriality by permitting the opening of domestic proceedings with coverage limited to locally situated assets alongside other principal proceedings with universal scope.[41] The benefits heralded by the Regulation are chiefly to enable creditors to avoid over-centralisation of insolvency proceedings to their detriment by being able to rely on a locally created instrument evidencing rights. Despite the potential for fragmentation, the original draft Regulation stated that mandatory rules of co-ordination for all proceedings would avoid the tendency to over-centralisation of proceedings. The fact of proceedings being dealt with in such a manner is felt to impede co-operation measures becoming successful. This concern is not seemingly replicated in the final text with co-ordination being more modest in nature.[42]

40 Recital no. 10.
41 Recital no. 11.
42 Draft Recital no. 12. See Hanisch, '"Universality" versus Secondary Bankruptcy: A European Debate' (1993) 2 IIR 151.

A Jurisdictional Issues

The question of the jurisdiction to be exercised by courts in insolvency is one that has bedevilled all previous attempts at securing international co-operation. It may be that this reflects the importance of insolvency as a subject matter for governments involved in economic planning or that courts have held different views of precise extent of their jurisdiction with respect to debtors and assets within their control. It is notable that rules on jurisdiction exist in almost every treaty setting out how co-operation is to be achieved in cross-border insolvencies, whether this jurisdiction is termed direct, in that the convention sets rules our, or indirect, in that the rules may be deduced from the paradigm it offers, particularly where it also has rules on recognition and the allocation of responsibilities and duties in the insolvency context. Of particular interest, the jurisdiction paradigm is of course at the root of deciding which courts may use which laws and rules and how the interests in insolvency are to be promoted and protected.

(i) The Primary Jurisdiction

As a basic rule, insolvency proceedings may be opened in the member state where the debtor has the centre of his main interests.[43] Insolvency proceedings opened in this jurisdiction are deemed to have universal scope and encompass all the debtor's assets. Further clarification of the extent of the effect was originally intended in the draft proposals to include the use of the words 'on a world-wide basis, affecting all creditors, wherever they may be located.' This definition would offer more certainty of the precise scope of the Regulation but seemingly would offend states with a particular territorial ambition. That may be the reason the words were omitted. An amendment to also include a qualification on the extent of the powers, provided they did not affect the basis of separate legal personality, was not adopted in the final version. This last amendment may be closely connected with the perceived differences in doctrinal approaches between those states practising the real seat doctrine and those adhering to the state of incorporation philosophy. Protection of the diversity of interests to be found in proceedings is provided for by allowing the maintenance of secondary proceedings in parallel, limiting the qualification to those states where an establishment is to be found and their impact to assets within the jurisdiction. The need for unity within the Community receives a mention with a justification for maintaining the territorial dichotomy deriving from the availability of mandatory rules of co-ordination.[44]

This definition for the main qualification for opening proceedings, that of a 'centre of main interests' underwent some evolution during consideration of the proposals. This definition, which features in most of the previous proposals, aims at

43 Article 3(1).
44 Recital no. 12.

reconciling the civil law test for jurisdiction based on the real seat rule and the common-law presumption of incorporation or residence determining jurisdiction. It thus would depend from jurisdiction to jurisdiction on a number of different factors being found. Part of the definition in the proposals looked to find that the debtor is in regular and close contact with a place of business or a jurisdiction where there is tangible proof of a concentration of business interests or assets and the creditor evidences familiarity with the jurisdiction.[45] The European Parliament sought to justify the creation of a more appropriate definition by looking to the fact that the term was not generally recognised. It also sought to place this definition, which looked to the place where a debtor has main commercial interests and carries out economic activities, thus maintaining a close connection with that jurisdiction, within the body of the text in a modified Article 2(i). The final version states very simply that the centre should correspond to that place where the debtor conducts the administration of his interests on a regular basis. For that reason, this place and thus the competent jurisdiction, would be ascertainable by third parties.[46] The existence of a registered office is a presumption in favour of exercising jurisdiction in the case of a company and legal person, although the text does not offer a solution to the problem of associated or related companies, where the criterion of jurisdiction must be established for each separate legal entity.[47] This framework is intended to afford third parties the opportunity to ascertain the locus where the debtor is domiciled for the purposes of exercising jurisdiction, given that the application of the laws of a particular member state is a matter of interest to the creditors as it follows that insolvency and the measurement of risk of trading with particular debtors form part of the context in which trading relationships are conducted.[48]

The Regulation also goes on to explicitly state that it not to apply where the centre is physically located outside the Community.[49] This default rule in the Regulation leads to the use of rules of private international law to identify the state that has the appropriate competence to open proceedings. If this is within the Community, that country will have jurisdiction. Domestic law is then used to determine where internally those proceedings will be heard. This will provide for the situation of member states, where the country is divided into separate judicial districts and allowing for determination of the appropriate court.[50] The importance of having a primary jurisdiction identified in this way is to allow an appropriate court to begin

45 Former Recital no. 13. See also section 42 of the Civil Jurisdiction and Judgments Act 1982 for rules determining domicil for companies for Brussels Convention purposes.

46 Recital no. 13.

47 See the Virgos and Schmit Report at paragraph 76.

48 Ibid. [75].

49 Recital no. 14.

50 Recital no. 15. There is a question of what mechanism applies to countries, such as the United Kingdom, where separate legal systems may apply within its borders, unless explicit recognition is given to this fact by that state, as for example in the *Civil Jurisdiction and Judgments Act 1982*.

taking necessary measures for the preservation of assets. The Regulation states that it enables the court having jurisdiction to open main insolvency proceedings to order provisional and protective measures from the time that a request is made to commence proceedings. It deems these powers important in order to guarantee the effectiveness of the insolvency proceedings, principally by avoiding the dissipation and fraudulent disposal of assets. The Regulation allows for two options in this context. The first is to give the court ordinarily competent under the basic test the right to order provisional protective measures covering assets situated outside the jurisdiction of that court which will themselves be enforced in accordance with later Regulation provisions. The second is to give an official appointed, often on an ad hoc or temporary basis, prior to the opening of main insolvency proceedings, the facility to apply for preservation measures in other jurisdictions where a separate establishment belonging to the debtor is to be found. A separate qualification, which linked the facility to a desire by the liquidator to open proceedings in these jurisdictions, has been relaxed.[51]

(ii) The Secondary Jurisdiction

In order to control the proliferation of proceedings, secondary jurisdiction to hear cases is qualified by limiting occasions when independent territorial proceedings may be opened. Jurisdiction is to be exercised by a court in whose area a debtor has an establishment or assets, although the effect of this type of proceedings are limited to assets situated within the jurisdiction.[52] The Regulation provides for the maintenance of simultaneous proceedings in many member states, though secondary proceedings are generally limited to winding up proceedings.[53] This limitation in practice would have the benefit of preventing territorial proceedings operating in order to further a localised grab-rule without some form of supervision or control. There are two specific instances where secondary proceedings are envisaged: first, where proceedings are for the benefit of local creditors or creditors of a local establishment and, second, where main proceedings cannot be opened for any reason under the law of the member state where the debtor has the centre of his main interests. Secondary proceedings may also occur in time before main proceedings where the latter cannot be initiated because of a legal impediment or because a creditor in the same member state initiates proceedings over a debt acquired or dispute arising in that member state. Only in this instance is there an exception in the text allowing these 'independent territorial proceedings' to use the format of either rescue or liquidation proceedings.[54]

The Regulation states that the reason for placing these restrictions on independent proceedings is in order to limit proceedings to only what is absolutely

51 Recital no. 16.
52 Article 3(2).
53 Article 3(3).
54 Article 3(4).

necessary, but this will also have the advantage of concentrating assets for distribution rather than dissipating these on fees and costs. The final version of the proposals makes explicit the rule that the existence of main proceedings, once opened, results in all other territorial proceedings being converted to secondary proceedings.[55] The final version also states that, following the opening of main proceedings, the right to request further proceedings in any state where the debtor has an establishment is not restricted in any way. The liquidator in main proceedings as well as any person empowered under the domestic law of that state may apply for the opening of proceedings.[56] The difficulty with such qualifications, however, is that they may be generously interpreted in order not to deny a creditor legitimate redress or recovery against assets that are conveniently situated. Nevertheless, a localised grab rule is avoided by requiring dividends to be credited if a claim is made in other proceedings. What is more problematic may be the second qualification, where proceedings can not be opened in a primary jurisdiction, perhaps because of a legal impediment related to the status of the debtor. If in this case assets are insufficient to meet the demand from local creditors, an effective remedy could not be obtained if assets in the principal jurisdiction are not subject to recovery for the benefit of these creditors. A further exception to the limit on the proliferation of proceedings consists of an exception in favour of a liquidator in primary proceedings to request the opening of secondary proceedings for the efficient administration of assets belonging to the estate. This could arise where the debtor's estate is too complex to administer as a unit or where differences in the legal systems concerned may cause difficulties for orders given by the court in main proceedings to have proper effect on the assets where located.[57]

B The Co-ordination of Proceedings in Parallel

The co-ordination of proceedings occurring in parallel is stated by the Regulation as a must for the efficient realisation of assets and subsequent distribution to creditors. The main pre-condition for achieving proper co-ordination of proceedings relates to the duty on all liquidators to co-operate closely. In particular, this is to be effected through regular contact for the purpose of exchanging any relevant information relating to the conduct and progress of proceedings as well as keeping other liquidators properly apprised of important steps taken as a result of proceedings. The requirement for co-ordination does not exclude the pre-eminence enjoyed by the liquidator acting in the context of primary proceedings. This pre-eminence is ensured by giving the liquidator powers to intervene in secondary proceedings, including applying for the opening of such proceedings, proposing a

55 Recital no. 17.
56 Recital no. 18.
57 Recital no. 19. An example could be the situation of real property in jurisdictions that require special authority to evidence a transfer, e.g. an order of court effecting a change on the register or notarisation.

restructuring plan or composition or applying for suspension of the process by which assets in secondary proceedings are realised.[58]

(i) Co-Ordinating Proceedings

Secondary proceedings may in fact be opened at any time in the courts of a member state in which the debtor has assets or a business establishment. However, these proceedings are limited to those covered in Annexe B, which include proceedings of a winding up nature.[59] The law applicable to these proceedings will be that of the host member state.[60] The liquidator from the main jurisdiction is specifically entitled to request the opening of secondary proceedings, subject to a limitation where certain acts may only be effected by the debtor.[61] Any other person or authority permitted this right by the member state in which secondary proceedings are sought may also seek to have proceedings opened. Amendments by the European Parliament to the proposals sought to subordinate this right to either the consent of the liquidator first being obtained or a requirement for diligent notification of the liquidator following the taking of steps provided the identity of the liquidator was known. None of these amendments appeared in the final version.[62] In any event, any request that is put forward may be made subject to adequate security for costs being furnished, where this is authorised in domestic law.[63] Mutual assistance between the personnel managing the main and secondary insolvencies is provided for in the Regulation by three methods. First, there is authorisation for the mutual communication of information; second, there is a duty on liquidators in all proceedings to co-operate; and, thirdly, there is authority afforded to the liquidator in main proceedings to submit proposals for the use of assets in secondary proceedings.[64]

Liquidators may also resubmit claims in other jurisdictions, subject to the interest of other creditors being maintained. This may be exercised by objecting to the readmission of the claim, as well as to the right of a creditor to be able to withdraw his application.[65] Liquidators may attend in other proceedings on the basis as any creditor and have access to the same information.[66] The liquidator in main proceedings is also entitled to request a stay in secondary proceedings if the interests of creditors in this jurisdiction are adequately protected.[67] A court may

58 Recital no. 20. This will depend on courts rigidly adhering to Regulation rules allowing, subject to evidence being provided, for automatic recognition of a liquidator's appointment.
59 Article 27.
60 Article 28.
61 Article 29(a).
62 Article 29(b).
63 Article 30.
64 Article 31(1)-(3).
65 Article 32(2).
66 Article 32(3).
67 Article 33(1).

also lift a stay at the request of the liquidator or, where the measure no longer appears justified, of its own motion or at the request of a creditor or liquidator in secondary proceedings.[68] The liquidator is also empowered to propose measures ending secondary proceedings, such as a rescue plan, composition or other arrangement, where the law applicable to secondary proceedings permits this. Closure of secondary proceedings may occur subject to the agreement of the liquidator in main proceedings. In the absence of agreement, a court may still wind up secondary proceedings where the interests of creditors in main proceedings will not be affected.[69] Stays or discharge of debt suggested in the context of secondary proceedings do not have any effect on assets not covered by those proceedings unless creditors with an interest in those assets consent.[70] Nevertheless, whilst a stay is in operation, measures ending secondary proceedings are not subject to any approval or vote as only the liquidator or debtor, with the approval of the liquidator, may propose such measures.[71] The transfer of surpluses for the benefit of creditors in main proceedings is also provided for in the Regulation.[72] A temporary administrator, appointed for the purpose of main proceedings, is also empowered to seek preservation orders over debtor's assets in another member state.[73] Where main proceedings, defined as proceedings initiated under the jurisdiction of Article 3(1), are opened later in time than other proceedings, Articles 31 to 35 apply as regards the proceedings first in time. Thus, the application of the provisions on the communication of information, the exercise of creditors' rights, stays, requests for the end of proceedings and the transfer of surpluses will all depend on a particular need being shown.[74] In addition, the liquidator may request the transformation of these proceedings into any other mentioned in Annexe A if he considers it to be in the interest of the main proceedings.[75]

(ii) The Position of Creditors

Creditors receive explicit mention in the Regulation, confirming their central status to the success of any rescue arrangements. Information is felt to be the key to ensuring their active participation. As a preliminary point however, the pari passu principle is stressed in the Regulation as enjoying pre-eminence. All creditors, wherever domiciled in the Community, have the right to assert their individual claims in any of the insolvency proceedings that may be pending in relation to their debtor.[76] All creditors situated in other member states also have

68 Article 33(2).
69 Article 34(1).
70 Article 34(2).
71 Article 34(3).
72 Article 35.
73 Article 38.
74 Article 36.
75 Article 37.
76 Article 32(1).

the right to lodge their claims in writing in any main proceedings.[77] These provisions are of particular benefit to tax authorities and social insurance institutions, which may extend their reach across national boundaries, and is an important departure from the practice in many jurisdictions with regard to the (non-) recognition of foreign penal and revenue laws.[78] In practice, despite the notice requirements, only diligent creditors will be able to take advantage of these provisions and there well may be a cost-element prohibiting smaller creditors from participating in more than local proceedings. Nevertheless, in order to ensure equal treatment of creditors, there is an attempt to co-ordinate overall distribution of proceeds by requiring creditors to account for dividends received in other proceedings. Under this arrangement, the Regulation states that creditors may only participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.[79] Furthermore, the liquidator may also require a creditor to repay into a central fund any sum obtained as a result of enforcement measures in another country, subject to any rights in rem and clauses reserving title.[80]

In relation to how creditors may assert their rights, the Regulation has quite an extensive set of rules covering information. The court of any member state in which proceedings are taking place must inform any known creditors resident in other member states.[81] The notice which informs creditors must include details on how claims may be proved, in particular whether secured creditors are required to prove their claims, by indicating the body to whom claims should be addressed and the relevant time limits and penalties for non-observance.[82] The language in which the notice is drafted must be the or one of the official languages of that member state, though it must bear a heading inscribed 'invitation to lodge a claim' and 'time limits to be observed' in all the official languages of the European Community.[83] A creditor's claim must be proved in writing, to which must be appended any supporting documents. The claim must state the nature of the claim, the date on which the claim arose and the amount of the claim. In addition, any security, together with a list of the assets this covers, or reservation of title in respect of goods must be specifically mentioned.[84] Creditors, however, may use the language of the member state in which they are resident to state their claim, though this must bear a heading inscribed 'lodgement of claim' in all the official

77 Article 39.
78 For the position in the United Kingdom, see *Government of India v Taylor* [1955] AC 491.
79 Article 20(2) and Recital no. 21. The first draft proposals also spoke of a consolidated proportion survey to be established for the Community, which may be interpreted as imposing a requirement for courts to ensure a tally of distributions in parallel proceedings is kept.
80 Article 20(1).
81 Article 40(1).
82 Article 40(2).
83 Article 42(1).
84 Article 41.

languages of the European Community. Creditors should also be aware translation into an official language may be required.[85]

C Recognition Rules

It may be argued that proper recognition rules are more significant than arrangements for the exercise of jurisdiction or co-ordination, once jurisdiction is obtained. The Regulation provides for immediate recognition of judgments relating to the opening, conduct and discharge of insolvency proceedings within the scope of the Regulation and, more importantly, recognition of judgments that are handed down on matters directly connected with such insolvency proceedings. This is particularly cogent given the possible extension of the remit of the court hearing insolvency proceedings to providing for other appropriate relief, one example being civil and criminal penalties for directors of insolvent debtor companies.[86] The objection raised by some commentators relates to the control a jurisdiction in which recognition is sought can exercise over the original judgment, in effect because the judgment is repatriated and given the same effect as one produced by the court of recognition. The Regulation establishes a principle of automatic recognition, meaning that the effects attributed by the judgment or order to the proceedings by the law of the member state in which the proceedings were opened extend to all other member states. It postulates that recognition of judgments delivered by the courts of the member states must be based on the principle of mutual trust. This theory has acceptance in the United Kingdom, where it is referred to as the comity principle, although lately courts have also begun to refer to a doctrine of obligation. It may be noted that grounds for non-recognition have been reduced to the minimum necessary, chiefly on grounds of public policy and protection of personal freedom.[87] The mutual trust principle is also the basis on which any dispute between the courts of two member states is to be resolved where both courts claim competence to open principal proceedings. Pre-eminence is given to the decision of the first court to open proceedings, which is to be recognised in other member states without those member states having the power to scrutinise the court's decision.[88]

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85 Article 42(2).

86 For an example, see Gruber, 'L'action en comblement de passif et l'Article 1, alinéa 2 de la Convention de Bruxelles du 27 septembre' 1968, PA 1995.52.4 and the case of *Krombach v Bamberski* (C-7/98) [2000] ECR I-1935 on public policy defences in the context of enforcement proceedings seeking to recover civil damages awarded during a criminal trial.

87 The Brussels Convention rules on refusal of recognition are also stated as being of potential application.

88 Recital no. 22. This may differ somewhat from the position in Article 21 of the Brussels Convention, which gives pre-eminence to the court first seized, but subjects this to the test of whether the jurisdiction is subsequently established.

(i) Courts and Liquidators

The framework set out in the Regulation provides that judgments in insolvency proceedings are recognised in other countries without further formality, even when secondary proceedings have been opened. This also applies where proceedings against the debtor would fail because of the debtor's status or capacity.[89] Recognition of proceedings opened on the basis of a registered office or presence of the debtor's main interests within the jurisdiction does not preclude secondary proceedings in respect of other business premises or jurisdiction founded on the basis of the presence of assets within the territory of another member state.[90] A judgment is recognised with no further formalities being required so long as the member state within which recognition is sought has not opened proceedings based on the presence of an establishment or other assets under Article 3(2).[91] Jurisdiction under this article may not be challenged in other member states and the principle extends to judgments that may not necessarily be final in nature but are subject to appeal as long as the judgment itself is effective in the state where proceedings are opened.[92] Any restriction of creditors' rights may only have effect where creditors have assented to the restriction that is to apply to assets situated in another member state.[93]

A liquidator appointed in main proceedings opened by virtue of Article 3(1) may exercise any powers available to him by the legislation of that country in any other member state where he wishes to recover assets, provided that no proceedings, defined to include any preservation measures,[94] have been instituted under the jurisdiction contained in Article 3(2). The liquidator may, in particular, remove the assets of the debtor, subject to any third party rights in rem and reservation of title clauses.[95] A liquidator appointed under Article 3(2) proceedings may reclaim any goods moved out of that member state after the institution of proceedings as well as conduct any action to set aside in the interest of creditors.[96] All liquidators are required to comply with the rules of the member state in which they wish to operate especially with regard to the procedures for realising assets. Liquidators may not exercise any coercive powers or make decisions of a judicial character in these member states.[97] The appointment of a liquidator must be evidenced by a certified copy of the judgment appointing him or any other certificate issued by the court with jurisdiction in his case. Although this document may need translation

89 Article 16(1).
90 Article 16(2).
91 Article 17(1).
92 See the Virgos and Schmit Report [147].
93 Article 17(2).
94 This concept is akin to mesures conservatoires, an interlocutory order similar to a hybrid Mareva and Anton Piller order.
95 Article 18(1).
96 Article 18(2).
97 Article 18(3).

into the official language of the member state in which he wishes to act, it does not require any other formality for recognition.[98]

(ii) Publication and Registration of Judgments

The existence of the decision opening proceedings with regard to any debtor and its content must be notified in other member states. This is a mandatory requirement for the principal liquidator to fulfil. For business considerations, it may also, where there is an establishment in the member state concerned, be the subject of a ruling making notification compulsory. Prior notification is not, however, felt to be a pre-condition for recognition of foreign proceedings.[99] This may not sit easily with the provision on protection of third parties also contained in the Regulation in situations where these parties are unaware of proceedings. As mentioned below, this provision deems persons acting in good faith effecting payment on account of any transaction with the debtor, where this payment should have been made to the liquidator, to have been discharged from any further obligation in this respect.[100] In particular, the judgment opening insolvency proceedings and the judgment or order appointing the liquidator are to be subject to publicity. The publication must mention the basis for jurisdiction, whether exercised under Article 3(1) or Article 3(2).[101] Where publication assists in the establishment of legal certainty, a member state may require mandatory publication in the interests of the creditors.[102] Similar rules apply to notices of judgments handed down in proceedings to be marked on any public register in another member state.[103] A member state may also require mandatory registration.[104] The costs of publication and registration are imputable as costs of proceedings.[105] The rules relating to publication are important in the context of acts performed for the debtor's benefit where the benefit should have gone to the liquidator. If the person providing the performance was unaware of the existence of proceedings, this is considered to discharge him from further obligations.[106] Publication is deemed to put all persons on notice, unless proof is provided to the contrary, of the existence of proceedings.[107] Judgments later in the insolvency process given by the same court or any other court concerning its course and closure shall also be recognised without further formality according to the

98 Article 19.
99 Recital no. 29. This may be contrasted with the position in Article 20, para 2 of the Brussels Convention on minimum standards of notice making it a pre-requisite in most cases.
100 Recital no. 30.
101 Article 21(1).
102 Article 21(2)
103 Article 22(1).
104 Article 22(2).
105 Article 23.
106 Article 24(1).
107 Article 24(2).

provisions of Articles 31 to 51 of the Brussels Convention.[108] Various options were in fact canvassed for the recognition scheme for later judgments, the final choice being to use the simplified exéquatur system under the Brussels Convention.[109] If the judgment is not directly connected with the insolvency proceedings, enforcement will be a matter for the Brussels Convention as a whole, subject to any defences and exceptions contained in that convention.[110] The question of whether a judgment is in fact related is a thorny one, given the Article 1(2) exception and the case law of the European Court of Justice.[111] The schematic of the text is designed so as to avoid cases falling in between the Regulation and the Brussels Convention.[112] Nevertheless, the Regulation provides for exceptions to the rule on general recognition based on two grounds: infringement of postal secrecy and limitation of personal freedom.[113] Equally, public policy is a ground for refusal of recognition.[114]

D Conflict of Laws

The choice of a law or laws to govern the insolvency procedure is one of extreme importance. It rests in part on the allocation of a jurisdiction, a feature of the first part of the Regulation, but also on the private international law rules inherent in the legal systems of member states. These rules decide the primacy of rules where these rules and others come into conflict and the extent to which other systems of rules will be recognised and given effect within the host jurisdiction. The specification of a choice of law system is seen as a necessary adjunct to the jurisdiction paradigm and for that reason forms a necessary element of any conflict resolution process in an insolvency text. The Regulation chooses to effect the division of application of rules by the use of a default rule, that of the member state which has primacy in the opening of proceedings, subject to necessary exceptions, of which there is a long list in the body of the Regulation, in the case of certain assets, transactions and categories of participants.

(i) The Default Rule

As an adjunct to the jurisdiction and recognition rules, the Regulation sets out particular rules of uniform application in conflict of laws situations replacing, insofar as these are also of application to the subject matter, equivalent national rules of private international law for the matters covered by it. The intention is to provide that the law of the member state where proceedings are first opened should apply to the subject matter of the dispute. With the exception of certain

108 Article 25(1).
109 See the Virgos and Schmit Report [192].
110 Article 25(2).
111 *Gourdain v Nadler* (C-133/78) [1979] ECR 733; [1979] 3 CMLR 180.
112 See the exhaustive discussion in the Virgos and Schmit Report [194-197].
113 Article 25(3).
114 Article 26.

limited instances, this lex concursus principle is stated as valid both for principal and secondary proceedings and will determine the effects of insolvency proceedings, whether of a procedural or substantive nature, on the participants and legal relationships they have contracted or acquired. The same principle also governs all the conditions for the opening, conduct and closure of the insolvency proceedings.[115] It is the law of the jurisdiction where proceedings are opened that will govern many of the substantive issues during proceedings.[116] These issues are defined to include the identity and capacity of debtors against whom proceedings may be brought, the ascertainment of assets which will form part of the estate as well as the treatment of assets the debtor acquires or inherits after insolvency proceedings begin. Furthermore, the powers of the debtor and liquidator during proceedings, the rules governing the invoking of set-offs, the effects of insolvency on current contracts to which the debtor is a party and on other proceedings are all governed by the substantive law of the main jurisdiction. An exception is made as far as the effect of other proceedings is concerned for pending lawsuits, which fall to be judged according to the laws of the place they were instituted.[117] The rules governing the admission of claims, what these may consist of and the special position of debts arising after the institution of insolvency proceedings, as well as proof and verification of all these claims are all matters for the substantive law of the main jurisdiction. These constitutes matters most of interest to creditors in proceedings. It is of course necessary for the substantive law to govern the distribution of proceeds, the ranking of claims, the question of subsidiary rights remaining after the end of insolvency proceedings as well as questions of costs.[118] The substantive law also governs the legal nature of acts detrimental to creditors' interests, which may be declared void, voidable or unenforceable at the instance of the court. This in particular may cover the situation of transactions occurring after the institution of insolvency proceedings as well as those occurring during the relation-back period.[119]

(ii) The Case for Special Rules

The inclusion of exceptions by way of special rules in the Regulation is a reflection of the recognition that, in spite of the principle of automatic recognition of insolvency proceedings to which the law of the opening state normally applies, there will be cases in which strict adherence to this principle will interfere with the rules under which transactions are carried out in other member states. There is a sentiment that legitimate expectations by parties arising in some situations and the overriding requirement for certainty of transactions in other member states will need to be met by providing for some exceptions from the general

115 Recital no. 23.
116 Article 4(1).
117 Article 4(2)(a)-(f).
118 Article 4(2)(g)-(l).
119 Article 4(2)(m). This paragraph is the subject of frequent reference throughout the Regulation.

rule.[120] The exceptions relate to particular rights, recognised as being useful in the insolvency context, to particular categories of transactions and to particular classes of participants in insolvency.

(a) Insolvency Organisation, Assets and Security

In the context of insolvency organisation, national rules are preserved in relation to issues governing acts detrimental to creditors, where these acts take place in another member state than where proceedings are opened. These rules, which are predominantly transactional avoidance rules, are deemed necessary in the context of insolvency most often so as to swell, through claw-back and recovery procedures, the assets available for the purposes of rescue or distributions to creditors. However, if the rules of that member state permit challenges to these acts, the main jurisdiction may also decide on the void nature, voidability or unenforceability of that act.[121] The effect of insolvency proceedings on other litigation, however, is a matter exclusively for the member state where the lawsuit is pending.[122] The preservation of domestic law rules in the Regulation applies most often to cases of assets often found underlying security. For example, real property is expressly governed by the law of the member state in which the property is situated.[123] Furthermore, the law which applies to rights over immovable property, a ship or aircraft that are subject to registration is that of the member state under whose authority the register is maintained.[124] The disposal by the debtor of any property of these types is governed by the same laws.[125] Disputes over Community patents or trademarks or other rights, similarly protected, may only be raised in main proceedings.[126] In relation to security, two forms of particular rights recognised as meriting exceptions from the general rule relate to rights in rem and the exercise of rights of set off, both considered as useful guarantees for the granting of credit. These rights are especially protected because they permit credit to be obtained in conditions not otherwise possible without the presence of a guarantee, even though the effect of this type of security is to insulate holders against the risks of insolvency affecting the debtor and interference by third parties with contractual arrangements governing the supply of credit. Balz states that the issue of security was particularly sensitive during negotiations leading up to the adoption of the predecessor convention. An unconditional application of the law of the state where proceedings were opened would not have been possible because of differences in the treatment of the rights of security holders, with some systems, the example being given of the French, interfering substantially with these rights for the purpose of securing

120 Recital no. 24.
121 Article 13.
122 Article 15.
123 Article 8.
124 Article 11.
125 Article 14.
126 Article 12.

rehabilitation of the debtor. Others are stated, however, as leaving security substantially unaffected and concentrate on rescue aspects that reschedule unsecured and non-priority debt only. For that reason, although allowing the law of the opening state to govern would assist the overall administration of the estate, complexity would be created by the potential application of two insolvency laws in tandem to the same assets subject to the security.[127]

A right in rem, its basis, validity and extent, are to be determined by the law where the right in rem is situate and will not be affected by the opening of insolvency proceedings. The proprietor of the right in rem can therefore continue to assert his right to separate settlement of his claim, which may rely on separation of the security on which the right depends from other assets. In order to more effectively deal with rights in rem, the liquidator may request the opening of secondary insolvency proceedings in the jurisdiction concerned if the debtor has an establishment there or deal with the security under preservation orders made in the context of principal insolvency proceedings. Proceeds from the sale of the security are first used to settle with the creditor, whose right in rem it is, before any surplus reverts to the asset fund.[128] By way of extending these principles, the Regulation states that insolvency proceedings may not affect third party rights in rem in respect of any property situated in another member state at the time insolvency proceedings are initiated.[129] Third party rights in rem are defined to include rights in relation to the disposal of assets under liens and mortgages, the right guaranteed by an assignment of security, the right to restitution from possessors or users in cases where use is contrary to the owner's wishes as well as rights in rem to the beneficial use of assets.[130] As defined, these rights also include rights in relation to specified assets as well as collections of assets, as would be the case with the creation of a floating charge. Virgos, co-author of a commentary that accompanied the 1995 predecessor convention, has stated explicitly that floating charges of the type recognised in Great Britain and Ireland would qualify as rights in rem.[131] Also included as rights in rem are any rights defined by Article 5(3) as being subject to registration on a public register for purposes of being enforceable against other parties. An exception is, however, provided, in cases where an action is brought on a point covered by Article 4(2)(m) relating to void, voidable and unenforceable rights. The proprietor of the right in rem can therefore continue to assert his right to separate settlement of his claim, which may rely on separation of the security on which the right depends from other assets. In order to more effectively deal with rights in rem, the liquidator may request the opening of secondary insolvency proceedings in the jurisdiction concerned if the debtor has an

127 See Balz, op. cit. (fn. 8 above) at 509.
128 Recital no. 25.
129 Article 5(1).
130 Article 5(2).
131 See the Virgos and Schmit Report [104]; Virgos, 'The 1995 European Community Convention on Insolvency Proceedings: An Insider's View', Forum Internationale No. 25, The Hague, March 1998 [40].

establishment there or deal with the security under preservation orders made in the context of principal insolvency proceedings. Proceeds from the sale of the security are first used to settle with the creditor, whose right in rem it is, before any surplus reverts to the asset fund.

The situation of quasi-security is also covered with set-offs being expressly held as unaffected by the opening of insolvency proceedings where these set-offs would be recognised under the law applicable to the debtor's claim against the creditor.[132] As a result, a creditor normally entitled to exercise this type of claim will be permitted to do so, even if it is not available under the law of the jurisdiction where proceedings are opened. The Regulation states that set off acquires as a result the status of a guarantee on which the creditor concerned can rely when the claim eventually arises.[133] In cases of reservation of title, the text provides that insolvency proceedings may not affect the rights of a seller where the assets are situated at the time proceedings are opened in another member state.[134] Where it is the seller who is the subject of insolvency proceedings, the text also states that this fact may not be used as grounds for the resolution of the contract and does not prevent the acquisition of title by the purchaser where the good are in another member state.[135] Both set-offs and reservation of title clauses are also subject to the exception made for void, voidable and unenforceable acts.[136]

(b) Particular Transactions

An example of particular protection for transaction frameworks occurs with the exception made in the Regulation for payment systems and financial markets. This exception applies particularly to position-closing agreements and netting agreements that are to be found in such transaction systems. It also applies to the sale of securities and to guarantees provided in the case of such transactions, in particular to those governed by rules on settlement finality in payment and securities settlement systems. These rules are expressed as taking precedence over the general rules in the Regulation as, for such transactions, the law that should be material is that applicable to the payment system or market on which those transactions occur. The insertion of this provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in payment and set-off systems or by regulated financial markets in the member states from being arbitrarily upset in the case of insolvency of a party to that transaction. In the language of the directive concerned, this is to allow for those rights of holders of collateral security to be insulated from the effects of the insolvency of the provider of the security.[137] In this context also, the preservation

132 Article 6(1).
133 Recital no. 26.
134 Article 7(1).
135 Article 7(2).
136 Articles 6(2) and 7(3).
137 Recital no. 27.

of domestic law rules also applies to securities, whose regulation is to be determined by the law governing the financial market issuing the securities.[138]

(c) Particular Participants

As an example of protection of a particular class of participants in insolvency, the case for protection of employees and employment itself may be taken. This is felt to be a priority with special rules in the Regulation and is a logical progression from earlier work within the Community relating to protection of employees during take-overs and availability of state guarantee schemes in the event of insolvency of the employer.[139] In order to achieve this protection, the effects of insolvency proceedings on the continuation or termination of employment as well as on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement.[140] The applicable law will be determined in accordance with general rules on conflict of law. This represents a shift from the Brussels Convention 1968 and Rome Convention 1980 rules based on the habitual place of work rule or, an alternative in the former convention, the place of engagement rule.[141] Any other insolvency-related questions, including whether the employees' claims are protected by prior acquired rights and what status these rights have, will be determined by the law of the member state where proceedings are opened. It seems that the convenience for employees of having mandatory convention protection which could not be ousted by contractual provisions, is substituted by reliance on contract related rules with pre-eminence ultimately being given to the principal jurisdiction for questions of priority.

Final Provisions

The Regulation will only apply to proceedings opened after its entry into force.[142] Any act performed by a debtor prior to the Regulation entering into force will continue to be governed by the law applicable to that transaction at that moment in time.[143] The Regulation will affect other bilateral and multilateral conventions between member states, including the Nordic Council (Copenhagen) Convention

138 Article 9(1)-(2).

139 Directive 77/187/EEC of 14 February 1977 OJ 1977 L61/26 (safeguarding of employees' rights in the event of transfers of undertakings) and Directive 80/987/EEC of 20 October 1980 OJ 1980 L283/1 (protection of employees in the event of the insolvency of their employer). See also *Everson and T.J. Barrass v Secretary of State for Trade and Industry and Bell Lines Ltd* (C-198/98) [1999] ECR I-8903, dealing with Article 3 of the latter Directive.

140 Article 10.

141 Recital no. 28. See Article 5(1) of the Brussels Convention 1968 and Article 6 of the Rome Convention 1980.

142 Article 47.

143 Article 43.

1933 and the Council of Europe Convention previously mentioned. The Regulation is, however, expressed so as not to apply in any member state to the extent it would be incompatible with external obligations entered into before the Regulation comes into force. Following the agreement of the United Kingdom to opt into the Regulation paradigm, existing arrangements entered into by the United Kingdom with other Commonwealth countries are not to be affected by the Regulation.[144] The Regulation will apply to those types of domestic insolvency proceedings mentioned in its Annexes. Specific authority is reserved to allow for amendments to the Annexes in the regulation to allow for subsequent changes to domestic law in any of the member States. This will ensure that the Regulation remains up to date and its co-ordination element continues to be active as member states introduce changes to their domestic systems.[145] The Regulation also includes provision for periodic review, which is timetabled to occur by 1 June 2012 and thereafter at five-year intervals.[146] The Regulation is also accompanied by two declarations. The first, by Portugal, is in relation to Article 37 on the conversion of territorial proceedings opened prior to main proceedings into winding up proceedings. It is stated that this provision will be interpreted by the courts in Portugal so as not to exclude judicial appreciation of the state of proceedings under Article 36 or any potential application of the public policy exception.[147] A further declaration by the Community institution in charge of the instrument, the Council, expressly provides that the Regulation is not intended to prevent member states from concluding agreements with other states on the same subject matter as the Regulation, provided the other agreement does not affect the operation of the Regulation.[148]

Critique of the Regulation

The Regulation begins with a handicap compared to its predecessor Convention in that the choice of its fundamental legal basis in Title IV of the EC Treaty has consequences for the uniform application of the Regulation because of opt-out provisions secured by three member states, Denmark, Ireland and the United Kingdom, during negotiations for the Amsterdam Treaty. The United Kingdom and Ireland have in fact exercised their opportunity to opt in. Because of the complex nature of the opt-out provisions, it is unclear whether Denmark may in fact opt in and this is likely to remain a problem with future instruments under this title. A report in fact states that the Danish Government will in fact enact in domestic law legislation mirroring the terms of the Regulation so as to enable its

144 Article 44.
145 Recital no. 31.
146 Article 46.
147 Declaration by Portugal concerning the application of Articles 26 and 37 of Council Regulation (EC) no. 1346/2000 of 29 May 2000 (2000/C 183/01) OJ 2000 C183/1.
148 Declaration by the Council (2000/C 183/02) OJ 2000 C183/1.

courts to regulate cross-border insolvencies affecting Danish interests.[149] There are further consequences because the use of this form of instrument allows for references, with view to uniform interpretation of texts, to the European Court of Justice only from domestic courts from which there is no internal appeal. Because of this, the extent of judicial intervention by the European Court of Justice is a matter of concern, especially because of the need to ensure uniformity in an area in which there has previously been little consensus. On the positive side, however, it may be argued that the choice of Regulation structure avoids too much discretion by national courts in deciding how to implement its provisions. In any event, the European Court of Justice retains the ability, through the reference procedure, to have a say in this field, a factor that may lead to harmonising efforts and closer approximation of the laws of member states in respect of cross-border practice falling within the remit of the Regulation.

The Regulation also inherits the gaps in its predecessor, the 1995 text, including the lack of support for private law enforcement measures in aid of creditors' rights, such as receivership.[150] In this context, the credentials of the Regulation as a promoter of opportunities for corporate rescue remain somewhat ambiguous.[151] The absence of specific provision in the Regulation to cover the needs of the partnership structure has also been noted.[152] The existence of the group structure, although provided for in other Community instruments, is also not recognised, with insolvencies of group companies falling to be managed by the courts of countries where individual companies are based or carry out business. Furthermore, it is also of considerable interest that the Preamble states explicitly and, almost repetitively, material that is to be found in the body of the Regulation. There are views that this represents a serious defect, in that the material would be more appropriate for an Explanatory Memorandum of the type that accompanied the 1995 draft. In fact, whether or not this document will be updated so as to include developments since 1995 remains an open question. Although the text reveals some shortcomings, there has already been general commentary in the legal journals welcoming the advent of the Regulation.[153] Transposing a particular comment with respect to the 1995 draft, Fletcher commends the choice of law provisions as providing 'a practical and realistic solution' to the issue of

149 Report by Professor Ian Fletcher at a session of the Clive Schmitthoff Symposium on 1-3 June 2000 in London.

150 See Dahan, 'La Floating Charge: Reconnaissance en France d'une sûreté anglaise' (1996) 2 JDI 381. This may not now matter given proposals in the United Kingdom to restrict the availability of administrative receivership contained in the Enterprise Bill 2002.

151 See Johnson, '*The European Union Convention on Insolvency Proceedings: A Critique of the Convention's Corporate Rescue Paradigm*' (1996) 5 IIR 80

152 See Rajak, '*Bankruptcy Agreement in the EU – Eventually*' (2000) 16 IL&P 125 (editorial).

153 See Steiner, '*European Cross-Border Insolvency in the Millennium*' (1999) 15 IL&P 207.

regulating conflicts.[154] In fact, Fletcher makes the point that the Convention pursues a pragmatic course reserving the possibility of territorial insolvencies for strictly defined instances, which although potentially inefficient in terms of administration of assets, still presents an acceptable compromise.[155] There remain, nevertheless, a number of points raised in relation to the treatment of specific categories of debtors, consumers and employees being some of the more obvious,[156] which look at differences in treatment between this Regulation and other European Community measures. The position of creditors outside the European Community is a moot point, especially the instance of debtors without a centre of main interests within any of the member states, the fear being that territorial proceedings based on exorbitant jurisdiction or jurisdiction based on the presence of assets or agents of the traditional type would be relied on to channel the administration of insolvency proceedings and assets into local courts.[157]

Summary

The progress towards the enactment of the final Regulation has seen a number of different drafts and periodic versions as well as the interventions of two separate supranational bodies, the European Community and the Council of Europe. The work on all these drafts used the talents of many jurists and advisors of international stature. Their contributions shaped developments at the various stages of the drafts, especially given that the histories of the legal systems of the member states meant that each draft had to attempt the reconciliation of diverse and occasionally opposing principles and philosophies. To a great extent, the sterling work of the contributors to the text managed largely to overcome these problems. Nevertheless, the resulting texts were often rejected by the member states, especially in the European Community, for reasons more political in nature. Despite this, the parallel work of both institutions in the late 1980s and early 1990s, may be said to have created a climate of competition and eventual acceptance of the need for an instrument in Europe. This ultimately resulted in the enactment of the Regulation nearly four decades after work first began, perhaps creating a record for a project with an international dimension. Despite apparent shortcomings in the text and some notable omissions from its remit, the advent of the Regulation has met with a welcome and relief that an instrument now exists for the management within the Single Market for the insolvency of undertakings.

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154 See Fletcher, *'The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions'* (1998) 33 TILJ 119 at 139.

155 Ibid 123-124.

156 See Bogdan, op. cit. (fn. 24 above).

157 See Schollmeyer, 'The New European Convention on International Insolvency' (1997) <www.law.emory.edu/BDJ/volumes/spring97/SCHOLL.html>.

It may be said with some conviction that the Regulation is an important part of the long history of international insolvency initiatives. As the most important of all the initiatives thus far, the Regulation may be seen as especially deserving of success, perhaps because of the very fate of its predecessors, the European Insolvency Convention 1995 and the related Council of Europe Convention 1990. Together with related initiatives dealing with cross-border insolvencies in the financial and insurance sectors and other likely proposals, the Regulation is said to mark the beginnings of a comprehensive European legal order in insolvency law. Although this legal order is still at an early stage of development, it is likely that the lead given by the Regulation and its provisions will influence many of the future proposals in this field. It is already notable that both the UNCITRAL Model Law on Cross-Border Insolvency 1997 and the OHADA Uniform Law on insolvency 1998 are inspired by the jurisdictional paradigm represented by the Regulation. In this regard, the success of the Regulation would do much to inspire further efforts aimed at securing cross-border trade and allow creditors to properly estimate the risks inherent in commercial transactions.

In any event, the Regulation was designed to offer a partial solution to the conflict inherent in cases involving fact situations that might engender dispute between courts with very different philosophies of insolvency, not just those involving the administration of insolvency process but in the taking and exercise of jurisdiction. In this regard, the paradigm that results from the Regulation represents a compromise for all concerned, one that has been bitterly fought over for nearly forty years and through a considerable number of drafts. Although elements of the framework may contain some resonance for courts in both common and civil law jurisdictions, the overall framework will require the courts of all jurisdictions to lay aside existing views and preconceptions, arising for the most part from entrenchment of domestic practices over a considerable period of time. Despite reaction to the Regulation from the member states themselves proving varied, a clear conclusion overall from the perspective of many of the European Union's member states is certainly that there are benefits of having the Regulation framework as an added instrument to deal with the seemingly unstoppable phenomenon of international insolvencies. Given the consideration shown by many of these countries to the adoption of the UNCITRAL proposals, this may result in the introduction of a comprehensive system for dealing with insolvencies affecting commercial arrangements between European states and their principal trading partners, a measure that will undoubtedly have a beneficial impact on the regulation of cross-border insolvency.