



## **Explanatory Report to the European Convention on Certain International Aspects of Bankruptcy**

Istanbul, 5.VI.1990

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I . The European Convention on Certain International Aspects of Bankruptcy was drawn up within the Council of Europe by a committee of experts subordinate to the European Committee on Legal Co-operation (CDCJ).

The Convention was opened for signature by the member states of the Council of Europe on 5 June 1990.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.

### **General introduction**

1. This Convention contains rules for bankruptcy cases having international aspects on account of the situation of the debtor's assets or of his creditors being spread over different States.

2. When a debtor declared bankrupt in one state has assets in one or more other states, the Convention offers two possibilities:

- it allows liquidators to exercise, in countries other than the one in which the bankruptcy was opened, certain powers conferred upon them as liquidators (Chapter II);

- it allows and organises the opening of secondary bankruptcies (Chapter III).

The use of one or the other of the possibilities can depend on the amount of the assets situated in the other State. The impact of the measures to be taken can indeed be different depending on whether it concerns a bank account or an establishment of the debtor.

A liquidator who has started the necessary formalities for exercising his powers under Chapter II may have to face a request of a creditor for the opening of a secondary or other local bankruptcy or may, himself, consider at a later stage that the number of creditors or the amount of the assets justify a local bankruptcy and, as a result, the opening of a secondary bankruptcy.

3. When a debtor declared bankrupt has creditors in other States, the Convention allows these creditors to introduce their claims in this State and, therefore, it provides for the information of the creditors and lodgement of their claims in a simplified form (Chapter IV).

4. The Convention is not intended to supersede other multilateral (for example, the Nordic Convention) or bilateral agreements to which a State Party to this Convention is or becomes a Party. Any conflict between conventions shall be solved according to the rules of public international law.

## Chapter I – General provisions

### Article 1 – Scope of the Convention

5. Article 1, paragraph 1, defines the Convention's scope *ratione materiae*.

The term used to describe the proceedings to which the Convention applies may vary from one Party to another. This article therefore specifies the features of the said proceedings.

For the purpose of the application of Chapters II or III, proceedings must fulfil four conditions as follows:

- they must be collective insolvency proceedings;
- they must entail the appointment of a liquidator;
- they must be able to lead to a liquidation of assets, even if during the course of the proceedings other solutions may be adopted;
- they must entail a disinvestment of the debtor.

However, in order to fall within the scope of Chapter IV of the Convention, it is not necessary for the proceedings to entail a liquidation of assets and the disinvestment of the debtor (see Article 29).

6. The concept of insolvency varies according to the national laws of the Parties. It is understood that the primary goal of an insolvency proceeding within the meaning of the Convention is the optimal use of a debtor's assets in the interest of the creditors. Proceedings which disregard the financial interests of the creditors and which aim primarily at goals of economic policy such as the maintenance of employment or industrial structure are not insolvency proceedings within the meaning of the Convention. From this it follows, *a fortiori*, that proceedings which aim at the recovery of firms at a time when they experience financial difficulties but have not yet reached the stage of insolvency, do not fall within the scope of the Convention.

7. Having regard to the criteria set out in Article 1, the member States of the Council of Europe have listed in Appendix A the procedures to which the Convention applies.

The list contained in Appendix A may be modified, either by adding or deleting information, by States at the time of the deposit of their instrument of ratification if the other Parties to the Convention and the signatory States do not object within three months (see Article 36, paragraph 2).

Although Article 1 describes the scope of the Convention as applying to proceedings «which may entail the liquidation of the assets», the list adopted at the time of the conclusion of the Convention is confined to proceedings which have as their main aim the liquidation of the assets of an insolvent debtor.

The authors of the Convention agreed that, from the time of the conclusion of the Convention and its entry into force, it would cover proceedings which entail a liquidation of assets only if no other, more satisfactory solution can be reached, such as an agreement between creditors, a recovery plan, etc.

8. The Convention does not apply to insurance companies or credit institutions, such as banks, which are subject to proceedings which could fall within the field of application of the Convention. In fact, these institutions, which generally require administrative authorisation, are governed in case of insolvency by specific procedures which in some countries are of an administrative nature and may, at least as regards the stage preceding the bankruptcy, deviate from the generally applicable collective procedures for the avoidance of bankruptcy.

As the bankruptcy of the assets of a deceased person has not been excluded, it falls within the scope of this Convention.

9. Paragraph 2 defines the object of the Convention:

- the exercise in other Parties of certain powers of the liquidator concerning the administration of the debtors' assets;
- the opening of secondary bankruptcies in other Parties;
- the information to be given to creditors residing in other Parties and the lodgement of their claims.

These three points are dealt with respectively in Chapter II (Articles 6 to 15), Chapter III (Articles 16 to 28) and also in Chapter IV (Articles 29 to 32).

10. Chapter I contains general provisions.

Chapter II applies to the proceedings in which a liquidator is appointed and deals with the conditions in which he may exercise his powers.

Chapter III provides for the possibility of opening a secondary bankruptcy for the sole reason that a bankruptcy has been opened in another Party against the same debtor. It deals in particular with the conditions for opening, advertisement and closure, the methods of payment of creditors and the transfer of the surplus of the assets.

The scope of Chapter IV is different from that of Chapters II and III. By virtue of their contents, Chapters I and II may only apply to proceedings which are based on the insolvency of the debtor and in the course of which a liquidator is appointed to administer or dispose of the assets of the debtor. The proceedings which fall within the scope of Chapter IV, however, do not necessarily require the disinvestment of the debtor or the liquidation of his assets.

11. Article 1 also defines in paragraph 3, sub-paragraph a, the term «liquidator», stipulating that the latter must be a physical person or an institution appointed by a judicial or other competent authority, whose function is to administer or to liquidate the assets of the bankrupt or to supervise the management of the activities of the debtor.

These liquidators are listed in Appendix B to the Convention.

The supervisory function relates especially to proceedings such as judicial administration, preventive composition with creditors, compulsory administration or voluntary arrangements.

12. Finally paragraph 3, sub-paragraph b, of this article defines the word «disinvestment» as meaning the placing of the powers of the debtor over his assets in their entirety in the hands of a liquidator to the exclusion of any other person.

13. As regards the scope of the words «bankruptcy» and liquidator it is pointed out that the Convention is confined to proceedings which are based upon insolvency. The proceedings regarded as «bankruptcy» and the persons regarded as «liquidators» are specified in Appendices A and B, subject to what is explained in paragraph 7 of this Report.

## **Article 2 – Proof of the appointment of the «liquidator»**

14. Article 2 lays down the evidence to be provided by the liquidator in order to establish his appointment as liquidator abroad.

15. The presentation of a certified copy of the decision appointing the liquidator or the presentation of an official appointment certificate from the court which opened the bankruptcy is sufficient to establish his appointment in that capacity.

The aim is not to execute the decision appointing the liquidator but to establish evidence that the person appointed in the certificate of appointment is the liquidator in a particular bankruptcy proceeding opened in another Party.

16. The decision or the official certificate is exempt from legalisation or other similar formality such as the certificate under the Hague Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents.

17. By decision appointing the liquidator is also understood the decision which, as in Switzerland, refers the matter to a body responsible for conducting the activities of the bankrupt.

18. In order to meet the requirements of certain Parties, provision is made for the possibility of requiring a translation into the official language or one of the official languages of the requested Party where the liquidator seeks to operate. This translation must be carried out according to the usual provisions applicable to the translation of official documents.

19. Recognition of the liquidator's standing and powers is automatic only as long as these are not challenged (see Article 12).

## **Article 3 – Opening of a bankruptcy**

20. The liquidator cannot act in another Party unless the decision to open the bankruptcy fulfils the conditions laid down in Article 3.

Where there is a dispute and when the court is required to decide on the objection made under Article 12, it may ascertain, in particular, whether the decision opening the bankruptcy fulfils these conditions.

21. These are the three conditions:

a. The decision to open the bankruptcy must be given by a court or other authority having competence under Article 4. These are indirect rules concerning territorial competence (see below).

b. The decision to open the bankruptcy must be effective in the Party where the bankruptcy is opened. The decision does not need to have the *res judicata* effect but must be enforceable or at least provisionally effective in the Party where the bankruptcy is opened, even if it is subject to appeal. It was considered undesirable to require finality of the decision in order to prevent transfers of property by the bankrupt or abrupt seizure by certain creditors in the period between the passing of a decision and its becoming final.

c. The decision to open the bankruptcy must not be manifestly contrary to the public policy of the Party in which the liquidator is to exercise his powers or in the territory of which the opening of a secondary bankruptcy has been requested. The term «manifestly» – commonly employed in international instruments – has been used in order to restrict the meaning of the concept of public policy.

#### **Article 4 – Indirect international competence**

22. Article 4 contains rules governing indirect competence in international relations for courts and competent authorities.

23. The words «competent authority» are to be construed broadly and may include the meeting at which a company resolves to wind itself up, the creditors' meetings or an administrative authority.

The majority of company liquidations in the United Kingdom are creditors' voluntary liquidations at the instance of creditors. These are opened by an insolvent company passing a resolution to wind itself up at a meeting of its members; this is followed by a meeting of creditors at which the liquidator is appointed. The winding up and appointment of a liquidator are therefore the result of these two meetings which, taken together, are the «competent authority».

24. The rules on indirect competence apply, not to the court or authority in the State of the main bankruptcy, but to the court or authority in the state where the main bankruptcy is relied upon, the latter's court or authority being required to recognise the former's competence.

25. The Convention thus does not compel States to incorporate into their domestic law the rules in Article 4 governing competence. Where, however, a court or authority is asked to apply the Convention, it is not bound to do so unless the bankruptcy decision relied on was given by a court or authority which was competent for the purposes of Article 4.

26. Since it is indirect competence that is involved, the court or authority of a Party will be competent if it meets the requirements of paragraph 1, even if the court, in accordance with that Party's law, based its competence on other criteria such as official place of residence.

27. The basic principle is the competence of the court in the Party where the bankrupt has the centre of his main interest. In the case of corporate entities, the registered office is presumed to be the centre of main interests. This presumption may be refuted.

This might be the case where it is proved that the entity's management decisions are taken elsewhere.

28. Paragraph 1 is concerned with the case where the bankrupt person or entity has the centre of his main interest in a Party.

29. Paragraph 2, on the other hand, considers that jurisdiction lies with the courts or other authorities of the Party in whose territory the debtor has an establishment in two cases.

The first case (a) is that in which the centre of the debtor's main interests is located in the territory of a State which is not a party and has an establishment in the territory of a Party. In this case, the courts or other authorities of the latter Party shall be competent.

30. The second case (b) is different because it depends on the legal system of the Party in whose territory the centre of the debtor's main interests is located. If, under the law of this Party, the debtor's bankruptcy cannot be declared owing to his particular status (non-trader, small contractor, craftsman, farmer, etc.), the courts or other authorities of a Party in whose territory the debtor has an establishment shall be competent.

31. The application of paragraph 2 (sub-paragraphs a and b) may result in a conflict of jurisdiction where there are several establishments.

The second sub-paragraph of paragraph 2 accordingly establishes an order of competence based on priority in time.

32. It is necessary to insist on the fact that the purpose of Article 4 differs from the draft conventions based on the unity of the bankruptcy and which enact direct jurisdiction for the opening of a bankruptcy or other collective procedure.

33. The Council of Europe Convention confines itself to establishing indirect jurisdiction as explained in paragraph 24.

34. The provisions of Article 4 also apply in the event of bankruptcy involving the estate of a deceased person, provided the conditions laid down in this article were fulfilled as regards the debtor at the time of death.

#### **Article 5 – Partial payment of the creditors**

35. Article 5 seeks to ensure respect for the principle of equality between creditors in cases where, under this Convention, they have occasion to lodge claims in separate liquidation proceedings. A creditor who has obtained partial payment in one bankruptcy may not receive payment in another bankruptcy against the same debtor until the other creditors in this other bankruptcy have obtained a payment equal to the dividend which the creditor has already received. In practice, this rule means that a creditor may lodge his claim to its full extent in a plurality of bankruptcies. The amount of the claim in one bankruptcy is not reduced by the fact that the creditor has obtained a dividend in another bankruptcy so long as he has not received 100% of his claim. The rule comes into play only at the moment when the assets of the debtor are distributed to the creditors. The effect of the rule is the same no matter whether the advance dividend paid to a creditor results from a liquidation or from a composition or whether the proceeding, in which the earlier dividend is taken into account, is closed upon a liquidation or from a composition or a similar arrangement. The claim in question shall be taken into account when calculating the dividend in the other Party under Article 5.

As stated in the opening phrase of the article, the rule is not to operate to the detriment of creditors who have an in rem security. This is in consonance with the policy of the Convention as laid down in Article 14, paragraph 2, sub-paragraph a.

This rule does not bar a creditor from participating in a dividend in one bankruptcy on an equal footing with all other creditors unless he has effectively received a dividend in another bankruptcy. The mere fact that he is entitled to receive a dividend in another bankruptcy does not entitle a court or liquidator to withhold a payment from the creditor.

#### **Chapter II – Exercise of certain powers of the liquidator**

36. This chapter concerns the exercise of the powers of the liquidator in a Party other than the one in which the bankruptcy is opened.

37. The application of this chapter does not involve recognition of the foreign decision opening the bankruptcy.

38. The Convention is confined to allowing a foreign liquidator to exercise his powers in a country other than the one where the bankruptcy has been opened. These powers enable him to administer and to dispose of the debtor's estate in the conditions specified in the following articles.

#### **Article 6 – Scope of Chapter II**

39. Chapter II applies not only to the procedures specified in Article 1, paragraph 1, but also to procedures for temporarily protecting the debtor's assets before the formal opening of a bankruptcy proceeding.

Procedures of the latter kind, which exist in the Federal Republic of Germany, for example, consist of temporary protective measures by a court or a competent authority pending a decision on the application for bankruptcy proceedings. The court involved may appoint a receiver *pendente lite* to administer the debtor's assets in order both to prevent the debtor disposing of them and to protect them from proceedings brought by individual creditors.

#### **Article 7 – Capacity of the liquidator**

40. Subject to the conditions laid down in Article 3, the liquidator may exercise his powers on the sole presentation of the document mentioned in Article 2, it being understood that only the specific powers granted to him in his capacity as liquidator may be exercised. The character and extent of these powers are determined by the bankruptcy law of the Party where the bankruptcy proceeding was opened. These powers may vary from one Party to another. It is important to emphasise that the powers of the liquidator are not necessarily identical with the powers of a liquidator appointed in a hypothetical bankruptcy opened in the Party where the liquidator seeks to exercise his powers. His powers are of course restricted in accordance with Article 10 (see paragraphs 52, 53 and 54).

#### **Article 8 – Measures of protection and preservation of the assets**

41. The committee was of the opinion that, from the moment of his nomination, the liquidator should be entitled to take or cause to be taken the measures necessary for the protection or the preservation of the debtor's assets. These measures are urgent and of a conservative or provisional nature.

He may, in particular, affix seals, register mortgages, sell perishable movable, seize estate, take possession of property deeds, drafts, ledgers and registers belonging to the bankrupt person, recover debts due, manage the debtor's activities, etc. and other measures foreseen by the national law.

42. These measures must be taken in conformity with the national law of the Party where the liquidator seeks to act; it follows that, accordingly, the liquidator will be entitled to take the measures himself or cause them to be taken by the competent authority in the state where he is acting. The purpose of this provision is to avoid the debtor making certain assets disappear or certain well-informed creditors being paid to the detriment of the creditors as a whole. These measures may be taken by the liquidator without waiting for the elapse of the two-month period mentioned in Article 11 nor for the opening of a secondary bankruptcy under Article 16.

43. The measures taken under Article 8 do not, however, allow the liquidator to move the assets out of the territory of the Party where he is acting.

These measures may possibly be frustrated by creditors' action under the terms of Article 11, paragraph 2, or be challenged under the terms of Article 12.

#### **Article 9 – Advertisement of the liquidator's powers**

44. Article 9 contains provisions intended for informing creditors and any other interested persons residing on the territory of the Party where the liquidator seeks to act. This information will be carried out by publishing the decision appointing the liquidator or the official certificate of his appointment, as mentioned in Article 2.

45. This advertisement will be made according to the rules existing on the territory of the Party where the liquidator seeks to act. These rules will determine whether an authorisation is required for such an advertisement, what authority is competent to authorise it, where and in what way the advertisement shall be made. The advertisement will be in accordance with the rules and customs of the Party where the liquidator seeks to act in order to be as efficient as possible.

46. The information will concern matters of interest to the creditors; it may accordingly cover the appointment of the liquidator, the powers he may exercise and the conditions governing the creditors' lodgement of their claims.

#### **Article 10 – Acts of administration, management and disposal of the debtor's assets**

47. The provisions of Chapter II allow the liquidator to take or to cause to be taken any acts of administration or disposal of property that are within his powers.

The Parties are left to interpret the two concepts and to distinguish between these two categories of acts. The content of these two concepts varies somewhat from one Party to another and it would appear to be difficult to harmonise them for the purposes of application of this Convention.

48. The recognition of the powers of the liquidator does not depend upon the nature of the moveable or immoveable property to be affected by the acts taken.

49. The powers which have been granted to the liquidator by the law of the Party in which the bankruptcy has been opened shall be exercised only over the assets of the debtor.

50. The liquidator may exercise his powers in another Party, without there being any need for a procedure of prior authorisation to execute a foreign decision to declare the bankruptcy.

51. However, he may only exercise his powers on certain conditions, that is:

- a. the liquidator must be appointed by a court or other authority with competence under Article 4;
- b. the liquidator must act within the limits of his powers;
- c. none of the obstacles mentioned, particularly under Article 14, should be found to bar the exercise of the liquidator's powers.

52. The powers in question are those powers which may be exercised by the liquidator in his capacity as liquidator and not those which he might exercise in some other capacity, for example as business manager.

53. The committee examined the question of whether the liquidator should also be authorised to receive the adjudicated bankrupt's mail from the postal authorities of other Parties. This was denied since the Convention does not oblige the Parties to recognise any suspension of mail.

It goes without saying that the liquidator, acting in a Party other than the one where the bankruptcy has been opened, remains subject to the provisions of public policy of this state. It follows that he is not authorised to move the assets whose removal is not allowed or is restricted for reasons of public policy; for example, the protection of national currency or financial markets or artistic and cultural heritage, the provision of basic public utilities and the protection of assets necessary for the bankrupt's personal use in his employment, business or vocation (the tools of a man's trade, for example) or for the basic domestic needs of the bankrupt or his family.



54. Under Article 10, paragraph 2, acts of administration, management and disposal are governed by the law of the Party in whose territory the debtor's assets are located. This should be applied as *lex fori* or in application of the rule *locus regit actum*, depending on the nature of the act that is taken.

#### **Article 11 – Conditions of exercise of the liquidator's powers**

55. A period of moratorium of two months starts from the day following the day of publication of the advertisement mentioned in Article 9; during this moratorium, the liquidator may not carry out any act of administration or disposal provided for in Article 10; he may only take the conservatory measures that he is empowered to take under Article 8. These measures are provisional by nature and can be regarded as acts taken in the interests of everyone, including the debtor. Most of these measures are acts which can, in most of the Parties, be carried out by any third person and do not require the status of liquidator.

56. There are several grounds for the moratorium: it may, for example, enable the liquidator's powers to be contested or a request for bankruptcy to be made in the Party where the assets are located etc.; it is therefore intended to safeguard the interests of the creditors.

57. The period of moratorium of two months is extended if, in the Party where the liquidator intends to act, requests for bankruptcy have been made. In such a case, the two-month delay is prolonged until the date of rejection of these requests. If they are not rejected, then Article 14, paragraph 1, applies.

58. The Convention enables the liquidator to make a request for bankruptcy in the Party where he intends to act.

Three situations may arise:

- if the Party in which the liquidator intends to act has made no reservation (Article 40) and is bound by Chapters II and III, the request may only apply to the opening of a secondary bankruptcy under Articles 16 and 28;
- if the Party in which the liquidator intends to act has made a reservation to the application of Chapter II (Article 40), the request may also only apply to a secondary bankruptcy under Articles 16 and 28;
- if the Party in which the liquidator intends to act has made a reservation to the application of Chapter III (Article 40), the request will apply to the opening of an ordinary local bankruptcy and Articles 16 and 28 will not apply.

The opening of the bankruptcy requested by the liquidator will be governed by the conditions provided by the law of the State where he is acting.

59. During the two-month period of moratorium, only some categories of creditors may commence or pursue individual legal action against the debtor's assets, namely:

- creditors who enjoy a right to preferential payment or would enjoy such a right in the event of a bankruptcy in the Party where the liquidator intends to exercise his powers;
- creditors who have a public law claim;
- creditors who have a claim arising from the operation of an establishment of the debtor;
- creditors who have a claim arising from employment in that Party.

60. A preferential creditor is any creditor with a preferential right, which he may exercise either in the event of individual enforcement measures or if a bankruptcy has been opened in the Party in which the liquidator intends to act.

61. The term «public law claim» is understood to mean claims arising from the public law of the Party in whose territory the liquidator intends to act.

62. In assessing the scope of Article 11, paragraph 2, account must be taken of the limitations also provided for under Article 14, paragraph 2.

Under the latter provision, the liquidator cannot at any time perform an act which is contrary to any security held by any person other than the debtor over land or other property established or recognised by the law of the Party in which the liquidator is acting.

It follows that a person holding in rem rights or a creditor holding security rights may also commence or pursue individual legal action during the two-month moratorium.

63. Individual legal actions include requests for interim measures, civil actions and executory measures.

64. The above-mentioned categories of creditors are likewise entitled to special treatment under Chapter III on secondary bankruptcies.

The committee of experts' intention was that those categories of creditors be favourably treated under the Convention.

65. At the end of the moratorium period, the liquidator alone is empowered to act, subject to the other provisions of the Convention.

The limitations placed on the exercise of the liquidator's powers may, however, be set aside in whole or in part as a result of the application of Article 15.

This last provision allows each Party to permit the liquidator to exercise wider powers than those laid down in the Convention and more specifically in Article 11. However, any creditor who, in accordance with Article 11, paragraph 2, has commenced individual legal action before the expiry of the two months' moratorium but has not completed such action may continue to pursue his claim in priority to the liquidator.

#### **Article 12 – Objections to the liquidator's powers**

66. Article 12, paragraph 1, lays down the procedure to be followed in the event of an objection to the exercise of the liquidator's powers, for whatever reason.

67. The committee did not intend to give the term «objection» a procedural character.

68. Such objections may be made by the debtor himself or by any interested party.

69. Two examples of situations where objections may be made.

The first hypothesis is that of a liquidator laying claim to a service provided by one of the bankrupt person's debtors, and either the debtor or the bankrupt person objects to this.

The second hypothesis is the case of an objection made in the course of an action undertaken by or against the liquidator, or an exception in the course of the proceedings.

70. In any case, the liquidator may ask the court to confirm that he exercises his powers within the limits thereof according to the law of bankruptcy of the Party where he was appointed and in conformity with the Convention.

71. It is left to the law of each Party to determine the relative or *erga omnes* authority of the confirmation of powers given by the court in the event of an objection that the liquidator is transgressing the limits of his powers or not exercising them in conformity with the Convention.

72. The committee expressed the wish that Parties regulate the procedure under Article 12 in the easiest way possible.

73. Article 12, paragraph 2, imposes the burden of proof regarding the extent of his powers on the liquidator.

For example, reference has been made to the question of whether the liquidator is authorised to make a disposal alone or whether he requires prior authorisation, without prejudice to the problem of the validity of the act which has been carried out.

### **Article 13 – Effects of discharge of payment and delivery of assets**

74. Article 13 concerns payment and delivery of assets into the hands of the liquidator and has the purpose of protecting anyone dealing with the liquidator from acts of third parties, or even of the bankrupt person when he is still able to receive these payments or deliveries.

75. The payer or deliverer to the liquidator is presumed to have acted in good faith if he made the payment or delivery after the advertisement or on presentation of the liquidator's certificate of appointment.

76. This provision does not concern other matters which could have an effect on the legal validity of the act.

77. Article 13 supposes that the liquidator has the power to demand or to receive delivery or payment.

78. Payment or delivery to the debtor after the advertisement referred to in Article 9 will not constitute a valid discharge unless the payer or deliverer proves that he did not have any knowledge of this advertisement.

This stipulation does not affect the right of the creditors referred to in Article 11, paragraph 2, to take individual legal action against the assets (property and rights) of the debtor during the two months' moratorium, or the debtor's right to require payment of his claims on third parties.

### **Article 14 – Limitations to the exercise of the liquidator's power**

79. Article 14 sets limits to the exercise of the liquidator's powers in the Party where he intends to exercise his powers, either in a general manner or for certain specific acts.

80. The former limits are set in paragraph 1 which precludes the exercise of the liquidator's powers if a bankruptcy, under domestic law or an international instrument, is opened or recognised in the Party where the liquidator is acting.

In specifying that the provision also applies in the event of recognition of foreign bankruptcy proceedings, the Convention allows any bilateral conventions or other international arrangements that the Parties may have entered into, particularly with states non-parties, to retain their full effect, if a bankruptcy was opened in one of those states and recognised in the Party in which the liquidator is acting.

81. The same applies to procedures which are not intended to open a bankruptcy but to prevent one and which involve the suspension of individual legal action of enforcement.

In fact, a number of countries, with the aim of protecting employment or for the benefit of creditors, have laid down rules to assist the recovery of ailing businesses through certain bankruptcy or other procedures. Such procedures, which have the effect of suspending bankruptcy under national law, will prevent the liquidator from exercising his powers.

82. This provision prevents the liquidator from carrying out any act, either after the opening of a bankruptcy or any preventive procedure in the Party where he wishes to act.

It follows from this that a liquidator having carried out acts in a Party other than the Party where the bankruptcy was opened, when no proceedings for bankruptcy or preventive procedures were commenced in this Party, could later be prevented from carrying out other acts as soon as bankruptcy or preventive bankruptcy proceedings are also opened in this Party.

83. While application of the first paragraph produces a general limitation preventing any action by the liquidator in that State, the second paragraph places limitations on the accomplishment of certain acts.

The limitations provided for under paragraph 2 are made in the interest of persons and creditors of the Party in which the liquidator is acting and in the interest of public order in that Party.

84. According to the terms of paragraph 2, sub-paragraph a, the rights of a liquidator acting in a Party other than that in which the bankruptcy was opened will be superseded by the rights of persons holding in rem rights on the estate of the bankrupt person and the rights of creditors having the guarantee of security rights attached to that same estate.

85. The Convention does not define the concept of «security over land or other property» which, consequently, will be interpreted according to the law of the Party in which the liquidator acts.

86. The use of the word «manifestly» in sub-paragraph b indicates that it refers to a limited concept of public policy.

87. If, contrary to the provisions under sub-paragraphs a and b, the liquidator violates the rights of a third person, the latter must be able to institute legal proceedings against the liquidator in the Party in which the estate is situated. Each Party should define the competent court.

88. This chapter does not affect the creditor's or the liquidator's right to make use of the rules laid down in Chapter III and to apply for a secondary bankruptcy in order to protect the creditors' rights by causing the opening of a collective procedure.

#### **Article 15 – Extension of the liquidator's powers**

89. The Convention provides only for a minimum standard of legal co-operation. A Party that recognises a bankruptcy opened by a competent court or authority in another Party and gives full effect to such a bankruptcy vis-à-vis the debtor, the latter's debtors and his creditors shall not be bound to abrogate or be barred from introducing rules that are more favourable to the general body of the creditors in the bankruptcy than the articles enumerated in the text. A Party would for example be free to recognise the liquidator's powers immediately on his appointment, that is, without prior advertisement and before expiry of the two-month period provided for in Article 11.

### Chapter III – Secondary bankruptcies

90. Chapter III contains rules allowing the opening of a secondary bankruptcy in a Party on the sole ground that a main bankruptcy has been opened against the same debtor by a court or a competent authority of another Party, and thus without it being necessary to prove the insolvency of the latter in this other Party.

91. Such a possibility is aimed to give full consideration to the local claims most worthy of being dealt with and to proceed to a fair liquidation of the assets at the local level, which would perhaps not always be the case if the foreign liquidator were authorised to transfer to the main bankruptcy all the bankrupt's assets located in another Party.

92. The secondary bankruptcy is designed as a system of compromise between, on the one hand, a complete procedure carried out in each state while being co-ordinated with the main bankruptcy and, on the other hand, a procedure which amounts, after the payment of the sole privileged creditors, to the transfer of the surplus of the assets to the main bankruptcy for the payment of all other creditors.

93. The Convention makes provisions for the payment, in the framework of the secondary bankruptcy, of the creditors who in the present social and political context appear to be important for the State, that is to say the creditors with a preferential right (privilege or security), public law creditors (treasury, social security) and the creditors having a link with the functioning or the activity of the debtors' establishment or with employment in the service of the debtor, in particular the workers.

94. Only after the payment of these creditors, appearing as the most important, will any surplus of the assets be transferred to the main bankruptcy.

95. In order to respect the specific character of the collective liquidation procedures in each Party, the Convention submits the secondary bankruptcies to the *lex fori* in bankruptcy matters, and makes an exception to this principle only when it appears to be necessary for the good implementation of the Convention.

96. The secondary bankruptcy can be opened not only on the request of the liquidator, but also on the initiative of any other natural or legal person qualified to request the opening of a bankruptcy according to the legislation in force in that country.

97. The secondary bankruptcy is characterised by a legal link with the main bankruptcy. It is this link that the authors of the Convention wished to emphasise in choosing the term «secondary» in preference to «satellite» or «parallel».

#### Article 16 – Secondary bankruptcy

98. This article states that a bankruptcy – called secondary – can be opened in any other Party by virtue of the fact alone that a decision opening a bankruptcy considered as a main bankruptcy has been taken in another Party where the debtor has the centre of his main interests (Article 4, paragraph 1).

It is not necessary to prove the local insolvency of the debtor. Two requirements must, however, be met before a bankruptcy can be opened as a secondary bankruptcy.

99. The decision opening the main bankruptcy must be effective in the Party where it was taken, which does not mean that it has to be a final decision, but the decision must have been taken by a court or a competent authority under Article 4, paragraph 1, and must entail the effects provided for by the law of that Party such as the disinvestment of the debtor, the transfer of the debtor's powers to the liquidator, the suspension of individual enforcement of certain claims and the commencement of the whole liquidation procedure.

100. For example, it follows that the new rules introduced in France by the Act of 25 January 1985 do not enable *redressement judiciaire* proceedings to be regarded as equivalent to a main bankruptcy. Such proceedings do not automatically entail disinvestment of the debtor, unlike the *liquidation judiciaire* provided for in the same Act.

101. In addition, the debtor must not have been declared bankrupt already and proceedings to avoid his bankruptcy must not have been commenced in the Party where the secondary bankruptcy is sought. Whether proceedings are bankruptcy-avoidance proceedings is to be judged from the law on avoidance of bankruptcy.

102. On the other hand, as is explained in Article 18, the opening of a secondary bankruptcy does not follow automatically from the existence of a main bankruptcy.

#### **Article 17 – International competence**

103. Since Article 4 contains provisions on indirect competence, Chapter III would, in the absence of a special provision, be inapplicable in Parties which base jurisdiction for bankruptcy exclusively on the debtor's domicile, principal place of business or the like. Article 17, therefore, establishes a minimum harmonised system of direct competence for the opening of secondary bankruptcies which is based on the presence either of an establishment or of assets of the debtor. This rule does not prejudice the application of national legislation providing for wider competence.

#### **Article 18 – Opening of the secondary bankruptcy**

104. This article specifies who can request the opening of the secondary bankruptcy and what must be produced for this purpose.

It is stated that, in order to rely on the existence of the main bankruptcy, the decision pertaining to it must be produced.

105. The right to petition for secondary bankruptcy proceedings rests with the liquidator of the main bankruptcy who may have an interest in adding to the assets of the main bankruptcy the proceeds of the liquidation carried out within the secondary bankruptcy.

This right also rests with persons or bodies that are entitled, under the national bankruptcy law, to request a bankruptcy proceeding. Parties cannot withhold the right to demand a secondary bankruptcy from persons who are entitled, under their national law, to demand the opening of a regular bankruptcy proceeding. Such persons or bodies may be:

- the debtor;
- the creditors (whether private or public);
- the public prosecutor's office;
- *ex-officio* parties (the court, for example), etc.

106. Without an actual petition from the above-mentioned persons or bodies, no secondary bankruptcy may be opened. That is to say, the opening of the secondary bankruptcy does not automatically follow on from the existence of a main bankruptcy in another Party.

### **Article 19 – Applicable law**

107. According to Article 19, the secondary bankruptcy shall be governed by the national bankruptcy law of the Party in which it is declared open, except as otherwise provided in the Convention.

108. The law applicable to the secondary bankruptcy determines who will incur the costs of it. Certain legislations make it the duty of the requesting party to bear the costs if the assets do not cover them; others require the deposit of a provision to cover the costs; these provisions will be applied as the case may be.

109. The law applicable to secondary bankruptcy is the *lex fori*. It is not possible to list all the matters settled under the national law, but the following may be mentioned by way of illustration:

- the local competence of the court;
- formalities;
- the effects of bankruptcy on current contracts;
- the reservation of title;
- procedure;
- rules of preference;
- costs;
- the bankrupt person's maintenance obligations;
- notices and publications;
- individual suits and enforcement procedures;
- the lodgement of claims;
- the opposability of decisions;
- the conditions of verification and acceptance of claims, be they preferential or unsecured;
- continuation of activity;
- appointment of assets, etc., in so far as they are covered by the national bankruptcy law.

110. The mere fact that the main bankruptcy exists constitutes a sufficient ground for requesting the opening of the secondary bankruptcy; accordingly, by virtue of the link between secondary bankruptcy and main bankruptcy, the Convention lays down certain rules, as for example mutual information of liquidators or transfer of assets remaining after payment of the creditors mentioned in Article 21.

### **Article 20 – Lodgement of claims**

111. This article provides that any claim may be lodged in the secondary bankruptcy. A copy of the declaration of all claims lodged must be transmitted to the liquidator of the main bankruptcy.

Such transmission constitutes a valid lodgement, subject to the formalities to be complied with in the other Party, for a claim to be validly lodged. If the law of the Party where the bankruptcy is opened lays down conditions or formalities regarding the lodgement of claims, the Convention does not exempt from such formalities or conditions. Since this article concerns only formalities, it is self-evident that, if the law of the Party where the main bankruptcy is opened does not permit a lodgement of claims of that type, such claims cannot be admitted for payment.

### **Article 21 – Payment of claims**

112. Article 21 indicates what claims are to be met, after verification or admission with the secondary bankruptcy, from the proceeds of the liquidation of assets. These claims are, for example:

- preferential claims;
- claims secured by land or property;
- public law claims such as fiscal claims, social law claims, administrative fines, penal fines'.
- claims arising from operations or activities of an establishment of the bankrupt in the Party where the secondary bankruptcy is opened;
- claims arising from employment of a person in the Party where the secondary bankruptcy is opened.

Claims other than those referred to in Article 21 will be met in the main bankruptcy from the assets thereof, to which might have been added, as provided in Article 22, any assets remaining from the secondary bankruptcy.

#### **Article 22 – Transfer of the remaining assets**

113. Under this article, the liquidator in the secondary bankruptcy is charged with the duty to effectuate the transfer of any assets remaining after the payments of the claims referred to in the preceding article.

114. The transfer is made not only in money but, as the case may be, also in goods.

115. By «transfer» the committee of experts means a purely administrative transaction in connection with the management of the bankruptcy.

#### **Article 23 – Claims arising after the opening of the main bankruptcy**

116. As the main bankruptcy proceedings will already have begun (how long they have been going on will vary) by the time the secondary bankruptcy is commenced, it is possible that claims lodged in the secondary bankruptcy will have arisen before it commenced but after commencement of the main bankruptcy. Such claims notified to the liquidator of the main bankruptcy under Article 20, and wholly or partly unmet under the secondary bankruptcy, cannot be excluded from the main bankruptcy on the sole ground of lateness. Article 23, paragraph 1, lays down a rule to that effect.

In the absence of a special provision, holders of such claims would not be entitled to participate in, and receive a dividend from, the main bankruptcy.

117. It was felt, however, that there were good grounds for a proviso that any payment of such claims be made solely from the assets remaining from the secondary bankruptcy.

#### **Article 24 – Equality of creditors**

118. This article confirms the principle of equality in the main bankruptcy between all creditors who seek payment out of the part of the assets transferred from the secondary bankruptcy. The privileges and securities in rem existing under the national law applicable to the main bankruptcy are thus no longer taken into consideration for the payments to be made from the proceeds of the secondary bankruptcy.

119. A distinction must accordingly be drawn between the assets in the main bankruptcy and assets remaining after payment of claims in the secondary bankruptcy or bankruptcies.



120. The assets in the main bankruptcy will be used to pay all claims other than those referred to in Article 23, paragraph 1. Payment of competing claims will comply with any grounds of preference established or recognised by the law governing the main bankruptcy.

121. Assets remaining after payment of claims in the secondary bankruptcy or bankruptcies will go to pay all claims, including those referred to in Article 23, paragraph 1, which are entitled to a dividend only on the assets remaining from the secondary bankruptcy in which they were originally lodged. Competing claims will be equally treated, regardless of any ground of preference.

122. The following examples illustrate how Articles 21 to 24 are to be applied.

*Hypothesis:*

Main bankruptcy (MB): assets: 100,000,000  
Secondary bankruptcy (SB): assets: 100,00,000  
Assets remaining from SB and transferred to MB (RAT): 1,000,000  
Amount of claim lodged: 1,000

123. *Case 1*

A The claim is lodged in the SB

B. It is an unsecured claim other than the claims dealt with in Article 2 1.

C. It is paid:

- out of the MB assets after any preferential claims;
- out of the RAT on an equal footing with other claims (proportionate shares).

124. *Case 2*

A. The claim is lodged in the SB.

B. It enjoys unrestricted preference.

C. It is paid:

- out of the SB assets and any part unmet is then paid;
- out of the MB assets, as a preferential claim if the preference is recognised under the MB, or as an unsecured claim if not recognised;
- no RAT (the SB assets were insufficient to pay the claim on them).

125. *Case 3*

A. The claim is lodged in the SB.

B. The first 500 of the claim is preferential.

C. The claim is paid:

- out of the SB assets, for the first 500, the remaining 500 being paid;
- out of the MB assets, as an unsecured claim;
- out of the RAT on an equal footing with other claims.

126. *Case 4*

A. The claim is lodged in the SB

B. It is a claim arising from the operation or activities of the enterprise.

C. It is paid:

- out of the SB assets, and any part unmet is then paid;
- out of the MB assets;
- no RAT (the SB assets were insufficient to pay the claims on them).

127. *Case 5*

A. The claim is lodged in the SB.

B. It is not one of the claims dealt with in Article 21 and arose after the commencement of the MB but before that of the SB.

C. It is paid:

- out of the RAT on an equal footing with other claims.

128. *Case 6*

A. The claim is lodged in the MB.

B. It is unsecured.

C. It is paid: out of the MB assets; out of the RAT on an equal footing with all other claims.

129. *Case 7*

A. The claim is lodged in the MB.

B. It is preferential.

C. It is paid: out of the MB assets according to rank; out of the RAT on an equal footing with other claims.

130. *Case 8*

- A. The claim is lodged in the MB.
- B. It is a public-law claim.
- C. It is paid:
  - out of the MB assets according to rank if preferential;
  - out of the RAT on an equal footing with other claims.

131. *Case 9*

- A. The claim is lodged in the MB and the SB.
- B. It is preferential in the MB and the SB.
- C. it is paid:
  - out of the SB assets according to rank;
  - out of the MB assets according to rank;
  - out of the RAT on an equal footing with other claims (Article 5 should avert double payment).

132. The examples are to be applied in conjunction with the rule in Article 5: a creditor who receives part-payment in the SB and to whom payment is due in the MB may not receive any payment in the MB as long as the dividend to the other creditors of the same rank according to the law governing the MB is lower than the dividend he has obtained. By «dividend» is meant the proportion of claim paid (for example 30% of the original claim).

133. The examples take no account of any composition in the SB. When such a composition is foreseen by Article 27, it can only affect creditors with a right to be paid in the secondary bankruptcy according to Article 21 ; to the extent that their claims are not met under the composition, the operation of Articles 5 and 24 is not affected.

134. Article 24 must be applied in accordance with the principles relating to the equality of creditors referred to in Article 5.

**Article 25 – Duty to communicate information**

135. The recognition of a legal link between the two bankruptcies naturally entails coordination of the respective procedures, which is impossible if the liquidator is not informed on how the other procedure is progressing. For this reason and on the basis of the principle that the liquidator of the main bankruptcy must have an overall view of assets and liabilities of the bankrupt, the authors of the Convention have made of this mutual information a positive rule participating in the efforts to guarantee the equality between creditors.

136. Examples of information to be exchanged could be:

- lodgements of claims;
- priorities and securities;
- assets;
- disputed or unsubstantiated claims;

- administration of the bankruptcy;
- composition proposals;
- schemes of apportionment of assets;
- continuation of the business;
- compositions;
- state of verification of claims;
- any relevant information concerning the closure of the proceedings.

#### **Article 26 – End of the secondary bankruptcy**

137. Because the secondary bankruptcy arises out of the main bankruptcy, it cannot be closed until the liquidator in the main bankruptcy has been consulted; he need not consent to closure, but the secondary bankruptcy proceedings cannot be terminated until his opinion has been sought and received, or a reasonable time has been given to him for communicating his opinion. The question of what is reasonable is evaluated in any given situation in the light of the facts of the case. This provision is necessary in order to respect the interest which the creditors in the main bankruptcy have in the outcome of the secondary bankruptcy.

138. If the main bankruptcy proceedings are annulled or otherwise discontinued, there is obviously no longer any reason for secondary bankruptcy proceedings. What now becomes of the secondary proceedings is governed by the relevant domestic law, which decides in particular whether they are converted into ordinary bankruptcy proceedings or are themselves terminated.

#### **Article 27 – Composition in the secondary bankruptcy**

139. Article 27 does not itself provide or require Parties to provide for the possibility of closing the secondary bankruptcy by a composition.

However, where national law provides for this possibility, Article 27 introduces the two following restrictive conditions:

- a. the national law of the secondary bankruptcy provides expressly for the possibility of a composition of secondary bankruptcies, which presumes that the secondary bankruptcy has been introduced in the national law as an institution; and
- b. a favourable opinion of the liquidator of the main bankruptcy has been given on the content of the composition, which seems to be logical because of the repercussions of such a composition on the assets of the main bankruptcy.

140. A rule has, however, been provided to guard against unjustified refusal of consent. Refusal of consent is to be disregarded where the composition in the secondary bankruptcy does not harm the creditors in the main bankruptcy.

This requirement is met in particular where assets remaining from the secondary bankruptcy and transferred to the main bankruptcy as a result of the composition are at least equal to the surplus assets which would have been transferred after payment of the creditors referred to in Article 21.

If this is the case, then the creditors in the main bankruptcy are financially unaffected by the composition.

141. Where no opinion is forthcoming from the liquidator, it may amount, after a reasonable time, to refusal of consent. Regarding the notion of reasonable time, see paragraph 137 above.

142. Compositions in secondary bankruptcies concern only creditors payable under that bankruptcy, namely the creditors referred to in Article 21. Only such creditors or some such creditors may be asked to vote on composition proposals according to the rules of law governing the secondary bankruptcy.

#### **Article 28 – Plurality of bankruptcies**

143. Article 28 states which bankruptcies come within Article 16, namely bankruptcies opened after the bankruptcy opened by a court or an authority having jurisdiction under Article 4, paragraph 1. Any bankruptcy opened after the main bankruptcy is therefore a second bankruptcy.

144. Bankruptcies opened before the main bankruptcy do not fall entirely outside the scope of Chapter III, however. The liquidator in the main bankruptcy may request the transfer of any assets remaining after payment of claims in that bankruptcy – and in particular he may request information on the progress of the proceedings.

#### **Chapter IV – Information of the creditors and lodgement of their claims**

145. Chapter IV seeks to avoid placing creditors who reside abroad in a less favourable situation than others.

146. To that end, creditors residing in other Parties must be informed of the opening of collective proceedings.

147. It has been noted that, in all member states of the Council of Europe, creditors residing in another member state generally have the right to lodge their claims in a foreign bankruptcy proceeding, subject to certain limitations justified by public policy.

148. This chapter is therefore concerned with two practical questions: the information of foreign creditors and certain rules on the lodgement of claims in view of the fact that formalities and language requirements differ from one country to another.

#### **Article 29 – Scope of Chapter IV**

149. This article extends the scope of Chapter IV to collective proceedings based on insolvency and which entail the nomination of a liquidator but, contrary to Article 1, paragraph 1, the disinvestment of the debtor is not necessary; neither is it necessary for the procedure to entail the liquidation of assets. Such proceedings are listed in Appendix, letter c.

150. Chapter IV is much wider in scope than Chapters II and III.

151. Chapter IV deals with procedures set in motion by the debtor's insolvency, which may lead to the realisation of his assets or the recovery of the business and which require lodgement of claims. These procedures do not always entail a liquidation.

#### **Article 30 – Duty to inform the creditors**

152. Article 30 makes it compulsory to inform foreign creditors of the opening of bankruptcy proceedings in a Party.

153. It should be further noted that the information dealt with in this article is compulsory solely at the time the proceedings commence. The information requirement under Article 25 is not affected by Article 30.

154. It would be appropriate, if the creditors residing in the Party where the proceedings have been opened are informed directly and individually at a later date, for creditors residing in the other Parties to be informed at the same later date.

155. The question has arisen as to whether the information provided for in Article 30 must be supplied even where the assets justify neither the lodgement of claims nor, therefore, the expense of informing creditors. The view was taken that even then such information must be given *inter alia* for the following reasons:

- the foreign creditor may have an interest in knowing about the debtor's bankruptcy, even though he does not expect to recover the debt in full or in part;
- the creditor may have an interest in lodging his claim in order to interrupt the running of the limitation period;
- failure to supply information would amount to discrimination between foreign creditors and national creditors, since national creditors might be informed of the bankruptcy through the official publications;
- in some countries, it is difficult to establish at the outset whether or not there are assets.

156. Paragraph 2 relates to the substance of the information to be supplied to foreign creditors.

157. The idea of drawing up a standard notice for use by all Parties was discarded; consequently, this paragraph merely states a number of particulars which the information notice must at all events contain, the wording of the notice being left to the discretion of its author. This might, for example, give some indications concerning the currency in which the claim has to be expressed or the time-limit for submitting the claim. The amount of the claim could be required to be indicated in the currency of the Party in which the proceedings were opened.

### **Article 31 – Lodgement of claims**

158. Article 31 sets out the conditions governing the lodgement of claims by foreign creditors.

159. Although this article mentions the concept of «residence», the Convention does not define this concept. However, such a concept is utilised in numerous international instruments and is traditionally understood to be a factual notion, in particular a prolonged stay in another country, and not as a legal notion.

160. No special form is required. It will suffice to inform the authority or the liquidator mentioned in Article 31 by whatever means in writing; a simple letter, a telex, a telegramme or any other writing is sufficient; the only condition is that it should be in writing, without taking into account the possible rules of the *lex fori* relating to the conditions of validity of the acts under privy seal.

161. It was pointed out in this connection that the arrangement embodied in this article would have the effect of placing foreign creditors in a more favourable situation than nationals in certain States, where nationals are required to lodge their claims through a lawyer.

162. The aim of this article is to enable creditors to use a simplified form to transmit all the information required for the lodgement of their claims to the authority or person who, under Article 31, has sent an information note.

163. This article in no way affects substantive matters governed by the applicable law. Thus, for example, whether a claim is preferential or not, and the nature of the steps to be taken (agreed choice of residence, for instance) once bankruptcy commences are not regulated by the Convention.

### **Article 32 – Languages**

164. Article 32 concerns the language in which the information notice and the letter of claim may be written.

The principle adopted is that the language will be that of the author. However, if that language is not the language of the addressee, the notice or letter must be accompanied by a translation in French or English.

165. In order to take into account any difficulties which the use of a foreign language for the documents of the judicial proceedings might create in certain Parties, the possibility of providing for another language, similar to Article 13 of the European Agreement on the transmission of applications for legal aid, has been provided for Parties by Article 32, paragraph 2.

166. The committee expressed the view that it should be possible for supporting documents to be sent in the form of photocopies, thus in the original language. It will be for the court or the liquidator to decide whether a translation is necessary.

167. Article 39 allows Parties to depart from the provisions of Article 32 on languages.

## **Chapter V – Final provisions**

### **Articles 33 to 43**

168. In general, these provisions follow the model final clauses adopted by the Committee of Ministers of the Council of Europe for conventions and agreements drawn up within the Organisation.

### **Article 36 – Appendices**

169. This article contains the provisions for mentioning the required information in appendices:

A. relating to the procedures failing within the scope of application of the Convention; see Article 1, paragraph 1 ;

B. relating to the persons or organs to be considered as liquidator; see Article 1, paragraph 3.

### **Article 38 – International conventions and arrangements**

170. The term international conventions also covers other international arrangements such as those existing between Nordic states. Furthermore, this term also covers EEC rules, as well as the provisions of the domestic law of EEC member States implementing these rules (see paragraph 80).

### **Article 39 – Declaration on the use of languages**

171. The information note to be sent by the liquidator abroad and the lodgement of the claims in a foreign bankruptcy raise questions of the use of languages. If Article 32 states a rule of principle in both cases, Parties are however free to stipulate otherwise. This option is contained in Article 39, that opens up the possibility for a Party to declare that the notice or the written claim shall be drawn up exclusively in its official language or one of its, official languages.

### **Article 40 – Reservations**

172. No reservation is allowed other than that allowed by the first paragraph of Article 40, that is, a reservation that Chapter II or Chapter III will not be applied. The Convention gives Parties this option to enable them to ratify it without having to disregard the importance they attach to the principles of unity or territoriality. The withdrawal of any reservations will be a step towards European unity in this field.

173. However, paragraph 2 of this article stipulates that a Party which has declared that it will not apply Chapter III (secondary bankruptcies) must nevertheless apply:

- Article 20, paragraph 2, on the validity of the lodgement of claims made in the secondary bankruptcy;
- Article 23 on claims arising after the opening of the main bankruptcy;
- Article 24 on equality of creditors.

Nevertheless, a Party may declare that it will not apply these three articles either. In that case, any other Party where a secondary bankruptcy is opened is not obliged to apply Article 21 regarding the payment of claims; it may pay the claims of all creditors out of the proceeds of the secondary bankruptcy.

### **Article 41 – Implementation of the Convention**

174. The committee of experts was aware that the implementation of the Convention would give rise to problems. On the one hand, the Convention deals with a difficult matter and the differences between the national laws increase this difficulty; the options and reservations provided by the Convention show how difficult it is to implement machinery in line with the needs of European economic life. On the other hand, the compromise which was reached may already be used by several member States while other States may have to face internal difficulties and may not be ready to apply the Convention or to deal with certain problems which could be solved by consulting member States, whether or not Parties to the Convention.

To enable consultation to take place easily in order to resolve such problems or to adapt the Convention to a very changing economy, the Committee of experts included this article which provides for an easy and rapid procedure.