

# Genesis of the European Initiative in Insolvency Law

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## Abstract

This article deals with the history behind the initiative that led to the adoption of the European Insolvency Regulation 2000. It covers the background to the proposals, the content of the various drafts that have merged over the past four decades and criticism of the proposals by commentators. Copyright © 2003 John Wiley & Sons, Ltd.

## I. Introduction

The history and background to European initiatives in insolvency is a long and arduous tale illustrating the complexities of dealing with the diversity of domestic regimes within Europe, both at the level of the European Community (later Union) and the Council of Europe. Each stage of the overall project, which has lasted for approximately 40 years in total, has had to deal with the laws of more and more jurisdictions as the number of interested participants has expanded. This history is a rich one and, with regard to the European Community especially, contains elements that derive from every stage through which that organisation has passed. These stages range from the period shortly after the creation phase in its economic mode to the period when the purpose of the Community seemed to expand into other fields, leading to more areas of cooperation, and, finally, to the consolidation phase following the Treaties of Maastricht and Amsterdam. It is instructive to note that the various drafts that have been produced have differed greatly in emphasis, from those seeking to produce rules resolving conflicts of jurisdiction to those seeking more detailed regulation of insolvency itself. As will be seen below, the lengths of the different drafts have also varied in function of the complexity of the strategies pursued and whether the agenda has been for the approximation, convergence or harmonisation of laws.

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## II. The Case for Harmonisation of Laws

There have been a number of studies by commentators looking at the differences and similarities between the procedural and substantive laws of insolvency within Europe.<sup>1</sup> A strong conclusion that many reach is that harmonisation of laws is desirable. Reasons in support of this include the factor of increasing establishment by companies in more than one jurisdiction and the convergence of European economies into a single cycle, leading to insolvency itself becoming a unitary phenomenon. Fundamental distinctions exist between domestic models of insolvency, not the least because of the presence within Europe of at least four separate families of legal systems, the common law, the two principal varieties of civil law originating in France and Germany that have influenced developments elsewhere and Scandinavian law. Some of the distinctions within insolvency laws lie in the differences between commercial and ordinary civil law, between the place of insolvency within civil law, including whether there is a penal character to insolvency.

There is also the general interest of the state in promoting insolvency procedures as a function of economic or political control, by which the orientation of the law towards a pro-debtor or pro-creditor stance is often influenced.<sup>2</sup> The onset and defining moment of insolvency is also a feature that differs from system to system and the articulation between insolvency and other legal areas also differs between domestic laws with concepts of property interests, security and family law playing a different role in each jurisdiction. Finally, the role of the courts and issues of jurisdiction also play a part in determining the differences in treatment at procedural level of insolvency matters. All of these factors have played a part in considerations by commentators of the value of finding an approximation to the legal systems regulating insolvency in Europe.

## III. Extension of the Treaty Framework in the European Community

Progress towards the creation of a convention to deal with insolvency must be sited in the context of work supplementing the treaty framework creating a common legal system within Europe following the foundation of the European Community in 1957. The development of fundamental principles provided for the free movement of goods, services, employees and capital. These brought in their wake the need for the settlement of disputes and the availability of enforcement measures across the member states of the community so as to remove structural impediments to the free flow of commerce and the creation of the single market. The extension

1. See, inter alia, Obadia, Les procédures collectives en droit européen (in three parts), *PA* 1991.83.38; 1991.84.8, 1991.85.6; Poitevin, Les procédures collectives en droit européen, *RPC* 1991.I.47; Ponceblanc, L'Harmonisation des Procédures Collectives en Europe, *GP* 1990.doctr.588; Woodland, Observations sur les orientations des

droits européens de la faillite, *La Semaine Juridique* 1984.chron.3137.

2. See particularly Montbrial, la Protection des Créanciers en Europe, *GP* 1990.doctr.596; Schroer et al, Le droit des Créanciers dans les Procédures Collectives des Principaux Pays d'Europe, *GP* 1989.doctr.579.

of the treaty framework has in certain cases been effected by further treaties between the member states on the basis of provisions within the EC Treaty allowing for the development in the private international arena of instruments designed to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments.<sup>3</sup> Although this text gives freedom of manoeuvre for member states, the text is said by commentators to sacrifice certainty for flexibility.<sup>4</sup> Much of the progress seen to date has been achieved in the form of multilateral conventions entered into between the member states although a strict reading of the text does not rule out the use of other treaty powers to effect legal harmonisation. Most of the initiatives for instruments in this field have resulted from the output of working parties set up to consider the extension of the treaty. Of the instruments produced by these working parties, the most famous text is that dealing with the recognition and enforcement of judgments known simply as the Brussels Convention.<sup>5</sup> Nevertheless, a number of other texts have also been produced in the areas of patent law, contractual obligations and the recognition of legal entities.

#### IV. The Brussels Convention Exception

One of the most important in the area of reciprocal recognition and enforcement, the Brussels Convention is expressed as having broad application in civil and commercial matters,<sup>6</sup> subject to a number of important exclusions. These exclusions are in areas dealing with personal law, administrative law and insolvency, the last of which includes in its definition bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. The precise meaning of the term “analogous proceedings” has led to case law defining the relationship between the Brussels Convention and insolvency law. This was also a useful exercise in that it also permitted a precise definition of the scope of work aimed at securing a convention to run in parallel with the Brussels Convention. The Jénard Report, which accompanied the text, explained that the term ‘analogous’ proceedings’ referred to proceedings based on the suspension of payments, the insolvency of the debtor or an inability to raise credit. Furthermore, these proceedings would normally involve the judicial authorities for the purpose of compulsory and collective liquidation of assets or a form of supervision of the debtor.<sup>7</sup> However, what else was covered by the term was the subject of the case law of the European Court of Justice, which has had to consider the extent of the exceptions in Article 1.

The case of Gourdain,<sup>8</sup> in particular, involved a provision in French law requiring the German director of a holding company to contribute towards reconstituting the assets of an insolvent subsidiary of which he was regarded the de facto manager.<sup>9</sup>

3. Article 293 (formerly 220), EC Treaty.

4. See Aminoff, *The EEC Draft Bankruptcy Convention—An Exercise in Harmonising Private International Law* (1990) 1 *LIEI* 121 at 123.

5. Convention on the Mutual Recognition and Enforcement of Judgments of 27 September 1968

(consolidated version published in *OJ* 1998 C27/1).

6. Article 1, Brussels Convention.

7. Jénard Report (1979) (*OJ* 1979 C59/1).

8. *Gourdain v Nadler* (C-133/78) [1979] ECR 733.

9. Article 99, Law no. 67-563 of 13 July 1967.

This provision, although civil in nature, was regarded as arising out of insolvency proceedings and thus not amenable to recognition under Brussels Convention rules. The opinion of the Advocate-General in the matter on the definition is instructive. He regarded the phrase to be understood as having regard to the essential nature of the proceedings taking place with reference to the legal principles applicable in the member state concerned. In this context, the purpose of the order was to get in assets for the purpose of satisfying the creditors in the insolvency and thus arose directly from and was intimately connected with the insolvency.<sup>10</sup> This line of reasoning has been followed in Germany with respect to the enforcement of a French judgment seeking to order the directors of an insolvent company to pay a certain sum into the assets of the company. However, the commentary accompanying this judgment doubts whether the order is excluded from the Brussels Convention merely because it is ancillary to an insolvency as the requirement in the Brussels Convention is that the insolvency itself be the subject of the judgment concerned.<sup>11</sup> The analogy might be drawn with the recovery of debts by a liquidator from third member states, which has also been held to fall outside the exception.<sup>12</sup> Consideration of whether the definition is exhaustive has also occurred in a case where a company in insolvency had commenced claims against its directors for conspiracy and breach of duty and by way of constructive trust. It was held that the insolvency was a purely collateral measure that did not affect the substance of the claim and subsequently it could be enforced under the Brussels Convention.<sup>13</sup> Professor Smart argues that the cases reveal that the nature of the claim, and not the person bringing the proceedings, is more appropriately the decisive factor.<sup>14</sup>

## V. The Insolvency Working Party<sup>15</sup>

The reason that the Brussels Convention excludes insolvency stems from a decision made early on in the context of preparatory work defining the remit of that convention. As a result, a second working party was formed in 1963 to examine the specific case for a convention in insolvency. This was due to the opinion of a committee of experts that a separate insolvency convention, which dealt with the insolvency of both individuals and companies and other bodies, seemed to be the only method

10. See Advocate-General's Opinion at paragraph 5.

11. See Gruber, L'action en complément de passif et l'Article 1, alinéa 2 de la Convention de Bruxelles du 27 septembre 1968, *PA* 1995.52.4.

12. Re: Hayward [1997] Ch 45 (trustee in bankruptcy recovering real property).

13. Grupo Torras SA v Al-Sabah [1995] 1 Lloyd's Rep. 374.

14. See Smart, Cross-Border Insolvency (1998) Butterworths: London; 14–15.

15. A number of excellent accounts exist of the early activities of the working party, for which see Muir Hunter, The Draft Bankruptcy Convention of the EEC (1972) 21 *ICLQ* 682; Lemontey, Perspectives d'unification du droit dans le projet de con-

vention relative à la faillite (1975) 11 *RTDE* 172; Noël, Lignes directrices du projet de convention CEE relative à la faillite (1975) 11 *RTDE* 159; Richard, A entreprise européenne faillite européenne? *PA* 1995.42.9; Balz, The European Union Convention on Insolvency Proceedings (1996) 70 *ABLJ* 485, Moss, Fletcher, Isaacs (eds.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2002) OUP: Oxford in Chapter 1. Matres Noël and Lemontey chaired the working party in its early stages and were also the co-authors of an explanatory memorandum on the 1970 draft. Professor Balz chaired the working party when it was reconstituted in the early 1990s.

of achieving harmony in this area of the law.<sup>16</sup> At the time the working parties were first formed, the domestic law and practice of insolvency in many countries were at an early stage of development. The changes over the years to the economic climate have meant that many countries have had to re-tailor their insolvency regimes to fit worsening situations by providing for intervention at an early stage and the introduction of rescue proceedings as a priority as opposed to liquidation proceedings. A significant reappraisal of the role of insolvency law resulted in large-scale reforms in major Western European jurisdictions in the mid-1980s.<sup>17</sup> This has meant that the many individuals who have worked over the years to produce the convention have had to take note of almost continual change to domestic rules, which have in turn to be reflected in the overall settlement of definitive texts. Despite the eminent status of many of these individuals and their undoubted pre-eminence in the field of insolvency, this may explain why many of the drafts are difficult to read. In fact, had these drafts been enacted at the time of their production, courts might well have found it difficult to interpret the provisions in a manner consistent with the practice in other member states. Nevertheless, the contribution of the working parties represents a commendable effort in a field that has had to wait nearly 40 years for decisive action.

## VI. The 1970 Draft

The report of the first working group was produced in 1970, together with an annexe containing a draft convention running to some 82 articles and accompanied by a model law of six articles for enactment as part of the domestic laws of the member states. To this tally was also added two annexes, one including the above model law, and substantial protocols.<sup>18</sup> The intention of the draft was to establish a single jurisdiction to deal with insolvency matters and it included therefore conflicts of law rules to deal with the assertion of jurisdiction by more than one court. The allocation of jurisdiction was made with reference to the 'predominant jurisdiction' of a particular court. Choice of law matters were simplified by the *lex fori* applying to most procedural and substantive matters, including the determination of third party interests. Limited exceptions were made for the *lex situs* principle in cases of liens, assets subject to security at the place where the assets are registered and the classification of claims as general preferences. The effect of the insolvency on employment contracts and sale of goods was also determined by the same conflict of laws provisions. The convention also stipulated rules governing time limits, publication of notices regarding the proceedings and registration of orders of a court in another state. Nevertheless, the underlying principle in the convention was that judgments in the course of insolvency proceedings would have effect in other member states and would be recognised as a matter of course. The problems faced

16. Report of the Advisory Committee on the EEC Preliminary Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings (1976) Cmnd. 6602 ("Cork Report") at paragraph 8.

17. Witness, for example, the successive enactments

in 1985–1986 of insolvency law in the United Kingdom and the reforms of 1984–1985 in France.

18. See Appendix C in Lipstein (ed.), *Harmonisation of Private International Law by the EEC* (1977) Chameleon/Institute of Advanced Legal Studies: London.

by the working party did not stem from a failure to anticipate the radical nature of a convention in this area but the extent of opposition likely to be encountered by any draft text in this area. In fact, the comparative novelty of the problems being faced in international insolvency, at that point a little developed factor in international commerce, meant that the text first produced by the working party met with almost universal opposition. Reaction overall was reasoned but critical. One of the perceived problems of the draft convention was that it was designed to work only with the parallel introduction of a uniform law. This would have the effect of altering domestic law with regard to even those insolvencies with no international effect, although curiously, one reading of the convention would also have its provisions unable to deal with the situation of assets lying outside the convention area.<sup>19</sup>

Analysing the convention from the standpoint of three desirable canons, creditor protection, debtor protection and predictability of the forum concursus, Professor Fletcher criticises a number of aspects of the convention. These include the proper definition of primary, secondary and, indeed, tertiary levels of competence, the continuing anomaly of exemptions for non-traders borrowed from civil law systems, the likelihood that the general conflicts rule would not act so as to deliver a satisfactory outcome as well as the overall impact of the *lex fori* rule determining the majority of procedural and substantive issues.<sup>20</sup> Summarising the critique, Professor Fletcher states that the draft is 'defective in many details' in that it does not achieve the objectives it sets out of maintaining the objectives of unity and universality. Nevertheless and despite the considerable period that had passed between the formation of the working party and the production of the draft, Professor Fletcher saw the convention as a precursor to the production of a 'simplified and rationalist system of bankruptcy' for the Community.<sup>21</sup> However, because the convention also allowed for a system of reservations by member states, the existence of this right and the likely extent of any reservations would ultimately have prevented the realisation of this hope.

This convention, which incidentally turned out to be the first of many versions, was also the subject of exhaustive analysis by the national governments of many member states. Indeed, a further draft of the text was necessitated by the accession of three new member states in 1973. At the same time, previous conventions adopted under the aegis of Article 293 were acceded to by the new member states. However, the new version of the insolvency convention did not meet with any greater enthusiasm, especially by one of the new members, the United Kingdom. The Cork Committee Report was a substantial document extending to some 180 pages that meticulously analysed the impact of the convention on domestic law. To this was also appended a Note of Reservations by A.E. Anton, a prominent Scots lawyer and member of the Scottish Law Commission, reflecting the particular anxiety of Scottish institutions at the terms of the convention.<sup>22</sup> The Committee recognised

19. See Nadelmann, *Clouds over International Efforts to Unify Rules of Conflict of Laws* (1977) 41 *LCP* 54 at 63.

20. See Fletcher, *The Proposed Community Convention in Bankruptcy and Related Matters*, Final

Chapter in Lipstein, *op. cit.* at 122–130.

21. *Ibid.*, at 135.

22. See Miller, *The Uniform Law of the Community on Bankruptcy* (1973) 18 *JLS* 382.

the difficulties of the convention jurisdictional scheme, which faced many hurdles of a practical nature and the inherent weakness of the scheme in relation to the question of preferential claims. Overall, the Committee took the view that the advantages of the convention lay largely in the perceived benefit to creditors and that the United Kingdom would benefit from accession to the convention.<sup>23</sup>

Commentators in the United Kingdom, however, did point to the fundamental difficulties of harmonising British law with convention terms that reflected the underlying views of civil law systems, for example the determination of the onset of insolvency, which differs from common law views of an act of bankruptcy.<sup>24</sup> Despite the difficulties evident in the draft, particularly in areas such as liability, where the draft is not entirely certain,<sup>25</sup> commentators have continually argued the merits for a convention in this field, particularly in the years between production of this draft and the subsequent updated version in the early 1980s.<sup>26</sup> One of the most consistent reasons advanced has been the defective and inadequate state of private international law measures in the field. Nevertheless, there have also been reservations about the appropriateness of a convention as a substitute for substantive harmonisation of laws.<sup>27</sup> Furthermore, the comparatively small numbers of international proceedings at this period in time also persuaded many commentators against the wisdom of embarking on the ambitious project of securing a convention.<sup>28</sup>

## VII. The 1979–82 Draft

Work on the proposal for a convention did not abate after the critical reception of the first draft. The working party was reconvened to work on further matters with the inclusion of representatives from the new member states. The resulting draft was published in a number of documents as early as 1979, but was not transmitted to the Council with view to adoption till 23 June 1980.<sup>29</sup> In fact, the finalised text did not appear in the *Official Journal* till 1982.<sup>30</sup> The Commission published an opinion in 1981 reflecting on this second draft. In essence, the draft applies to all proceedings leading to the cessation of trading activity and distribution of liquidated assets as well as measures tending to the rehabilitation of debtors. The purpose of the draft remains the improvement of the position of the creditor in the common market through ensuring that decisions taken in the insolvency context have effect in other member states. This avoids the debtor being able to freely dispose of assets to the detriment of creditors. Unity of proceedings and the universality principle

23. Cork Report at paragraph 421. See also Muir Hunter, *European Bankruptcy: The New Dimension of Insolvency* (1977) *New LJ* 195.

24. See Muir Hunter, *op. cit.* (in fn. 15 above) at 696.

25. See Connerton, *Directors' Liability and the EEC Draft Convention on Bankruptcy* (1977) *JBL* 8.

26. See Muir Hunter, *The Draft EEC Bankruptcy Convention: A Further Examination* (1976) 25 *ICLQ* 310.

27. 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.

28. See Farrar, *The EEC Draft Convention on Bankruptcy and Winding Up: A Progress Report and Evaluation* (1977) *JBL* 320 at 337.

29. Commission Opinion 81/1068/EEC of 10 December 1981 *OJ* 1981 L391/23 (31 December 1981) at paragraph 2.

30. Supplement 2/82, *Bulletin of the European Communities*. An extensive Report is also contained in the Supplement.

remain constants in the new version. This is ostensibly in order to prevent the wasteful duplication of proceedings covering the same assets that may occur if other proceedings of an insolvency-type involving the debtor are opened or execution of judgments that may have already been obtained is permitted. Uniform rules regulating the jurisdiction of the courts are rigorously adhered to by reference to the criterion for opening proceedings, that of the debtor's "centre of administration." The concept of 'establishment' is used to allow the opening of proceedings where, fortuitously, the centre may be found outside the Community. Again, the *lex fori* model is of application with limited exceptions recognised in the case of property and rights subject to registration, employment contracts as well as real property.

The fact that the text was of a comparable dimension to the first draft did not escape the attention of commentators. One noticeable change was that the model law has been truncated to three articles dealing with rules on property claims by the debtor's spouse, set-off and reservation of title. Views on what else may have changed did, however, differ. Some commentators stated authoritatively that the changes to the text were merely consequential on the need to cater for the enlargement of the Community that had affected the previous draft. Furthermore, although some work did reflect constructive criticisms that had appeared as to proposals included within the remit of the first draft convention, the changes were minor in nature.<sup>31</sup> Nevertheless, comments in a later Cork Report suggested that the terms of the new draft represented a considerable simplification of proposals and were to be welcomed for that reason.<sup>32</sup> The inclusion of the accession candidates within negotiations for the text had in fact influenced the text with, for example, the conception in English law of the set-off rule finding its way into the text.<sup>33</sup> A possible compromise between such radically different views as to whether there had been changes to the underlying philosophy of the instrument can be seen in the work of Professor Fletcher. Professor Fletcher agrees that the main outline and basic conceptions remain the same in the new text. Nevertheless, "rigorous revisions" resulting in "the incorporation of numerous modifications and refinements in detail, and some transformations on matters of principle" necessitate an independent and critical appraisal of this version of the convention.<sup>34</sup> Indeed, it is possible to see that the structure of this version influenced the thinking behind the work that emerges later in the Council of Europe proposals, which in turn themselves influence later European Community proposals. For example, the exception relating to the winding up of insurance institutions also appears here, although credit institutions, later to be the subject of separate proposals, have been included within the ambit of the text. The relationship between insolvency and insolvency-related actions has also been treated here, resolving the ambiguities of the Brussels Convention referred to above.

31. See Ganshof, *Le projet de convention CEE relative à la faillite* (1983) *CDE* 163.

32. Report of the Review Committee into Insolvency Law and Practice (1982) Cmnd. 8558 at paragraph 1918.

33. See Aminoff, *op. cit.* (in fn. 4 above) at 132.

34. See Fletcher, *Conflict of Laws and European Community Law* (1982) North-Holland Publishing Co.: Amsterdam at 191.

One of the more important differences between the drafts lay in the powers of the European Court of Justice to control interpretation and application of the convention. Insofar as private international law conventions of this type are concerned, there is no set model by which uniform interpretation of its provisions is to be secured. For example, Article 18 of the Rome Convention,<sup>35</sup> dealing with uniform rules of jurisdiction in cases of contracts, merely states that the interpretation and application of its rules, as far as possible, should be made in light of the international nature of the convention provisions and the desirability of maintaining uniformity. The basis for jurisdiction by the European Court of Justice is then left to the protocols. The draft convention, however, takes the model of the Brussels Convention as far as the principle of interpretation of its provisions was to go. This would allow interpretation of convention terms through the facility given to national courts to request rulings from the European Court of Justice, the only court permitted to give preliminary rulings or decisions on interpretation. Nevertheless, there are important differences between the draft and the Brussels Convention in that only national courts from whose decisions there is no appeal may make requests for a preliminary ruling or seek a decision on interpretation of convention provisions. This differed from the original facility under the Brussels Convention allowing all courts such rights and was made largely in order to prevent the court from being overburdened by references. Despite this draft apparently correcting some of the excesses perceived inherent in earlier drafts, it was not destined to proceed much further and work within the European Community was suspended in 1985 after a failure to agree a consensus on the second draft of the convention.<sup>36</sup>

## VIII. The Articulation of the Council of Europe Text

Progress towards the creation of a convention structure in Europe moved onto a different stage with the emergence on the convention scene of another organisation in the shape of the Council of Europe. The common membership of both organisations was said to have prompted the Council of Europe, whose membership is far more extensive, to embark on a project to see whether an agreement could be reached on the same subject matter. This would have had the potential to integrate countries beyond the boundaries of the European Community into a single mechanism determining jurisdiction and choice of law, thus enhancing the prospects for cross-border trade and resolution of conflicts. The Council of Europe's work in the insolvency field emerged from the coordination of legal activities carried out for it by the European Committee on Legal Co-Operation. A meeting of this body in June 1980 established a Committee of Experts with view to exchanging information about the then current state of bankruptcy law and reforms in member states. As a basis for the work, two areas were singled out in particular, these being the possibility for insolvency administrators to operate extra-territorially to protect

35. Convention on the Law applicable to Contractual Obligations of 19 June 1980 (OJ 1980 L266/1).

36. See preface to outline of the Council of Europe

Convention in Dictionnaire Permanent Difficultés des Entreprises (*Bulletin* 77) (21 January 1991).

assets and institute proceedings as well as the protection of foreign creditors in the context of local proceedings. It is said that the failure of the European Community project to advance in the 1980s acted as a direct catalyst to the Council of Europe proposals.<sup>37</sup> In fact, the European Community was represented at meetings of the Committee of Experts as an observer and contributed to the initial discussions by assisting the Council of Europe Secretariat to draw up a list of questions and points of interest. These included questions on the progress of insolvency law reforms in member states, points on the status of debtors in insolvency, the treatment of creditors, the domestic view of security interests, the law relating to recognition of foreign orders and the status of foreign insolvency administrators within local proceedings.<sup>38</sup> The conclusions of the Committee of Experts, drawn up after almost three years of meetings, revolved around four themes. These related to the increasing role of rescue procedures within domestic law, the principle of equal treatment of creditors, the suspension of rights in rem and of reservations of title in the context of rehabilitation procedures. A draft convention was also elaborated containing many of the recommendations.<sup>39</sup> There were, nevertheless, problems during the adoption process with the initial proposals before the Council of Ministers in 1984 being adjourned in 1985 due to dissent over the terms of the convention. It was not till 1987 that negotiations that led to the final text were able to recommence.<sup>40</sup> The civil and commercial conventions previously noted were joined by the Convention on Certain International Aspects of Bankruptcy ("Istanbul Convention"), previously adopted during the 434th meeting of the Council of Ministers in February 1990 and which was opened for signature in Istanbul on 5 June 1990.

The Istanbul Convention was welcomed at the time of its production as an important text of its kind. Some commentators saw it as being a measure that would lead to the regulation of insolvency at the European level and would ensure better treatment of creditors through the 'Europeanisation' of their security interest.<sup>41</sup> Nevertheless, a certain caution was implicit in the analysis by commentators of the chances of success of this particular text, which seemed to rest on a number of conditions being met. These were that the Istanbul Convention would be adopted by commercially significant states and that the territorial practice of ring fencing would be adequately dealt with through the secondary insolvency procedure it instituted. Furthermore, it also depended on the initial jurisdictional criteria, on which recognition of the liquidator's appointment also depended, being applied uniformly in all member states. One notable defect in ensuring uniformity of application and interpretation was highlighted as being the absence of a court within the Council of Europe hierarchy for deciding matters other than human rights.<sup>42</sup> Not all of the commentary was positive, with one stating that it was surprising

37. See Lowry, *The Harmonisation of Bankruptcy Law in Europe: The Role of the Council of Europe* (1985) *JBL* 73.

38. *Ibid.*, at 74.

39. *Ibid.*, at 76.

40. See Bottiau, *La Convention Européenne sur certains aspects internationaux de la faillite*, *RPC*

1990.2.97 at 99.

41. See Warin, *Les procédures collectives dans la CEE*, *D.1992.chron.11.98* at 100.

42. See Fletcher, *International Insolvency: A Case for Study and Treatment* (1993) 27 *International Lawyer* 429 at 438-439.

that France had so readily signed up, given that the underlying philosophy of the Istanbul Convention was so radically different from the domestic conception of the importance of insolvency, particularly its rescue elements.<sup>43</sup> Furthermore, given the immense practical difficulties in implementing its provisions, it was held by some commentators that it would be unlikely that the instrument would make much impact on the regulation of international insolvency.<sup>44</sup>

Despite these faults, the Istanbul Convention was termed by some commentators to constitute a reasonably flexible text that would give a partial response to the problems of international insolvency and, for that reason, deserved encouragement for its use.<sup>45</sup> It certainly represented a considerable compromise when compared with the aims of the European Community text and was seen as much less ambitious in scope, although the opportunity had been taken to regulate the phenomenon of secondary proceedings during negotiations. The outcome reflected some of the jurisdictional content of the European Community text, albeit using the Swiss model of private international law.<sup>46</sup> The differentiation of primary and secondary proceedings was seen as very different from the European Community model, although the criteria in the Istanbul Convention only operated indirectly.<sup>47</sup> One commentator in fact hailed the choice of this indirect jurisdiction as being the right choice to make in order to resolve the deadlock between conceptions of universalism and territoriality.<sup>48</sup> In fact, the Istanbul Convention was destined to enjoy the same (lack of) success as its European Community counterpart. Although eight countries signed up, only one, Cyprus, has ratified the text, leaving the instrument with two further ratifications necessary before it can enter into force.<sup>49</sup> Given the considerable time that has elapsed since the production of the text, it must be considered that the Istanbul Convention is unlikely to enter into operation among the member states of the organisation. However, the Council of Europe remains interested in the insolvency field and has held a number of conferences and colloquia in the area, one of the more prominent initiatives being in 1994 where participants from Europe and further afield discussed the continuing scope for reforms and the advantages of convention work in the area.<sup>50</sup>

## IX. Groundwork for the 1995 Text

A fresh impetus seems to have been given by the production of the Council of Europe text to work within the European Community. Commentators believe

43. See Guillenchmidt (de), *Projet de convention du Conseil de l'Europe sur certains aspects internationaux de la faillite, Banque et Droit* 1989.7.191 at 192.

44. See Ramackers, *Réflexions critiques sur la Convention Européenne relative à certains aspects internationaux de la faillite, La Semaine Juridique* 1993.doctr.3685.277 at 279–280.

45. See Daniele, *Les problèmes internationaux de la faillite: heur et malheur du projet de convention communautaire (1987) CDE* 512 at 525.

46. See Volken, *Cross-Border Insolvency: Co-op-*

*eration and Judicial Assistance in Forum Internationale* No 19, The Hague, November 1993 at 26.

47. See Ramackers, *op. cit.* at 284.

48. See Dom, *La Convention Européenne sur certains aspects internationaux de la faillite, PA* 1991.154.24.

49. From the Chart of Signatures and Ratifications section of the Council of Europe website <<http://conventions.coe.int/>>.

50. *Proceedings of the Council of Europe Conference on Bankruptcy and Judicial Liquidation*, 10–13 October 1994.

that, despite the existence of a rival text, there was still a need for action within the European Community that eventually led to pressure to seek a solution to the apparently insurmountable problem of international insolvency.<sup>51</sup> The working group for insolvency matters was reformed as a result of proposals brought to a meeting of the European Council in San Sebastian in 1989 and to the Committee of Permanent Representatives in April 1990. The first proposals that emerged from the activities of the working group relied on maintaining the principle of universality but with rules governing the direct exercise of international jurisdiction. A preliminary draft in fact appeared further outlining the development of these ideas in March 1991.<sup>52</sup> The objectives of the new work also rested on maintaining a minimum level of opt out, adopting a system of secondary proceedings compatible with the furthest extent of universality possible, harmonisation of conflict rules with a bearing on administration of insolvency and taking proper account of the development in most Western European states of fully fledged rescue regimes.<sup>53</sup> In June 1991, this was followed by an Explanatory Memorandum. Commentators reported that discussions within the working group centred on four themes. These included the legal basis for the instrument, the practical operation of the proposals for primary and secondary jurisdiction, the impact of the convention on rescue procedures and the definition of the types of insolvency proceedings to be included in the text.<sup>54</sup> It may be seen that some subjects of debate were common to both the European Community and Council of Europe proposals. The response to the proposals in the United Kingdom included comments from professional organisations, among which the Law Society. They stated that consistency among the different proposals then en route, which then also included a Winding Up Directive for credit institutions, should be achieved and that the position of rescue procedures should be clarified within the text.<sup>55</sup> Pending the discussions, the question of accession by member states of the European Community to the Council of Europe text was raised in the European Parliament in response to a written question. Pointing out, however, that the text was of limited scope and, given the scope for reservations, likely to result in uneven application throughout the member states of that body, the Commission was of the opinion that they could not recommend the text. Nevertheless, as in any event the text guaranteed the supremacy of Community law in Article 38(2) by avoiding its application of the Convention to relations between European Community member states, the Commission could not discourage member states from considering the text.

A final discussion draft of the European Community text was produced in 1994. This formed the basis for the version that the Council of Ministers were to approve

51. See Balz, *The European Union* (1995) 4 *IIR* 60 at 65.

52. See Dine, *Proposals for an EC Bankruptcy Convention* (1992) 8 *IL&P* 178.

53. See Balz, *op. cit.* (in fn. 15 above) at 495.

54. See Andrés and Alfaro, *European Community*

chapter in Campbell (ed.), *International Corporate Insolvency Law* (1992) Butterworths: London at 619–632.

55. See Draft EC Bankruptcy Convention (Comments of the Law Society's Joint Insolvency Law Sub-Committee, Paper No. 22, 1994).

in 1995.<sup>56</sup> The resulting convention had come a long way in significant respects from the first draft in the 1970s and differed in slight respects even from the document issued in 1994. The influence of the Council of Europe text on this document were palpable, with commentators stating that the differences between early European Community drafts and this latest version represented “a dramatic retreat from the universality principle” inherent in previous drafts.<sup>57</sup> There were, however, noticeable differences in emphasis and the philosophical approaches. Similarities included the division between primary and secondary jurisdiction criteria, with the use of the centre of the debtor’s main interests to justify primary assumption of jurisdiction, although there were important differences in the later definitions that are used to develop the concepts. Differences included the addition of uniform choice of law provisions, although some commentators regretted the territorial nature of some of these provisions.<sup>58</sup> There was also a change in emphasis from indirect jurisdictional regulation to direct criteria for assumption of jurisdiction, supplanting national rules. In addition, the scope of secondary insolvencies was very different, with the ancillary nature of these proceedings being far more evident than in the Council of Europe text.<sup>59</sup> Furthermore, the European Community text, by the nature of legislation within the Community, contained very limited opt-out provisions, thus reducing the opportunity for reservations that could detract from uniform application of rules throughout member states.

## X. Critique of the 1995 Text

Commentators hailed the 1995 text as a forward step in the regulation of European cross-border insolvency, some even referring to the date of notional adoption as a “remarkable date” in European insolvency history.<sup>60</sup> By contrast to its predecessor drafts, it was said to be a manageable compromise between the various national interests in the European Community. The proposals were considered as forming a net reversal of the trend of the previous drafts, but which were comparatively progressive in structure in opposition to the Council of Europe draft. This was because of the lack of any possibility of reservations and the availability of interpretation through the European Court of Justice, both of which were seen as providing that necessary focus of unity and uniform application of the rules the text contained. In fact, the strict application of unity and universality, although in keeping with the ideals of the Single Market, would not have advanced matters significantly within the European Community. The modified universality approach the text took, although an appreciable compromise, nevertheless represents work-in-progress towards getting states to understand the cogency of reducing the costs and formalities inherent in international insolvency and inducing acceptance of partial

56. The final draft was opened for signature in Brussels on 23 November 1995.

57. See Trautman et al., *Four Models for International Bankruptcy* (1993) 41 *AJCL* 573 at 602.

58. *Ibid.*, at 604.

59. For an analysis of the differences between

Anglo-American ancillary practice and Continental views, see Bottiau, *op. cit.* (in fn. 40 above) at 103–106.

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

harmonisation of the rules of procedure.<sup>61</sup> This represents a sea change in attitudes from the scope of the first drafts, which sought to harmonise across the substantive and procedural arenas without much discrimination.

For that reason, many commentators looked forward to its entering into force as it represented a more than acceptable compromise in the face of the only other option, that of not having an instrument in this area.<sup>62</sup> This was despite a few remaining criticisms about the precise extent of its provisions. One particular criticism emanating from the United Kingdom was the lack of recognition for the administrative receiver, particular in relation to acting abroad in pursuit of assets for the insolvency.<sup>63</sup> Another comment related to the lower level of protection for consumers in the text, the contrast being made with the position in the Brussels Convention.<sup>64</sup> The position of creditors outside the European Community was also raised in the case of debtors without a centre of main interests within any of the member states, the fear being that territorial proceedings of the traditional type would be relied on. This was raised especially in relation to countries, such as France, with a tradition of applying exorbitant jurisdiction rules.<sup>65</sup>

By far the most analysed articles of the text were the allocation of jurisdiction and choice of law provisions. This was in effect unsurprising, given that the scheme of the text was clearly aimed at emulating the Brussels Convention model in this regard. It is perhaps the fundamental differences in legal culture within the European Community that necessarily prompted this choice of formula, pending sufficient development in commercial law harmonisation to make it feasible for the approximation of laws. In fact, the differences were wider than those prevailing in the United States, where, despite a relative homogeneity in legal culture, the creation of a domestic bankruptcy law took a century to develop.<sup>66</sup> In that regard, the progress achieved thus far in a mere four decades may be seen as truly remarkable. Professor Fletcher makes the point that the text 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. This is given that even those states, where the universality doctrine nominally applies, reserve the right to grant or withhold recognition of foreign orders, also leading to the multiplicity of proceedings in these instances.<sup>67</sup> Professor Miguel Virgos subjects an analysis of the textual paradigm to the reality that previous draft conventions failed because they adhered too rigidly to the unity model at the expense of any possible compromise with strongly held national views on the likely distortion of internal markets through unrestrained application

61. See Richard, *op. cit.* (in fn. 15 above) at 14.

62. See Bogdan, *The EU Bankruptcy Convention* (1997) 6 *IIR* 114 at 126.

63. See Dahan, *The European Convention on Insolvency Proceedings and the administrative receiver: a missed opportunity?* (1996) 17 *Co Law* 181.

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

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

66. See Balz, *op. cit.* (in fn. 15 above) at 490.

67. See Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions* [1998] 33 *TIIJ* 119 at 123–124.

of the principle and the effect on domestic creditors competing in Community-wide proceedings.<sup>68</sup>

## XI. Fate of the 1995 Text

Following approval of what became known as the European Insolvency (or Bankruptcy) Convention, a period was opened for member states to adhere by signature from 23 November 1995 to 23 May 1996. Most of the member states signed within a short time after the text was made available. The United Kingdom took a more cautious approach with the production by the Insolvency Service of the Department of Trade and Industry of a consultative document only in February 1996.<sup>69</sup> Consideration was at the same time given to the text by the House of Lords Select Committee on Europe.<sup>70</sup> By the time the period for signature had expired, however, the United Kingdom had still failed to sign up. The official story would relate that the text ran into a British Conservative Government that had withdrawn cooperation from European institutions in the wake of unresolved issues over the BSE crisis. One of the tactics used was to refuse to sign or adhere to instruments, of which the convention text was one. A different and unofficial story relates that Britain's concern at the reluctant inclusion of Gibraltar within the scope of the convention led to the failure to adhere. Nevertheless, as the signatures on the document were incomplete, the instrument failed to negotiate the final obstacle before entering into force.<sup>71</sup> Opinion was divided on what measures could be taken to surmount the hurdle caused by the failure of the United Kingdom to accede. Professor Balz suggests that the text itself would not be open to renegotiation, although it is unclear whether the United Kingdom ever considered this to be a pretext for not signing the instrument. He does make the point, however, that two possibilities were open, the first being that the Council of Ministers could re-open the text for signature, although the express wording of the text was silent on this possibility. The second possibility was for the remaining member states to create a separate convention amongst themselves using almost the same text. This would not, however, render this text amenable to the jurisdiction of the European Court of Justice, for which the unanimous agreement of all member states was a pre-requisite.<sup>72</sup>

The demise of the European Insolvency Convention did not completely remove hope for the insolvency project ultimately reaching the statute book. As early as 1998, Mario Monti, then European Financial Services Commissioner, stated that:

68. See Virgos, *The 1995 European Community Convention on Insolvency Proceedings: An Insider's View* in *Forum Internationale* No. 25, The Hague, March 1998 at 7.

69. EC Convention on Insolvency Proceedings: A Consultative Document (1996) DTI.

70. Seventh Report of the House of Lords Select

Committee on Europe (1996) HL Paper 59.

71. See Balz, *op. cit.* (in fn. 15 above) at 485-6; Fletcher, *The European Community Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind* (1997) 23 *BJIL* 25.

72. See Balz, *op. cit.* (in fn. 15 above) at 529.

... in order to solve this situation, the Commission plans to examine all options to progress in this field and, in particular, whether a legislative proposal is necessary to enforce the measures contained in the 1995 Convention.<sup>73</sup>

Immediately following the period when the project seemed doomed to join the many similar and unsuccessful attempts at achieving international consensus, many commentators speculated whether there was any possibility of the project being revived.<sup>74</sup> Privately and despite the many noises emanating from the European institutions, there seemed to be little hope of there being a further initiative. In fact, when it did arrive, the proposal for a European Regulation on Insolvency Proceedings (“Insolvency Regulation”) emerged with little fanfare.

## XII. Revival of Proposals

The project received a new lease of life through an initiative jointly proposed by Finland and Germany and submitted to the Council of the European Union on 26 May 1999.<sup>75</sup> This had been preceded by a report of the Committee on Legal Affairs and Citizens’ Rights in April 1999 that recommended that the Commission take the opportunity of drafting a regulation or directive on cross-border insolvency proceedings.<sup>76</sup> At the 2184th Council Meeting in Brussels, the Council confirmed the tabling of the proposals based on the powers given to member states by the provisions on judicial cooperation in civil matters. The initiative was tabled in order to improve and speed up insolvency proceedings with cross-border implications and thus the functioning of the Single Market. The Council Presidency, at that time held by Germany, expressed the hope that matters would proceed because of the importance of the text and that both the United Kingdom and Ireland would accede to the instrument with a solution being found for the particular position of Denmark, a country that had sought and obtained exemption from the civil justice cooperation provisions of the EC Treaty.<sup>77</sup> Interestingly, the same meeting also reported consensus among experts as to the method for proceeding to revision of the Brussels and Lugano Conventions.<sup>78</sup>

The text resulting from the initiative was published in August 1999. Its terms echoed those of the 1995 text with the addition of some 31 clauses in an extended preamble stating the legal basis for the initiative and many of the key principles it contained.<sup>79</sup> The European Parliament passed a resolution in October 1999 applauding the proposals and invited the Commission to proceed by seizing the

73. Response to Macartney, Written Question No. 3450/97: Cross-Border Claims in the Event of Receivership *OJ* 1998 C223/2 (17 July 1998).

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

75. See announcement of the proposals in Judicial Co-Operation in Civil Matters: Insolvency Proceedings (1999) <<http://www.europa.eu.int/scadplus/leg/en/lvb/133110.htm>>.

76. EP Rapporteur’s Report on the Convention on Insolvency Proceedings of 23 November 1995 to

Committee on Legal Affairs and the Internal Market of 23 April 1999 (377187.doc) (“Malangré Report”).

77. Minutes of 2266th Council Meeting on Justice and Home Affairs of 29 May 2000.

78. The Brussels Convention now appears in the form of Council Regulation (EC) No. 44/2001 of 22 December 2000 *OJ* 2001 L12/1 (16 January 2001).

79. Published in the *OJ* 1999 C 221/8 (3 August 1999).

initiative to have a text concluded before the end of the then current Council Presidency.<sup>80</sup> The United Kingdom was able to consider the proposals in November of that year and the Select Committee on European Scrutiny cleared the matter as “a sensible attempt to simplify the procedures for mutual recognition and enforcement of judgments.”<sup>81</sup> The proposals were finally remitted to the Committee on Legal Affairs and Citizens’ Rights for consideration, where a number of minor amendments were debated and approved. After a number of preliminary drafts and observations,<sup>82</sup> the final report produced by this committee recommended the adoption of the text.<sup>83</sup> This was echoed by the legislative resolution of the European Parliament in March 2000.<sup>84</sup> Final consideration occurred at the 2266th Council Meeting in Brussels on 29 May 2000, when the proposals were adopted in the form of a regulation.<sup>85</sup> The Insolvency Regulation, with minor differences to the original proposals, was eventually published on 30 June 2000 and came into effect on 29 May 2002.<sup>86</sup>

### XIII. Legal Basis of the Initiative

The extension by convention structure originally envisaged by the Treaty of Rome was joined by a number of provisions on which subsequent harmonisation attempts have been based. These provisions, inserted variously by the Single European Act and the Treaties of Maastricht and Amsterdam, have allowed for various types of initiative taken in the context of the creation of the Single Market and enhanced cooperation in the field of civil justice. Title IV of the consolidated EC Treaty contains measures that originally featured in the Third Pillar of the European Union on Justice and Home Affairs. These relate mostly to visas, asylum, immigration and other policies connected to the free movement of persons.<sup>87</sup> Provisions in this title authorise the Council, in order to “establish progressively an area of freedom, security and justice,” to adopt measures in the field of judicial cooperation in civil matters.<sup>88</sup> The definition of these civil matters includes, by virtue of Article 65, 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. These would include improving and simplifying the system for cross-border service of judicial and extra-judicial documents, cooperation in the taking of evidence, the

80. European Parliament Resolution on the Convention on Insolvency Proceedings of 23 November 1995 *OJ* 1999 C279/499 (1 October 1999).

81. Report of the Select Committee on European Scrutiny (1999) <<http://www.publications.parliament.uk/pa/cm/199900/cmselect/cmeuleg/23-i/2312.htm>>.

82. European Parliament Draft Report on the Proposal for a Council Regulation on Insolvency Proceedings of 15 December 1999 (387139EN.doc); EP Opinion of 28 January 2000 (403007EN.doc); EP Rapporteur’s Report on Amendments to Committee on Legal Affairs and the Internal Market of 4

February 2000 (403531EN.doc).

83. European Parliament Report on the Proposal for a Council Regulation on Insolvency Proceedings of 23 February 2000 (406125EN.doc).

84. European Parliament Legislative Resolution of 2 March 2000.

85. Minutes of 2266th Council Meeting on Justice and Home Affairs of 29 May 2000.

86. Council Regulation (EC) No 1346/2000 of 29 May 2000 (*OJ* 2000 L160/1).

87. Title IV of Part III of the EC Treaty (Articles 61–69).

88. Article 61, EC Treaty.

recognition and enforcement of decisions in civil and commercial cases and promotion of the compatibility of rules concerning conflict of laws and jurisdiction. In particular, the enactment of the Insolvency Regulation is seen as extending the framework for the mutual recognition of decisions in civil and commercial matters highlighted by the creation of the Title IV provisions. Part of the new initiatives includes the instrument replacing the Brussels Convention, which also streamlines the process for obtaining enforcement of judgments. Furthermore, a draft programme of measures for implementation of the principle for mutual recognition of decisions in civil and commercial matters has been produced.<sup>89</sup> Work is also being carried out in the areas excluded from the scope of the Brussels Convention and a further regulation, titled Brussels II, has been enacted to cover judicial cooperation in certain family law proceedings.<sup>90</sup>

The choice of this structure has, nevertheless, consequences for the uniform application of the Insolvency Regulation and others like it in this field, because of the opt-out provisions secured by Denmark, Ireland and the United Kingdom during negotiations for the Maastricht Treaty. Two of these states, Ireland and the United Kingdom, have in fact chosen to adhere but there remains the question of what measures Denmark will need to enact to become party to the cross-border framework, its opt-out being complete. This is likely to remain a problem with future instruments under this title. In light of this, commentators are of the opinion that alternative bases for jurisdiction could have been considered. A number of other provisions could have conceivably been used provided they covered the subject matter of the European Insolvency Convention.<sup>91</sup> In fact, an alternative basis for jurisdiction that was canvassed was Article 293, the original basis for the Brussels and Rome Conventions, which allows for measures to be negotiated between member states with view to simplifying the formalities governing the reciprocal recognition and enforcement of judgments. This jurisdiction was seen as complementing the approach taken for the Brussels Convention in light of the view that the European Insolvency Convention was a supplementary act to this first convention. Accordingly, any further measure should also rely on this provision. The question of the relationship between Articles 65 and 293 was considered. The view taken was that both provisions remain of application, even where the subject matter might overlap. The Council considered that member states would continue to be able to ratify conventions based on Article 293 until such time as the Commission or a member state seized the Council with a proposal for the adoption of a Community Act under Article 65. The requirement for primacy of the Community text was said to derive from Article 10 requiring member states to adhere to the principle of conduct in the interests of the Community.<sup>92</sup>

89. *OJ* 2001 C12/1.

90. Council Regulation (EC) No. 1347/2000 of 29 May 2000 (*OJ* 2000 L160/19).

91. Articles 47, 55, 95 and 308, EC Treaty, cited in the Malangré Report at 8.

92. *Ibid.*, at 9.

## XIV. Outline of the Insolvency Regulation

The terms of the Insolvency Regulation do not seem to greatly differ from the body of 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 necessitated by the expansion in membership of the European Community and by improvements to domestic insolvency laws, any commentary on the earlier text could be applied to the Insolvency Regulation *mutatis mutandis*.<sup>93</sup> The final provisions of the Insolvency Regulation do differ, of necessity, in small respects to those in the previous text because of the nature of the instrument incorporating the text. For example, some of the reasoning employed to justify the Insolvency Regulation with a view to its adoption appears in the preamble, containing thirty-one separate paragraphs forming a composite of views on insolvency law and its purpose within the framework of community law.

The fact that the Preamble states explicitly and, almost repetitively, material that is to be found in the body of the Insolvency Regulation has already been the subject of comment. There are further views that this represents a serious defect, in that the material would be more appropriate for an Explanatory Memorandum, such as that which accompanied the 1995 text. Furthermore, as at least one of the European Parliament's amendments reflected, this material also contains text more appropriate for the body of the Insolvency Regulation.<sup>94</sup> Nevertheless, as a guide to the purpose for which the Insolvency Regulation was enacted, the Preamble and the many recitals it contains are likely to receive close attention by commentators and jurists alike. It is also probable that, in the absence of detail in the body of the text itself, the wording of the Preamble will be closely studied to gauge how best the overall purpose of the Insolvency Regulation might be served through the orders a court might make when called upon to interpret the provisions of the Insolvency Regulation in a dispute before it. In addition, for commentators, there is an opportunity of assessing whether the Insolvency Regulation has coherence in terms of its fundamental policy objectives and will achieve its intended purpose. There is also an opportunity of examining whether there may be areas of difficulty in its implementation deriving from ambiguities in the stated objectives. Finally, there are some minor deviations from the original text owing to a different approach being taken with regard to the question of the control to be exercised by the European Court of Justice over the application of the Insolvency Regulation through the references brought before it. This is due to the choice of legal basis under which the Insolvency Regulation was made and is common to all instruments adopted under Title IV.

The Insolvency Regulation will only apply to proceedings opened after its entry into force on 31 May 2002.<sup>95</sup> Any act performed by a debtor prior to the Insolvency

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

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

95. Article 47, Insolvency Regulation.

Regulation entering into force will continue to be governed by the law applicable to that transaction at that moment in time.<sup>96</sup> The Insolvency Regulation will affect other bilateral and multilateral conventions between member states, including the Nordic Council Convention of 7 November 1933, although it is expressed so as not to apply in any member state to the extent it would be incompatible with external obligations entered into before the Insolvency Regulation comes into force. Following the agreement of the United Kingdom to be bound by the Insolvency Regulation, this Article also provides that existing arrangements entered into with other Commonwealth countries are similarly not to be affected by the Insolvency Regulation.<sup>97</sup> The Council will be permitted to make amendments to the Annexes reflecting changes to the domestic law of member states. The European Parliament wanted either the Commission to be in charge of changes or for amendments to be made in the form of amending Insolvency Regulations. These proposals were not accepted, although the final version, differing from the unqualified right in the original draft, has subjected this right to a requirement for a prior initiative on the part of a member state or the European Commission.<sup>98</sup> However, a proposal that the Insolvency Regulation should be subject to periodic review, to occur by 1 June 2012 and thereafter at five-year intervals, was accepted. The Commission will present a report to Parliament, Council and the Economic and Social Committee on the application of the Insolvency Regulation, together with any proposals for amendments.<sup>99</sup> A declaration by the Council, accompanying the Insolvency Regulation, expressly provides that the Insolvency Regulation is not intended to prevent member states from concluding agreements with other states on the same subject matter as the Insolvency Regulation, provided the other agreement does not affect the operation of the Insolvency Regulation.<sup>100</sup>

## XV. The Issue of Control

Because of the legal basis of the initiative, the control by the European Court of Justice is limited to references raised in the context of proceedings occurring before national courts against whose decisions there is no judicial remedy under national law. This is usually understood to mean decisions not subject to appeal or judicial review. Article 68 provides for the situation where a question on the interpretation of the title or on the validity or interpretation of acts based on this title is raised in a case pending before the courts of a member state. These courts are required to make a request to the European Court of Justice to give a ruling if these courts consider that a decision on the question is necessary to enable judgment to be given. This wording, which also appeared in a similar form in the Convention, limits references in practice to those from the highest courts in the civil structure in domestic law. Although this does not represent a change from the Convention situation,

96. *Ibid.*, Article 43.

97. *Ibid.*, Article 44.

98. *Ibid.*, Article 45.

99. *Ibid.*, Article 46.

100. Declaration by the Council (2000/C 183/02) (OJ 2000 C183/1).

it does represent a considerable tightening of the bases on which preliminary references can be sought as compared to the Brussels Convention 1968 or Rome Convention 1980. The fact that the Insolvency Regulation is a similar private international law instrument to the above conventions would not seem to justify this disparity in treatment. Nevertheless, the European Court of Justice itself has accepted the limits on its jurisdiction, having stated that:

... the specific nature of the rules contained in Title IV of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons) and of the Conventions adopted by the Council under the third pillar (justice and home affairs) justified derogations in the Treaty of Amsterdam from the principle that all courts and tribunals are to have the power to make references to the Court of Justice...<sup>101</sup>

The European Court of Justice is concerned, nevertheless, that an increase in the number of preliminary reference proceedings is likely because of the nature of proposals under this title, leading to an increased workload for the court.<sup>102</sup> However, it accepts that the solution of restricting the level at which references are made cannot be transposed to other rules concerning the internal market or to joint policies and actions. This is because of the view taken that preliminary references play a fundamental role in ensuring that the law established by the Treaties retains a Community-wide characteristic and that the law has the same effect in all circumstances throughout the member states. The court's position is that one of its essential tasks is to ensure just uniform interpretation, which is obtained by answering the questions put to it by the national courts and tribunals. A trend may, however, be noted towards the enactment of further cooperation measures under this title, including the instrument replacing the Brussels Convention and other likely future measures in this field. It may also be a general observation that the nature of insolvency law and procedure is such as to attract litigation, although this almost exclusively takes place at a lower level within the court hierarchy. It is rare that, because of the desire to preserve assets in insolvency, expenditure is made willingly on litigation at appellate level. The result may be that references are unavailable at those levels more appropriate for the nature of the cases and the interests of the parties concerned.

## XVI. The Wider Context of the Initiative

The achievements leading to the conclusion of the Insolvency Regulation, must, however impressive they are in isolation, be sited in the context of wider work in the company and insolvency law fields. In the area of insolvency cooperation proper, work has been limited in scope. Until the enactment of the Insolvency Regulation, one of the few instruments that purported to deal with an issue in cross-border insolvency was a text governing conditions relating to the protection of employees

<sup>101</sup>. ECJ Report on the Future of the Judicial System of the European Union (1999) <<http://curia.eu.int/eu/txts/intergov/ave.pdf>> at 22.

<sup>102</sup>. *Ibid.*, at 6.

in the event of the insolvency of their employer.<sup>103</sup> In a communication in early 2000, the Commission launched a first phase of consultation of social partners as part of an undertaking previously made to re-examine the terms of the Directive with view to amending this in light of difficulties identified by a group of experts relating to practical enforcement of the directive in a number of areas, including the case of employer insolvency with international considerations. The definition of insolvency in Article 2 will also be updated to coincide with that used in the Insolvency Regulation. The amendments were brought into effect by the Directive of 23 September 2002,<sup>104</sup> which enshrined the principle that the guarantee institution responsible would be that where employees “work or habitually work.”<sup>105</sup> Since the appearance of the Insolvency Regulation, there have also been two further initiatives aimed at governing the reorganisation and winding up of, respectively, insurance undertakings<sup>106</sup> and credit institutions.<sup>107</sup> It may be noted that these initiatives are necessary because of the exclusion from the remit of the Insolvency Regulation of a number of types of body, including institutions in the above two categories as well as investment undertakings holding funds or securities for third parties and collective investment undertakings.<sup>108</sup> It is very probable that further instruments will be forthcoming with respect to the last of these bodies because of the view taken that all the initiatives thus far are essential to secure the proper functioning of the internal market in cross-border insolvency proceedings.<sup>109</sup>

## XVII. Summary

There is a rich history in Europe for the production of insolvency initiatives, dating back to the early Middle Ages. This history might usefully be divided into two distinct periods, the first being that stretching from the 18th century to the early 20th century, where the norm was for the production of bilateral and limited multilateral texts. This is a situation perhaps reflecting traditional conceptions of sovereignty and treaty-making powers of nation states, where negotiations between individual governments led to such texts. The second period, which is largely the history covered here, begins with the closer integration of European countries into the supranational institutions of the Council of Europe and the European Community (later Union). As a consequence of the integration of the economies of many of the member states of these organisations and consideration of the reality of the phenomenon of cross-border insolvency, a need for multilateral initiatives dealing with international insolvency may have been stimulated. The history of these initiatives, however, shows that difficulties have beset the conclusion of any text that has been produced in this field. The history outlined above may ultimately be resumed

103. Directive 80/987/EEC of 20 October 1980 (*OJ* 1980 L283/1).

104. Directive 2002/74/EC of 23 September 2002 (*OJ* 2002 L270/10).

105. *Ibid.*, Article 1(4).

106. Directive 2001/17/EC of 19 March 2001 (*OJ* 2001 L110/28).

107. Directive 2001/24/EC of 4 April 2002 (*OJ* 2001 L125/15).

108. Preamble No. 9 and Article 1(2), Insolvency Regulation.

109. Legislative Observatory Procedure Files on later instruments, available from European Union website at <<http://europa.eu.int/>>.

as a learning process for the participants, one that acted as a prelude to a later successful conclusion. This tale has also been a long and continually evolving one and it may be likened in parts to the tale of Sisyphus, whose labours were destined never to be compensated. In this instance, the labours were those of the jurists and their advisors on the working groups formed to coordinate the drafting of the text. Many of these individuals, of international stature and great reputation, found their travails poorly rewarded as the texts were examined by the member states and rejected time and time again, often for reasons more political in nature. This was never more so than in the case of the ultimate convention draft, so near the statute book, which fell at the last hurdle due to an agricultural dispute between the European institutions and the United Kingdom over a cattle disease. Despite this, the European Community has, in the views of some commentators, acted essentially as "a schoolhouse for the entire world for learning about international co-operation."<sup>110</sup>

As the emphasis moves to the recently adopted Insolvency Regulation, the purpose of the work in creating a framework for the coordination of Community-wide insolvencies has an opportunity of being tested out in practice. It remains the case, however, that the Insolvency Regulation begins with a handicap compared to its predecessor texts in that the choice of fundamental legal basis in Title IV means it will not cover the entirety of the European Community. In addition, commentators have, in connexion with the previous convention texts, pointed to gaps in the rules, including the absence of support for private law enforcement measures in aid of creditors' rights, such as through receivership provisions, a comment that remains valid with respect to the Insolvency Regulation.<sup>111</sup> The absence of specific provision in the text to cover the needs of the partnership structure has also been noted.<sup>112</sup> There remain also a number of points raised in relation to the treatment of specific categories of debtors, consumers and employees being some of the more obvious, which look at differences in treatment between this Insolvency Regulation and other European Community measures. The extent of the judicial control allowed to the European Court of Justice is also a factor of concern in the future of this instrument, precisely because of the need to ensure uniformity in an area on which there has been so little consensus in the past. Nevertheless, the availability of control by the European Court of Justice may yet provide it with an opportunity to have a say in a hitherto inaccessible field, a fact that may lead to harmonising efforts by a court minded to be adventurous and innovative in this regard.

There has, despite the above, already been reaction in the legal journals mostly welcoming the advent of the Insolvency Regulation.<sup>113</sup> In any event, it must be realised that the Insolvency Regulation is by no means an exhaustive set of rules to

110. See Trautman et al., *op. cit.* (in fn. 57 above) at 625.

111. See Dahan, *La Floating Charge: Reconnaissance en France d'une sûreté anglaise* (1996) 2 *JDI* 381. This comment may now be partly redundant given the curtailing of receivership in the Enterprise Act 2002.

112. See Rajak, *op. cit.* (in fn. 94 above) at 126.

113. See Steiner, *European Cross-Border Insolvency in the Millennium* (1999) 15 *IL&P* 207; Fletcher and Anderson, *The Insolvency Issues*, Chapter 14 in Bridge and Stevens (eds.), *Cross-Border Security and Insolvency* (2001) OUP: Oxford at 283–286.

govern all the possibilities that may occur within a single insolvency and that scenarios ad infinitum could be set up for imagining how courts and participants would deal with variations in the estates of insolvent debtors. In fact, with an infinity of fact-situations possible, questions on the effect of the Insolvency Regulation will continue to multiply. As a final remark, the conclusion of the Insolvency Regulation is undoubtedly an important part of the history of the creation of a European legal order in company and insolvency law. As witness related initiatives, this legal order is not yet comprehensive and remains in development with many lacunae in these fields. It is likely that the work on the Insolvency Regulation will influence many of the future proposals in this field as well as the periodic revisions of existing texts. However, it is perhaps worthwhile recalling that insolvency has remained, until recently, one of the last and greatest areas of discord between states. This is certainly the result of insolvency being the area of law most closely identified with national interests for its economic and social importance. It may be instructive to observe whether this changes as a result of the passing of the Insolvency Regulation and, in time, with the further development of other instruments forming a comprehensive framework for the treatment of insolvencies with an international dimension. Nevertheless, as the most important of all the initiatives thus far, the Insolvency Regulation may be seen as especially deserving, because of the very fate of its predecessor European Community and Council of Europe texts, not to mention the time it has ultimately taken for proposals to get to the statute book, of every optimistic wish for its success.