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The New European Legal Order in Insolvency: Fundamental Legal Bases and Harmonisation Initiatives

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Introduction¹

The background to European initiatives in insolvency is a particularly long and arduous tale, illustrating the complexities of dealing with the diversity of domestic regimes within 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 contains elements that derive from every stage through which the European Union has passed, ranging from the period shortly after its creation phase in its economic mode to the period when the purpose of the original community of states expanded into other fields, leading to more areas of co-operation, and, more recently, to a further expansion phase following the Treaties of Maastricht, Amsterdam and Nice. It is instructive to note that the various texts that have been produced have differed greatly in emphasis, from those seeking to produce rules resolving conflicts of jurisdiction to those setting out more detailed regulation of insolvency itself. It includes texts that deal with insolvency as a main theme and also texts that deal merely in an ancillary way with insolvency issues. The purposes of the different texts have also varied in function of the complexity of the strategies pursued and whether the agenda has been for approximation, convergence or harmonisation of laws. Despite the recent set back experienced by the European Constitution project, insolvency may still prove to be an area of expansion. Quite how it will expand, particularly with present and future accession candidates finalising the terms of their eventual membership, will be a matter of some concern and speculation.

This article looks at (A) the economic and legal reasons behind insolvency becoming an issue of concern within the European Union, (B) the legal bases on which instruments within the European Union have been mooted or enacted and (C) whether the case exists for further harmonisation to be attempted and what shape this harmonisation might take.

A - Economic and Legal Reasons

The creation of an internal market within economic blocs, such as the European Union, fosters and enhances trading across national boundaries. In this context, the point has been made forcefully that a 'functioning bankruptcy system is essential to any economy that aspires to achieve the freedoms of establishment

¹This article is based on material in 'The New European Legal Order in Insolvency', Chapter 11 in Omar, European Insolvency Law (2004) Ashgate.

of business and the free flow of goods, [labour], services and capital, and to integrate national markets into a unitary internal market.² In fact, the failure of business is widely accepted as affecting the proper functioning of the internal market. There is the additional problem that the freedoms themselves may act as an incentive for parties to maximise their position through asset transfers and forum-shopping.³ It is certainly true that forum-shopping creates uncertainty for creditors and undermines the position of business financing by making lenders and investors more cautious about contracting with parties whose asset bases may volatilise in this way.⁴ However, a prime consideration relates to the way in which the internal market has grown, in that the freedom of establishment, freedom to move goods and capital around the European Union, co-ordination of company law and the rules on mergers and acquisitions as well as those on competition and merger control all serve to make businesses become Europeanised by default. Together with the further growth of supranational corporate forms promoted by the European Union, insolvency automatically becomes a cross-border consideration.⁵ The need for legislative action in this instance derives from the view that insolvency is not an area of law in which private parties can engage in 'spontaneous co-operation,' thus avoiding state intervention. The reason given is that insolvency poses a problem of 'collective action' that is all too easily defeated by competition for the debtor's property, therefore requiring co-ordination and disincentives for rogue creditors to appear. At the international level, these problems become acute as differences between the laws of various jurisdictions enhance occasions for 'opportunistic behaviour' and forum-shopping, thus requiring some form of international co-operation.⁶ In fact, the continued existence of disparate laws is argued as posing 'ominous difficulties' for all parties involved and could constitute the 'threat of distortion in economic relationships,' a phrase well-known to European law.⁷ There have been over the years various studies looking at the differences and similarities between the procedural and substantive laws of insolvency within Europe, from which a very strong conclusion emerges that the harmonisation of some aspects, if not the entirety, of insolvency law is desirable. Reasons in support of this include the very factors mentioned above and, furthermore, the convergence of European economies towards a single economic cycle leads to insolvency itself becoming a unitary phenomenon affecting the Single Market as a whole.

²See Balz, *The European Union Convention on Insolvency Proceedings* (1996) 70 ABLJ 485 at 490.

³See Andenas, *Insolvency Proceedings in Europe* (1999) 20 Co Law 253.

⁴See Page, *Inside Track Law & Business: Breach made in Frontiers of Debt*, *Financial Times* (27 May 2002).

⁵See Richard, *A entreprise européenne faillite européenne?* PA 1995.42.9 at 9-10.

⁶See Virgos, *The 1995 European Community Convention on Insolvency Proceedings: An Insider's View*, *Forum Internationale* No. 25, The Hague, March 1998 at 1-2.

⁷See Fletcher, *The Proposed Community Convention in Bankruptcy and Related Matters*, Final Chapter in Lipstein (ed.), *Harmonisation of Private International Law by the EEC* (1977) Chameleon/Institute of Advanced Legal Studies at 120.

There are, nevertheless, a number of hurdles facing those who would embark on the process of harmonisation. These include the basis on which the attempt at harmonisation is to be made as well as the scope of the instrument itself, whether it is to harmonise or approximate laws. This in turn depends upon the formula and the regulatory instrument used and, as a result, there may be questions about whether it adequately encapsulates the principles and motives lying behind the initiative. Within the European Union, these issues resume into questions of the appropriate legal basis under which the instrument will be enacted, on which will depend the parties' rights to take the initiative as well as the procedure for adoption itself, the qualification of voting rights and the extent to which review by the European Court of Justice ('Court') is available. Furthermore, there are also issues of the political will behind the enactment and the necessity of having an instrument dealing with the perceived issues of concern. All of these contrive to make harmonisation a delicate and thoughtful process which strives to chart a median way between often diametrically opposed views. In Europe, some of these disagreements stem from the fundamental distinctions that exist between domestic models of insolvency, not least because of the presence within the European Union of a number of different families of legal systems with very differing answers to basic insolvency questions. Indeed, harmonisation may falter in the face of determined resistance and end up taking a course that the originators of the idea might not have foreseen or intended. Often, harmonisation initiatives in Europe have begun by assessing the limits of what may be achievable and taking a pragmatic stance at the outset, thus preventing the more obvious objections that may occur.

B - Legal Bases

The most important point, when dealing with the issue of the appropriate legal basis, is to remember that the European Union is a creation and creature of international law. As such, the view is that it is generally restricted to those powers under the EC Treaty that are conceded to it by the member states. As a form of 'lex specialis', the EC Treaty obeys the cardinal rule of international law in that it must be used limitedly for the purposes that the member states are agreed upon.⁸ Although many EC Treaty provisions are broadly defined, the scope of initiative of the institutions in promoting legislative acts may be narrower, inasmuch as it is desirable that there be broad consensus for legislative initiatives, irrespective of the procedure that may actually be appointed for their adoption. Furthermore, the articles of the EC Treaty are subdivided into discrete subject areas and it is by no means possible for general powers to legislate in one field to operate so as to allow an unfettered right to enact measures in another area, however close or logically related the latter might be. There are also requirements for proportionality, insofar as any measure must be sufficient

⁸Article 5, EC Treaty. The numbering of the EC Treaty was substantially revised as a consequence of the changes brought in by the Treaty of Nice 2001. The references in this article use the revised numbering and citations prior to the changes are amended and noted where necessary.

for and related to the aim it seeks to promote, and subsidiarity, in that measures should not encroach into fields where member states retain their competence. Thus, the search for the appropriate legal basis is one that has bedevilled attempts at seeking the harmonisation of laws in many areas. Without explicit recognition of authority, it may not be possible for measures to proceed where member states resist limitations upon their own capacity for action. Nowhere has this been truer than in the insolvency field, where close state interests in the outcome of proceedings have long resisted attempts at obtaining a cross-border solution.

(i) The Private International Law Initiative: Article 293, EC Treaty

This article formed the legal basis on which the European Insolvency Convention 1995 ('Insolvency Convention') was anchored. It provided the context for work supplementing the treaty framework creating a common legal system within Europe which relied on the development of fundamental principles providing for the free movement of goods, services, employees and capital. In consequence of this, the need was felt for the settlement of disputes and the availability of enforcement measures across member states, so as to remove structural impediments to the free flow of commerce and the creation of the Single Market. The basis on which this was first initiated was Article 293, designed, in its fourth indent, so as to oblige member states to enter into negotiations with view to simplifying formalities attendant on the recognition and enforcement of judgments. The impact of this article has been to promote the development in the private international arena of instruments designed to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments. Although at first sight it seems to give freedom of manoeuvre for member states, in that it does not stipulate the type of instrument to be used, it was interpreted early on so as to require the conclusion of texts in the convention format, signalling the way for instruments such as the Brussels Convention,⁹ the Rome Convention¹⁰ as well as a text on the recognition of legal entities.¹¹ In this, the legal basis is said to fall squarely within the rich history in Europe for the conclusion of conventions, but at the same time, without an express mention of the type of instrument to be used, it also seemed to sacrifice certainty for flexibility.¹² This juridical uncertainty also gave rise to the view that other treaty powers might prove more appropriate to secure the passing of measures that might achieve the same aim of legal harmonisation.¹³ Nevertheless, there was a

⁹Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 ('Brussels Convention').

¹⁰Convention on the Law applicable to Contractual Obligations of 19 June 1980 ('Rome Convention').

¹¹Convention on the Mutual Recognition of Companies, Firms and Legal Persons of 29 February 1968. This convention is not in force.

¹²See Aminoff, *The EEC Draft Bankruptcy Convention - An Exercise in Harmonising Private International Law* (1990) 1 LIEI 121 at 122-123.

¹³*Ibid.*, at 124 citing Conostas, *Legal and Political Aspects of Intra-Community Conventions* (1982) 5 *Revue d'Intégration Européenne* 201. The articles mentioned were Articles 100 [now 94] and

view that member states would not agree to direct intervention by the EC Institutions and would prefer the convention scheme because this would allow for consensus to be achieved that the member states, 'concerned about their prerogatives'¹⁴ would be happier with, one of the limited advantages of such an arrangement.¹⁵ A similar point was made to the effect that '...unified bankruptcy laws (so far as they are attainable) are best enunciated in the form of an ancillary Convention, rather than by way of an EEC Directive.'¹⁶

The choice of the convention format, nevertheless, is not without some great disadvantages. Chief among these is that agreement on a text would require bridging 'conceptual and practical differences,'¹⁷ thus potentially weakening the final text through the many compromises that would be required. This in turn affects the solution to the initial choices facing the harmonisation initiative, which, at the outset, were two-fold: the extent of the harmonisation and its relationship to other harmonisation initiatives. The second question was more or less resolved by a decision made early on in the context of preparatory work defining the remit of the Brussels Convention. Not wishing to delay progress of and the implementation of that convention, a second working party formed in 1963 devoted its energies exclusively to examining the specific case for a convention in insolvency. This was because the committee of experts involved was of the opinion that a separate insolvency convention seemed to be the only method of achieving harmony. When the European Community was first formed, the domestic law and practice of insolvency in a number of its member states were still at an early stage of development. Nevertheless, this choice was to have the consequence that this convention was in more or less continuous revision as changes over the years to the economic climate meant that many countries had to re-tailor their insolvency regimes to fit cyclical fluctuations by providing, for example, for intervention at an early stage and the introduction of rescue proceedings as a priority as opposed to liquidation proceedings. Similarly, a significant reappraisal of the role of insolvency law resulted in large-scale reforms in major Western European jurisdictions in the mid-1980s, which had an impact on the progress of the text. This has meant that the numerous 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 had 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 fact may also explain why many of the drafts are difficult to decipher and their articulation with domestic law not easy to fathom. In fact, had these drafts been

235 [now 308]. See also Richard, *op. cit.* at 10 who suggested Articles 100 [now 94] and 100a [now 95].

¹⁴'...soucieux de leurs prérogatives...'

¹⁵See Richard, *op. cit.* at 11.

¹⁶See Muir Hunter, *The Draft EEC Bankruptcy Convention: A Further Examination* (1976) 25 ICLQ 310 at 314. Although both of these legislative forms require transposition into domestic law, there is a greater state input into the formation of a convention and autonomy when compared to the issue of a directive.

¹⁷See Aminoff, *op. cit.* at 124.

enacted at the time of their production, courts might well have found it difficult to interpret the provisions in a manner consistent with the overall aim of harmonising practice in the member states.

The first question, on the extent of harmonisation then capable, was more difficult to settle. Complete harmonisation, of procedural and substantive rules, seemed impossible. Nevertheless, a strong plea was made that any text must strive to 'establish the maximum degree of unification which national politics... and other obstacles permit' and that in order for the text to be successful 'every state must be willing... to make compromises and sacrifices of its own cherished national concepts.'¹⁸ Despite these laudable sentiments, a further comment was made to the effect that 'the substantive rules..., especially on privileges and priorities, were far from ever being harmonised even within a very homogenous region such as Europe...'¹⁹ In fact, the element of state interest was never far from the surface, as witness the thoughts of the British Government in a Consultative Paper issued in 1974: '...any Convention in this field must be founded upon an attitude of mutual trust in the integrity and efficiency of the bankruptcy courts and administration of member states.'²⁰ Although this in itself was a strong argument against substantive harmonisation, the growth of the European Community and accession of new members soon made any question of complete or partial harmonisation a far from pragmatic solution. Nevertheless, some harmonisation still seemed to be a desirable outcome, but only on the basis that conflict resolution was the only option as to procedural aspects through providing 'rules determining conflicts of jurisdiction, rules determining substantive conflicts of different policies.'²¹

As it turns out, the report of the first working group, produced in 1970, arrived together with an annexe containing a draft convention running to some 82 articles and, insofar as some substantive harmonisation was on the agenda, a model law of 6 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.²² This draft relied for its success on establishing a single jurisdiction to deal with insolvency matters and included a complicated series of conflicts of law rules to deal with the assertion of jurisdiction by more than one court. A second draft, produced in 1980, repeated most of the formula chosen, but slimmed down the substantive harmonisation aspect to a model law truncated to three articles dealing with rules on property claims by the debtor's spouse, set-off and reservation of title. Even this ambition faded over time to be replaced by a more pragmatic approach, especially as the first proposals that emerged from the activities of the working group reconstituted in 1989-90 relied

¹⁸See Muir Hunter, *op. cit.* at 314.

¹⁹See Balz, *The European Union* (1995) 4 IIR 60 at 62.

²⁰Department of Trade and Industry, *Consultative Paper on the EEC Draft Bankruptcy Convention* (1974) at paragraph 8.9.

²¹See Balz, *op. cit.* (in footnote 19 above) at 61.

²²See Appendix C in Lipstein (ed.), *op. cit.* at 169-195.

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 1991.²³ 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.²⁴ It was this draft that ultimately met its demise when the United Kingdom failed to sign up in time because of differences between the British Government and the EC Institutions. This in itself is an indicator of the other problems facing the convention format, namely that it is an international law text that demands strict adherence to any stipulations as to how and when it may come into force,²⁵ it generally requires unanimity for progress to be made and, even if it comes into force, it will, for many jurisdictions not adhering to the monistic view of international law, subsequently require enactment into domestic law, a process that may take some considerable time.²⁶ As a coda to the failure, it was mooted, albeit doubtfully, that the negotiations be reopened or that the member states, minus the United Kingdom, go it alone with the conclusion of a convention.²⁷

Nevertheless, irrespective of the solution to the challenge of how far to push for harmonisation, many problems of definition and interpretation could still be overcome provided that there was an appropriate focus. As an example, one of the more important differences between the first and second drafts of the Insolvency Convention lay in the powers of the Court to control interpretation and application of the convention. Insofar as private international law conventions of this type were concerned, there seemed to be no set model by which uniform interpretation of its provisions was to be secured. For example, Article 18 of the Rome Convention, dealing with choice of law issues in contractual situations, 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 provisions and the desirability of maintaining uniformity. The basis for jurisdiction by the Court is then left to the protocols. The 1980 draft of the Insolvency 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 Court, 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

²³See Dine, *Proposals for an EC Bankruptcy Convention* (1992) 8 IL&P 178.

²⁴See Balz, *op. cit.* (in footnote 2 above) at 495.

²⁵For example, the Council of Europe Bankruptcy Convention 1990 is not in force because of insufficient ratifications.

²⁶However, there may be an advantage in this as transposition measures would be easier to engineer so as to fit into domestic systems.

²⁷See Torremans, *Cross-Border Insolvencies in the EU* [1999] 4 *Insolv L* 183 at 184. The latter step would also have the undesirable consequence of preventing references to the Court.

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. The 1995 text of the Insolvency Convention repeats this formulation ensuring that interpretation of its provisions is made uniform by national courts being able to request the Court for rulings on interpretation.²⁸ It may be assumed therefore that, had the convention entered into effect, the question of interpretation, again mooted as one of the desirable canons that should inform the conclusion of any such text,²⁹ would have been overcome much as in the case of the Brussels Convention, which has spawned a considerable amount of jurisprudence. This might have gone some way towards lessening the inconveniences of the convention format.

(ii) The Company Law Harmonisation Initiative (Article 44(2)(g), EC Treaty)

The primary context for a considerable number of measures in the company law field is provided by powers that are essentially ancillary to the rights of free movement for companies inherent in Articles 43 and 48.³⁰ In this respect, any measures enacted must be proportionate to the outcome to be achieved, which is to promote the freedom mentioned. Progress on work reliant on this legal basis began early on in the life of the European Community but has so far tended to concentrate on elements of the framework for company operations, including matters such as issues of share allotment and pre-emption rights, listing particulars, format of accounts and qualification of auditors as well as disclosure of information and there have been to date some nine Company Law Directives in these mainly technical areas. The advantage of directives, mandated by Article 44(1), is that they are a more flexible instrument and allow member states to choose effectively the method of transposition into domestic law that suits the domestic system. Nevertheless, this does not rule out detailed directives which may need to be incorporated 'verbatim' in national legislation, nor does it prevent some texts lacking 'transparency' because the transposition measures may not be immediately obvious or ascertainable to the user.³¹ Villiers charts the development of these directives, noting that they can be defined as falling into four discrete groups, ranging in impact from uniformity towards the creation of standards of reference and framework models, reflecting the move away from unification pure towards harmonisation in simple form.³² Part of the explanation for the change in emphasis include such reasons as the intrinsic difficulties of the

²⁸Articles 43-45, Insolvency Convention.

²⁹See Muir Hunter, *op. cit.* at 314.

³⁰See Deakin, *Regulatory Competition versus Harmonisation in European Company Law*, ESRC Centre for Business Research, University of Cambridge Working Paper No. 163 (March 2000) at 5.

³¹See Hopt, *Company Law in the European Union: Harmonization or Subsidiarity?* (1998) Seminar Paper No. 31, Centre for Study and Research in Comparative and Foreign Laws, University of Rome at 4-5.

³²See Villiers, *European Company Law: Towards Democracy?* (1998) Dartmouth at 19 *passim*.

harmonisation process and the need to complete the internal market in as effective a manner as possible.³³

So far, proposals have tended to avoid the more problematic areas of company law, such as corporate personality, tortious liability and the question of directors' liability. Despite this, some proposals have notably failed to progress, such as those relating to methods for worker participation and co-determination in the Draft Fifth Directive, which saw light in 1972, and the Draft Tenth Directive on cross-border mergers. Work that would see the introduction of a proposed Fourteenth Directive to regulate cross-border transfers of registered offices has also been slow to progress. With the apparent failure of this last text and the related Draft Tenth Directive,³⁴ it might be assumed that the era of harmonisation proper is at an end, especially as the related power in Article 293 appears to have seen very limited progress in the field of company law since the conclusion of the abortive legal entities convention.³⁵ Furthermore, the use of Article 44(2)(g) has occasioned some controversy following the introduction of qualified majority voting by the Treaty of Maastricht and the loss of veto rights. In the *Centros* case, the Court noted that it is was open to the Council on the basis of these powers to achieve complete harmonisation of the issues that were in dispute in the case, namely the vexed question of minimum capital requirements and uniform rules on shareholder and creditor protection.³⁶ Indeed, there have been calls in the wake of that case for a uniform European company law or, alternatively, for the preparation of model laws through a private initiative, such as a European Law Institute, that would promote harmonisation by member states, the advantage of this latter type of text being that it would provide legal integration without conceding sovereignty, a contentious issue within the European Union, in a way that might be necessary for the conclusion of a major code for company law in Europe.³⁷

It is also noteworthy that insolvency in particular has failed to receive any mention in work-plans and the point has been made that company law harmonisation has 'always stopped short' of insolvency law,³⁸ perhaps in itself reflective of the difficulties that the working party felt about the project when it first began. Curiously, however, when the Insolvency Convention project ground to a halt, one of the options canvassed for implementation was to transfer the content of the convention to a series of directives that would 'overcome a lack of consensus' but leave the progress of the initiative hostage to the speed at which

³³See Timmermans, *Harmonisation in the Future of Company Law in Europe*, paper given at a conference in Siena (30-31 March 2000) at paragraph 5.

³⁴See Sorensen and Neville, *Corporate Migration in the European Union* (2000) 6 CJEL 181 at 195.

³⁵See footnote 11 above.

³⁶*Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) [1999] I ECR 1459; [1999] 2 CMLR 551 at paragraph 28.

³⁷See Ebke, *Centros – Some Realities and Some Mysteries* (2000) 48 AJCL 623 at 658-9.

³⁸See Andenas, *op. cit.* at 253.

member states implemented the proposals.³⁹ With this in mind, it is perhaps not surprising that the same considerations which limited the use of Article 293 to harmonisation of conflicts rules prevented recourse to Article 44(2)(g) for any measure that would have the effect of introducing substantive harmonisation,⁴⁰ thus depriving this legal basis of any role in the overall development of an insolvency initiative. Nevertheless, had insolvency played a part in the development of a comprehensive legal order in company law, there would not have been any concerns about interpretation with access to the Court an automatic feature of this mainstream provision.⁴¹

(iii) The Changing Legal Landscape of European Union Law: Judicial Co-Operation in Civil Matters (Articles 61 and 65, EC Treaty)

Later developments in the framework of the European Community influenced thoughts on the appropriate legal basis for an insolvency text. The Single European Act fostered the idea of the 'European Judicial Area,' a concept given some impetus by the Treaty of Maastricht in 1993 that added co-operation in civil and criminal matters to the Third Pillar on Justice and Home Affairs of the newly retitled European Union. It was the Treaty of Amsterdam that brought judicial co-operation in civil matters within the ambit of the European Community (or First Pillar) by creating the new Title IV of a consolidated EC Treaty. Although for a period of five years, unanimity would be a feature of the provisions, one of the signal advantages of this move was to avoid the cumbersome convention arrangements required within the Third Pillar, which was seen chiefly as a forum for co-operation on an inter-governmental basis. The resulting provisions have allowed for various types of initiatives taken in the context of the creation of the Single Market and enhanced co-operation in the field of civil justice and are linked, together with other policies, to the concept of the free movement of persons, one of the ideals set out in the original Treaty of Rome.⁴² An alternative source of jurisdiction for the insolvency initiative was canvassed for this new Title IV of the EC Treaty a little while after the failure of the 1995 text.⁴³ Under this title, Article 61 authorises 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, the definition of which would include, 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 recognition and enforcement of decisions in civil and

³⁹See Torremans, *op. cit.* at 184.

⁴⁰A point that might be made here is the gradual decline in content of the annexed model law, a situation not at all propitious for substantive harmonisation.

⁴¹As governed by Article 234.

⁴²From the document: 'Judicial cooperation in civil matters: introduction' available on SCADPlus through the European Union website.

⁴³European Parliament Rapporteur's Report on the Convention on Insolvency Proceedings of 23 November 1995 dated 23 April 1999 ('Malangré Report') at 8.

commercial cases and promotion of the compatibility of rules concerning conflict of laws and jurisdiction. Finally, the elimination of obstacles to the proper functioning of civil proceedings through ensuring the compatibility of the rules on civil procedure was also envisaged. According to commentators, a number of these areas would cover the ambit of the defunct convention.⁴⁴ There did not seem to be any desire at the time to revisit the terms of the Insolvency Convention, nor to seek any further harmonisation of domestic rules. In this, the new Title IV was conceived of as serving merely as a new legal basis.

In 1999, the German and Finnish Governments proposed an initiative in this field. Its terms echoed those of the Insolvency Convention with the addition of some 31 clauses in an extended preamble stating the new legal basis for the initiative and many of the key principles the text contained.⁴⁵ A resolution was accordingly emitted by the European Parliament in light of the Malangré Report recommending the adoption of a directive or a regulation covering the subject matter of the 1995 text.⁴⁶ As it turns out, a regulation, with minor differences to the original proposals, was eventually published on 30 June 2000 and came into effect on 29 May 2002.⁴⁷ Furthermore, once the unanimity period had expired, the same provisions were used very quickly as the basis for a range of transpositions of existing conventions, concluded under Article 293, as well as for the enactment of proposals that had stalled, thus introducing new and, in some cases, updated texts, in the areas of matrimonial matters,⁴⁸ document service,⁴⁹ evidence taking⁵⁰ and general judgments,⁵¹ the last of these replacing the Brussels Convention. The importance of this area of development is underlined by the creation of a European Judicial Network, whose mission it is to facilitate judicial co-operation between member states in areas covered by existing instruments as well as those as yet uncovered.⁵² Nevertheless, the choice of this structure has consequences for the uniform application of any instrument adopted under its aegis, because of the opt-out provisions secured by Denmark, Ireland and the United Kingdom during negotiations for the Treaty of Maastricht. In accordance with the Protocols attached to Title IV, any instrument adopted is not ordinarily binding on either the United Kingdom or Ireland unless these member states exercise rights pursuant to the Protocols to consent to its application. Both of these countries have in fact opted into the negotiations for many of the instruments mentioned, including the Insolvency Regulation.⁵³

⁴⁴Ibid., at 9; see also Andenas, *op. cit.* at 253.

⁴⁵OJ 1999 C221/8.

⁴⁶EP Resolution of 7 May 1999 (OJ 1999 C279/499).

⁴⁷Council Regulation (EC) No. 1346/2000 of 29 May 2000 (OJ 2000 L160/1) ('Insolvency Regulation'). See Moss, Fletcher and Isaacs (eds.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2002) OUP.

⁴⁸Council Regulation (EC) No. 1347/2000 of 29 May 2000 (OJ 2000 L160/19).

⁴⁹Council Regulation (EC) No. 1348/2000 of 29 May 2000 (OJ 2000 L160/37).

⁵⁰Council Regulation (EC) No. 1206/2001 of 28 May 2001 (OJ 2001 L174/1).

⁵¹Council Regulation (EC) No. 44/2001 of 22 December 2000 (OJ 2001 L12/1).

⁵²Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ 2001 L174/25).

⁵³Recital no. 32, Insolvency Regulation.

Similarly, the opt out negotiated by Denmark means that, unless the Council is informed under the Protocols that Denmark no longer wishes to avail itself of the arrangement, whether wholly or in part, any instrument will not apply to this member state.⁵⁴ Because of the complex nature of the opt-out provisions, it is unclear whether Denmark may in fact opt in. In fact, one report states that, in the case of the Insolvency Regulation in particular, the Danish Government will enact domestic legislation mirroring its terms. This would enable the courts of that country to regulate cross-border insolvencies affecting Danish interests.⁵⁵

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 Insolvency Convention.⁵⁶ In fact, an alternative basis for jurisdiction that was canvassed was to return to Article 293, the original basis for the 1995 text. This jurisdiction was seen as complementing the approach taken for the Brussels Convention in light of the view that the 1995 text was a supplementary act to the former 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 approached 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.⁵⁷ A point that is also made about the regulation structure is that it too is subject to advantages and disadvantages. The advantages are of course that the use of a regulation speeds up the process of adoption in relation to the original text and any subsequent changes that may become necessary. In this respect, it may be noted that specific authority is reserved in the Insolvency Regulation to allow for amendments to the Annexes to reflect any subsequent changes to domestic law in the member states. This is to ensure that the Insolvency Regulation remains up to date and its co-ordination element continues to be active even as member states introduce changes to their domestic systems.⁵⁸ The Insolvency Regulation also includes provision for periodic review, which is timetabled to occur by 1 June 2012 and thereafter at five-yearly intervals.⁵⁹ The second advantage to the regulation format is that it avoids the need for implementation measures, as

⁵⁴Ibid., Recital no. 33.

⁵⁵Report by Professor Ian Fletcher at a session of the Clive Schmitthoff Symposium on 1-3 June 2000 in London. In the case of the regulation replacing the Brussels Convention, recital no. 22 in its preamble states that the convention will continue to apply to relations between Denmark and the other member states, thus leaving Denmark without the benefits of the amendments that appear in the regulation text.

⁵⁶Articles 47, 55, 95 and 308, EC Treaty, cited in the Malangré Report at 8.

⁵⁷Ibid. at 9.

⁵⁸Recital no. 31, Insolvency Regulation.

⁵⁹Ibid., Article 46.

would be the case with a directive, and would thus avoid the risk of 'divergent national implementation.'⁶⁰ The disadvantages, however, remain that regulations, as a species of legislation, do not necessarily result from the levels of consensus that have to accompany a convention and much is lost by not having the same process of adoption, including, one commentator notes, the absence of 'travaux préparatoires' for which lengthy preambles, as in the Insolvency Regulation, are not an effective substitute.⁶¹ Similarly, although regulations are directly applicable in nature and thus not amenable to transposition measures, they do not entirely avoid some domestic legislation, if only in order to tidy up the chaos resulting from implicit repeal by the text and the consequent need to adjust procedural rules on which there has been an impact.⁶² A subsidiary question that may be asked is whether Title IV could serve as the basis for further harmonisation, which seems doubtful in the present climate.

One of the chief concerns remaining, nevertheless, about the impact of the use of this legal basis is the issue of references to the Court. Under Title IV, control by the Court 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 Court to give a ruling if it considers that a decision on the question is necessary to enable it to give judgment. This wording, which also appeared in a similar form in the Insolvency 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 Insolvency Convention situation, it does represent a considerable tightening of the bases on which preliminary references can be sought as compared to the Brussels Convention or Rome Convention. The fact that the Insolvency Regulation is a similar private international law instrument to the above conventions would not in the opinion of commentators justify this disparity in treatment. Nevertheless, the Court itself accepts 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)

⁶⁰See Torremans, *Cross-Border Insolvencies in EU, English and Belgian Law* (2002) Kluwer at 137.

⁶¹See Lüke, *The New European Law on International Insolvencies: A German Perspective* (2001) 17 *BDJ* 369 at 371.

⁶²For example, in the United Kingdom, six statutory instruments accompanied the advent of the Insolvency Regulation.

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...⁶³

The Court 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.⁶⁴ 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 its Community flavour 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 co-operation measures under this title, including those mentioned earlier,⁶⁵ and it is likely that more measures will be forthcoming. 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. In the long run, this may severely delay uniformity within the European Union in insolvency matters.

(iv) Sector-Specific Provisions on the Freedoms of Establishment and Provision of Services (Articles 47(2) and 55, EC Treaty)

This first of these is a sector-specific provision at the basis of directives in the insurance and credit sectors that deal with the reorganisation and winding up of institutions in these sectors.⁶⁶ In the case of the first text, Article 55 has been added as an extra legal basis for greater clarity as to the object of the measure. The impact of the first article is to permit the issue of directives for the coordination of rules in member states that apply to the take-up and pursuit of activities as self-employed persons, which term also includes, by virtue of Article 48, companies and firms. The second applies the provisions in the chapter on the right of establishment, to which Article 47(2) belongs, to the provision of services. A preliminary point that might be made is that the provisions only allow for directives, an issue also germane to the discussion above concerning Article 44(2)(g). Again, the point may be made that this form of

⁶³ECJ Report on the Future of the Judicial System of the European Union (1999) <curia.eu.int/eu/txts/intergov/ave.pdf> at 22.

⁶⁴Ibid. at 6.

⁶⁵See footnotes 47-51 above.

⁶⁶Directive 2001/17/EC of 19 March 2001 (OJ 2001 L110/28).and Directive 2001/24/EC of 4 April 2001 (OJ 2001 L125/15) respectively.

enactment is advantageous in that it is a more flexible instrument permitting member states a degree of latitude in the method of transposition into domestic law. However, the same caveats are applicable: some directives are so detailed that they may need to be incorporated 'verbatim' and there may be a 'transparency' deficit because what has been transposed into domestic law may not be accessible readily by those seeking clarification on the rules applicable in another jurisdiction.⁶⁷ In any event, these legal bases are ancillary to the main aim of measures in the areas concerned, which is to promote the freedom of establishment and the freedom to provide services. In this regard, measures therefore have to be proportionate to the aim of guaranteeing the freedoms. It is doubtful that they could sustain, especially if arguments about proportionality are brought in, the development of an entire harmonisation initiative in insolvency law, although, as a matter of record, Articles 47(2) and 55 were also canvassed as alternatives to the use of Title IV for what became the Insolvency Regulation.⁶⁸

(v) Internal Market Measures (Articles 94-95, EC Treaty) and Residual Powers (Article 308, EC Treaty)

Article 94, on the approximation of measures in the internal market, has been used notably within the employment and company law sectors as the basis of the guarantee and TUPE directives as well as the text introducing the European Economic Interest Grouping, all of which deal with insolvency as an ancillary issue.⁶⁹ Admittedly, with the enactment of a new chapter on social provisions, the first of those texts has acquired a new and specific legal basis in Article 137(2), a situation that in its previous incarnation had to be referred to the general powers for approximation of legislation that Articles 94-95 comprise.⁷⁰ Article 95, first introduced by the Single European Act, was extensively used as the legal basis for developments in the internal market, albeit that it contained a narrower remit by excluding measures related to the rights and interests of employees as well as the free movement of persons. In that light, it nevertheless allowed for considerable advances in rules governing the stock exchange and capital markets, but did not seem to have an extensive impact on the concurrent company law harmonisation initiative being conducted under Article 44(2)(g).⁷¹ Following the completion of the core of the Single Market programme, Article 95 has been used in 'less technical and more contentious areas,' with the consequence that its use has occasioned challenges before the Court. One limitation on the use of this article is that its object must be the harmonisation of domestic laws in areas over which the member states themselves have

⁶⁷ See footnote 31 above.

⁶⁸ See footnote 56 above.

⁶⁹ Directive 2002/74/EC of 23 September 2002 (OJ 2002 L270/10), Directive 2001/23/EC of 12 March 2001 (OJ 2001 L82/16) and Council Regulation 2137/85/EEC of 25 July 1985 (OJ 1985 L199/1) respectively.

⁷⁰ Department of Trade and Industry, Consultation Document on the Draft Directive (October 2001) at 10.

⁷¹ See Hopt, *op. cit.* at 2-3.

competence. For example, the power cannot be used to do things the member states themselves cannot achieve because of limits on their territorial competence, the illustrations given by commentators being those of pan-European legislation on a new type of intellectual property or a new corporate form.⁷² It goes without saying that if the member states have existing rules in the area, as would be the case in much of insolvency law, harmonisation could proceed. Nevertheless, the Court has held that the powers in Article 95 are purposive and can only be used to achieve harmonisation where the elimination of either distortions in competition or of barriers to inter-state commerce is an objective.⁷³

Article 308 is set out and described as a residual source of powers, its aim being to fulfil objectives under the EC Treaty where no other powers can be used. This provision has served as the basis for a considerable number of texts, albeit that member states are not entirely happy that it is used so extensively, leading the Court to set limits on how far this general residual power can be used by stating that the Article 'cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the [EC] Treaty as a whole.'⁷⁴ In fact, in the company law field, Article 308 has been used as the basis of the regulation introducing the European Company.⁷⁵ Furthermore, Articles 95 and 308 were also canvassed as alternatives to the use of Title IV for what became the Insolvency Regulation.⁷⁶ This would seem to indicate that insolvency harmonisation could take place under the ambit of the provisions subject to the caveats noted above, those in the case of Article 95 being the purposive elements required and, in the case of Article 308, the fact that the provision is viewed negatively by some states. Nevertheless, Article 308 still contains a unanimity requirement, which might palliate fears that it would be used in a way inimical to member states' interests. In fact, this provision in particular is considered to be a very flexible source of authority and has been invoked by member states themselves to resolve issues because the EC Treaty happens to be silent on the matter.⁷⁷ Thus, it may be conceivable that, if insolvency were considered sufficiently important by member states, an initiative might well take place under the remit of the 'residual' powers conferred by this article. With reference to Article 95, the economic arguments put forward for the initiative in the first place have not radically changed and might still provide the context for a strong case to be made that the purposive element of the article could be satisfied.

⁷²See De Burcá and Witte, *The Delimitation of Powers between the EU and its Member States* (2002) European University Institute (Robert Schuman Centre of Advanced Studies) Paper at 15-16.

⁷³*Ibid.*, at 16, referring to the case of *Germany v European Parliament and Council* (C-376/98) [2000] ECR I-8419.

⁷⁴*Ibid.*, at 17, citing *Opinion 2/94* [1995] ECR I-1759 at paragraph 30.

⁷⁵Council Regulation (EC) No. 2157/2001 of 8 October 2001 (OJ 2001 L294/1).

⁷⁶See footnote 56 above.

⁷⁷See De Burcá and Witte, *op. cit.* at 17-18, citing the examples of the introduction of the Euro and action by the European Community in the context of German reunification.

C - The Case for Further Harmonisation

The case for further harmonisation may be supported largely by the many arguments that have been made about the impact of insolvency in its economic aspect on society and the consequent need for action to tackle its negative manifestations. This has been recognised from the outset by many of the commentators that have urged harmonisation of insolvency laws in some form. As noted above, the extent of the harmonisation has always been problematic. In relation to the Insolvency Convention, the working party acknowledged that systematic unification of insolvency would take a long time and hence ruled out the creation of a 'European insolvency' and substantive modification of domestic laws.⁷⁸ This long lead time was viewed as necessarily arising from the fact that insolvency contained 'numerous, interconnected issues of legal and social policy' and its relationship to 'ordre public' issues in many member states that made full harmonisation unrealistic.⁷⁹ Nevertheless, harmonisation has never gone away as the utopian ideal of law-making and related measures in the field of company law have shown that, where harmonisation has been the aim, it has worked reasonably well, albeit that it has been largely attempted in discrete areas and not systematically across the field as a whole. Indeed, any question of harmonisation cannot avoid questions like whether it is even necessary to accomplish and for what purpose it is to be conducted. Similarly, such analyses cannot avoid coming to terms with the problems harmonisation can cause and, particularly, whether a cost-benefit analysis would, if undertaken at the outset, in fact deter those keen on harmonisation as a goal. Furthermore, merely stating that harmonisation is the right and apt tool to bring about integration of the Single Market is no longer sufficient in itself.⁸⁰ It is noticeable that even company law harmonisation has changed in emphasis from substantive to simple, minimal or 'framework' harmonisation measures, effectively introducing a veneer of European law, while retaining the domestic character of much of the rules applicable in member states.⁸¹ The question is whether insolvency law even approaches the point at which company law harmonisation was first mooted, that is whether there are elements within insolvency law that are capable of harmonisation. One clue may be to take the elements of the model law that accompanied the first drafts of the Insolvency Convention, where it may be seen that reservation of title, set-off, spousal property claims, transactional avoidance (Paulian actions) and the opening or extension of proceedings to directors were all considered potential subjects of harmonisation. Many of these remain as exceptions from the default rule of the *lex concursus* applying for the determination of issues arising out of proceedings.⁸² Nevertheless, they might

⁷⁸See Report on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings (Lemontey Report) (1981) (OJ 1982 Bull. Supp. 2/82) at 50.

⁷⁹See Fletcher, *Conflict of Laws and European Community Law* (1982) North-Holland Publishing Co. at 190-191.

⁸⁰See Hopt, *op. cit.* at 9.

⁸¹*Ibid.*, at 11-12.

⁸²Articles 5-15, Insolvency Regulation.

well be appropriate subjects if the determination remains to harmonise, albeit that it is difficult to see member states agreeing to do this unless there were overwhelming economic benefits for them to do so. Even were there to be arguments that would tend to persuade the EC Institutions to undertake the process, the question arises as to whether, in the context of the evolution of the European Union, the case may be made for cogent action on the political level to seek a legal solution for any decision that may be taken as to the scope and extent of further work in the insolvency field. Given the length of time it has taken to reach the determinative stage of the Insolvency Regulation thus far, it may be very doubtful that solutions will be forthcoming in the short to medium terms.⁸³

In any event and despite these doubts, if a decision were taken, it will become necessary, as a consequence, to see whether the same evolution will allow for the development of a legal basis that more explicitly deals with the position of insolvency. The difficulties inherent in the use of the legal bases dealt with thus far militate for this step. Whether it is realistic to expect the European Union to create a legal basis, solely or in conjunction with other critical legal fields, is the crucial question. The Treaty of Nice made minor changes to the provisions governing judicial co-operation in civil matters, chiefly altering the procedure for adoption by the introduction of qualified-majority voting. It also introduced the possibility of the establishment of specialised chambers of the Court to examine matters at first instance, thus opening up the prospects for the creation of a specialist venue for the hearing of matters in this field.⁸⁴ The recent proposals for a European Convention (Convention on the Future of Europe) contain a draft Constitution, whose Article 41 (in Part I) encapsulates the ideal of an area of freedom, security and justice by allowing for the adoption of laws (the new nomenclature for regulations) or framework laws (directives) intended to approximate national laws in certain areas to be defined as well as promote mutual confidence between member states on the basis of the mutual recognition of judicial decisions.⁸⁵ A related Article III-170 speaks of the same mutual recognition principle and the adoption of rules to ensure compatibility of the rules applicable in member states concerning conflict of laws and jurisdiction.⁸⁶ Commentary in an earlier draft pointed out that this provision, based on Article 65 of the EC Treaty, will omit the present reference to the proper functioning of the internal market,⁸⁷ potentially widening the scope of the application of this article.

⁸³Nevertheless, a proposal has emerged to enact measures dealing with directors' liability for wrongful trading, for which see 'A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts' at paragraph 12. This measure is considered by the group to fall within the province of company law, rather than insolvency law.

⁸⁴See Commission Publication titled Summary of the Treaty of Nice (2001), a copy of which is available at: <europa.eu.int/comm./nice_treaty/summary_en.pdf> at 7, 9.

⁸⁵Conv. 850/03 (18 July 2003) at 35. Draft articles, reports and proposals may be viewed through the EU website at: <europa.eu.int/futurum/index_en.htm>.

⁸⁶Conv. 850/03 (18 July 2003) at 137.

⁸⁷Conv. 614/03 (14 March 2003) at 20. However, an earlier report by the working party concerned had not seen any merit in removing these words (see Conv. 426/02 (2 December 2002) at 6).

The report of the working party dealing with the issue of competences, that is the division of powers between the EC institutions and the member states, recommends that the draft Constitution sets out a hierarchy of 'intervention' where particular legislative action is required, including uniform regulation and harmonisation, the example given in the case of the latter being that of company law.⁸⁸ Even with the redrafting, it is difficult to see that there is sufficient legislative leeway to permit a creative interpretation in favour of an initiative in insolvency going beyond the mutual recognition and conflict of laws resolution stages. With the set back experienced by the European Convention project in late 2003 and likely postponement of any further consideration, the issue of whether an insolvency initiative is underway may well have returned to the back burner.

Summary

The conclusion of the Insolvency Regulation is an important part of the long history of the creation of a European legal order in company and insolvency law. As witness the related initiatives governing insurance and credit institutions as well as ancillary measures in the company and employment sectors treating with insolvency issues, this legal order is by no means comprehensive, leaving many lacunae, and remains in at an early stage of development. Admittedly, it is likely that the work on the Insolvency Regulation and the lessons learnt over the 40 years the project has been in progress will influence many of the future proposals in this field as well as revisions of existing texts. Nevertheless, it is perhaps worthwhile recalling that, until recently, insolvency has remained one of the last and greatest areas of discord and dissension between member 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. This has often been described as resulting naturally from the close interest the State has in the creation of companies as well as the wealth and other benefits derived from entrepreneurship, factors that encompass the need to provide for the orderly dissolution of the business in instances of economic failure. There is still a strong element of national interest that has its expression in periodic revisions of legislation in the area and which may explain why international co-operation has been slowest in developing in this field in particular. It may be instructive to observe whether this position changes as a result of the passing of the Insolvency Regulation and increasingly familiarity with its use, thus promoting a more positive view of its benefits. Ultimately, the existence of a stable framework in insolvency will do much to further the aims of the Single Market in bringing the economies of the member states closer together. It is evident that there is as yet insufficient consensus on more harmonisation than has thus far been attempted. In time, with the further development of other instruments forming a comprehensive framework within the European Union for the treatment of insolvencies with a cross-border dimension, there may well come a time when more may be desired. Indeed, member states may well feel one day that their

⁸⁸Conv. 375/1/02 (Rev 1) (4 November 2002) at 12-13.

insolvency laws, in line with global trends that have encouraged the introduction of progressive insolvency measures, such as corporate rescue, pre-insolvency diagnostic and intervention procedures as well as more internationally focused co-operation, have sufficiently converged in philosophy and substance that closer harmonisation may be a more realistic ambition and prospect.

12 December 2003 (revised 31 January 2004)