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FIRST DRAFT NB. The paragraphs will be re-numbered when the Report is collated.

JURISDICTION TO DECLARE THE DEBTOR BANKRUPT

Introduction

1. Though Article 220 of the EEC Treaty contemplates only the recognition of judgments, the Committee of Experts which drafted the European Bankruptcy Convention concluded that it was necessary to prescribe, not only rules of recognition, but rules to regulate the assumption of jurisdiction in bankruptcy by the courts of Member States. Such rules, they considered, were required both to prevent the risk of concurrent bankruptcies and the continued use by Member States of such exorbitant[1] rules of jurisdiction as those in Articles 14 and 15 of the Civil Codes of France and Luxembourg. Only in this way could they give effect to the principle of unity of bankruptcy within the Communities. The Report, however, stresses that the relevant provisions of the Convention are not intended to prescribe internal rules for the assumption of jurisdiction by courts in Member States, but rather to delimit the jurisdiction of the Member States themselves.

2. The jurisdictional provisions of the Convention reflect the view that bankruptcy is designed to protect creditors and should be linked to the place where the debtor's business or affairs are principally administered. For this reason Article 1 declares that the Convention is to apply "irrespective of the nationality of the persons concerned", and the Convention in

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[1] This expression is used currently in the analysis of rules of jurisdiction to refer to national rules for the assumption of jurisdiction which are unacceptable to other countries as being prejudicial to their interests or the interests of defendants. Illustrations are the rules excluded by Article 3 of the European Judgments Convention and by Article 4 of the draft Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters.

fact applies irrespective of the debtor's domicile, whether in the sense of the law of the United Kingdom or in that of the law of the other Member States of the EEC.

Existing British Rules

3. To assess the effect of its jurisdictional provisions, the Convention has to be examined in relation to present British rules for jurisdiction in proceedings for the liquidation of companies, bankruptcy and in Scotland, sequestration.

Liquidations

4. The jurisdictional rules for the liquidation of companies are common to England, Scotland and Northern Ireland and need only to be summarised for ease of reference. English, Scottish and Northern Irish courts have jurisdiction to wind-up companies registered in England, Scotland and Northern Ireland respectively (1948 Act, ss. 218 and 220; 1960 Act, s. 209). They also have jurisdiction to wind-up unregistered companies, including foreign companies and dissolved foreign companies (1948 Act, ss. 398, 399 and 400; 1960 Act, ss. 348 and 349). It is thought that such companies must have carried on business in this country; but it has been held that a company not having a place of business in this country cound be wound up, provided there were assets within the jurisdiction to administer and persons subject or submitting to the jurisdiction, who claim to be creditors of the company.

5. For the purpose of allocating business between English and Scottish courts, a company's principal place of business is assimilated to its place of registration (1948 Act, s. 399). Under Section 349(2) of the 1960 Act the principal place of business in Northern Ireland of an unregistered company is deemed to be the registered office of the company. By referring to its place of business, there is an implication that the concern must be a trading company and orders have been refused against clubs and other institutions not established for gain. On the other hand Friendly Societies, whether registered under the Friendly Society Acts or unregistered, Trustee Savings Banks and Building Societies may be wound-up.

Bankruptcies

(i) England

6. Two conditions must be satisfied before an English court can exercise jurisdiction over a person: first, the person must have committed an "act of bankruptcy" and secondly he must be a "debtor" as defined by the BA 1914. The facts, each of which constitutes an act of bankruptcy,are also listed in that statute and some of them comprise acts which can occur in a foreign country.

7. Compliance with these two requirements is sufficient where the debtor presents his own petition, and jurisdiction depends on the debtor's presence,residence or participation in business in England, not on his nationality or domicile.

8. Additional requirements must be satisfied where a petition is presented by a creditor. S. 4(1)(d) of the 1914 Act provides that a creditor shall not be entitled to present a bankruptcy petition unless the debtor is domiciled in England, or within the last year has ordinarily resided or had a dwelling house or place of business in England, or has carried on business in England personally or by means of an agent or manager, or is, or within the last year has been, a member of a firm or partnership which has carried on business in England by means of a partner, agent or manager. This section specifically excludes persons domiciled in Scotland or Northern Ireland or a firm or partnership having its principal place of business in Scotland or Northern Ireland even though a business may have been carried on in England.

9. Thus, in the case of a creditor's petition, it is necessary for a creditor, to first ensure that the person is a "debtor" within the meaning of the Act and then have regard to the additional qualifications of s. 4(1)(d). On the other hand, when a debtor himself presents a bankruptcy petition, that is in itself an act of bankruptcy, and nothing more is required to found jurisdiction than that the person is a "debtor" within the meaning of s. 1(2).

10. Provided these conditions have been satisfied, the English court is not deprived of jurisdiction merely because similar proceedings have been opened in another country, but jurisdiction has been refused where proceedings had been started abroad and there were no assets in England.

11. With regard to the administration of a deceased insolvent's estate the grounds upon which jurisdiction may be founded are identical to those required for the hearing of a creditor's petition in bankruptcy.

Northern Ireland

11A. The jurisdiction of the Northern Ireland High Court to adjudicate a debtor bankrupt is not precisely defined by statute, although, by section 31 of the 1857 Act (as amended by section 17 of the 1872 Act) this Court has exclusive jurisdiction over a debtor if he resides or carries on business exclusively in Northern Ireland. It appears that the Court may only adjudicate bankrupt a debtor who is subject to the bankruptcy law of Northern Ireland either because he commits an act of bankruptcy in Northern Ireland or, where he commits outside Northern Ireland an act of bankruptcy which under Northern Irish law is capable of being committed out of Northern Ireland, he is a British subject or, possibly, is domiciled in Northern Ireland.

Sequestrations

12. The rules for jurisdiction in sequestrations under the Bankruptcy (Scotland) Act, 1913 differ from the corresponding rules under the Bankruptcy Act, 1914. Certain "companies" which are not registered companies under the 1948 Act may be sequestrated in Scotland under the 1913 Act. Section 2 of that Act provides that the expressions 'debtor', 'bankrupt' and 'creditors' shall apply to companies as well as individuals and shall include aliens. The same section declares that 'company' shall include 'bodies corporate, politic or collegiate, and partnerships' and that 'partners of a company' shall include the members of such bodies.

13. The 1914 Act expressly excludes from its operation companies registered under the Companies Acts. There is no such express exclusion in Scotland, though the court has concluded, that the sequestration of such companies under the 1913 Act is not incompetent /Standard Property Investment Co Ltd v. Dunhlane Hydropathic Co Ltd (1884) 12R. 328/. However, it is not clear whether or not the court would extend this principle to companies which it is competent to wind up as unregistered companies under s. 398 of the 1948 Act. If it were not prepared to do so, the ground of jurisdiction set out in s. 11(1)(B) of the 1913 Act would apply; namely that within a year before the presentation of the petition it carried on business in Scotland or a partner resided or had a dwelling house in Scotland.

14. The sole requirement enabling a living debtor to present his own petition is that he is "subject to the jurisdiction of the Supreme Court of Scotland." This expression was formerly construed to mean that the debtor was either domiciled in Scotland, possessed an interest in immoveable property there, or had continuously resided in Scotland for forty days. Since 1905, however, domicile has been rejected as a general ground of jurisdiction in personal actions but the two remaining grounds subsist.[1]

15. When the petition is presented by a creditor, the debtor must not merely be "subject to the jurisdiction of the Supreme Courts of Scotland" but have "within a year before the date of the presentation of the petition resided or had a dwelling house, or a place of business in Scotland" (1913 Act, s.11(i)(B)).

16. In petitions for the sequestration of the estates of a deceased debtor, the latter must have been "subject to the jurisdiction of the Supreme Courts of Scotland" at the date of his death (1913 Act, ss.11(2)).

Centre of Administration

17. The Convention makes the debtor's 'centre of administration' the fundamental criterion of jurisdiction, defining it as being the place where he usually administers his main interests. The official report which accompanies the Convention suggests that this new criterion has the dual advantage of defining the permanent and unquestionable seat of the debtor's economic activities whilst at the same time respecting the internal rules of Member States.

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[1] See Anton, Private International Law, p.432

18. The Committee which drafted the Bankruptcy Convention examined the traditional criteria of jurisdiction adopted in the original six Member States. They noted differences in the characterisation of these concepts, other than nationality, and the doubtful relevance of the debtor's nationality and domicile to the question where his business affairs should be wound up. They decided, therefore, to introduce as the principal basis of a State's jurisdictional capacity the criterion of the debtor's business seat: that is, the centre of his economic activities.

19. The Convention adopts as a subsidiary criterion of a State's jurisdictional competence the concept of an "establishment". This, again, is a novel concept in United Kingdom law. It is not defined in the Convention, but the Report indicates that it must be understood to refer to "secondary business premises, agency or branch without independent legal personality."

20. The primary rule is Article 3 which provides that, "where the centre of administration of the debtor is situated in one of the Contracting States, the courts of that State shall have exclusive jurisdiction to declare the debtor bankrupt". In the case of a company, it is provided by Article 3(2) that its registered office is presumed to be the centre of administration until the contrary is proved. These provisions are supplemented by Article 15(1), which requires the courts of all other Contracting States to decline jurisdiction in favour of a court having jurisdiction in terms of Article 3.

21. Where the debtor has no centre of administration in a Contracting State, Article 4 provides that the courts of any Contracting State in which the debtor has an "establishment" shall have jurisdiction to declare the debtor bankrupt. This is clearly not an exclusive jurisdiction, for the same enterprise may have business premises in several Contracting States.

22. Where the debtor has neither his centre of administration nor an establishment in any Contracting State, Article 5 provides that the courts of any Contracting State whose law permits them to declare the debtor bankrupt shall have jurisdiction for the purposes of the Convention. Such a declaration of bankruptcy also falls to be recognised in other Member States, and precludes a similar declaration in those States.

23. The practical effect of these rules is:-

(a) If a debtor, whether a natural or a legal person, has his centre of administration in a Member State the courts of that State will have exclusive jurisdiction to pronounce bankruptcy, to conduct the bankruptcy proceedings and to pronounce its closure. All courts of other Member States, must, if necessary of their own motion, declare themselves to be without jurisdiction.

(b) If the debtor's centre of administration is situated outside the ECC any Member State in which he has an establishment will have jurisdiction, provided its national law so allows.

(c) If the debtor has neither his centre of administration nor an establishment in any of the Member States, jurisdiction will exist concurrently in all Member States whose national law so allows.

24. We have received critical comments on the use of "centre of administration" as the basic ground of jurisdiction in the Convention. References have been made to the vagueness of the term and that it may give rise to complicated inquiries, particularly in the case of enterprises carrying on business in more than one State. It has also been suggested that creditors may be unaware, and have no means of ascertaining, where an individual debtor administers his main interests. We have examined and rejected several existing concepts, in particular, domicile, place of business and residence.

25. We accept that the concept does present difficulties: other things being equal, grounds of jurisdiction should be susceptible of ready ascertainment, since otherwise there is a risk of substantive issues being submerged in costly procedural debates. In our view however, objections of a similar kind apply to possible alternative concepts and we note that, at the stage of recognition, the problem of uncertainty of definition does not arise, because the Convention does not allow the grounds on which the original court assumed jurisdiction to be challenged in the courts of other States.

26. The Council of the Law Society of Scotland has strong reservations about jurisdiction referring either to a debtor's centre of administration or to his principal place of business. The Council advocates that the courts of the Member State in which the debtor has his domicile, or possibly his usual residence, should have exclusive jurisdiction; in the case of legal persons the situation of the registered office should be decisive.

27. The fundamental criterion of jurisdiction in the European Judgments Convention is domicile and it might be argued that the Bankruptcy Convention, as an ancillary to the Judgments Convention, should follow suit. But the Judgments Convention does not define domicile, and its official report suggests that a definition would tend to create confusion by increasing the number of internationally agreed definitions of the term. Further, the Judgments Convention provides for a persons's domicile to be determined in accordance with the national law of the State before whose courts he is being sued. As Member States all have different definitions of domicile, this means that different applications of the Judgments Convention are inevitable. In our view this would be unacceptable in the Bankruptcy Convention where a greater degree of certainty of loaction is required, both to assist creditors and to assist the courts.

28. A primary aim of bankruptcy proceedings is to make the debtor's assets available to his creditors. This indicates what is probably a more practical objection to domicile in this context as a debtor's domicile may bear no relation to the situation of his property.

29. It has been suggested that more often than not, a debtor's centre of administration will coincide with his principal place of business and that the latter term, being well understood, would be preferable. But this is not a term which can be readily applied to private persons and non-traders. Moreover there are differences in its interpretation as between Member States, and in the UK at least, it is possible for a business concern to have several "principal" places of business. (For example, see s. 399 of the 1948 Act).

30. We have been referred to the Report of the Committee on the European Judgments Convention, which suggests that a notion similar to habitual residence would best suit the UK's interests as a basic test for jurisdiction under that Convention. This concept has been introduced into some recent statutes in this Country. Moreover, we understand that where the term "domicile" occurs in the French text of the Bankruptcy Convention, the expression "habitual residence" will be used in the English text. However, it is probable that a concept of residence would not be acceptable to Member States having separate Civil and Commercial Codes, particularly those States whose laws prohibit the bankrupting of non-traders.

31. It has been represented to us that the definition of a centre of administration given in Article 3(2) is too vague, particularly since it is a new term and intended to relate to both private individuals and business concerns. It has been suggested that the reference to firms having registered offices is confusing and could imply that all firms, companies and legal persons must have registered offices. Firms required to register under the Registration of Business Names Act, 1916 are required to register a principal place of business but this is not generally referred to as a registered office. (However, see rule 284 of the Bankruptcy Rules, 1952 concerning the registered office of a limited partnership).

32. We understand that the question of an adequate definition has been raised with the Council's Working Group, which is considering the inclusion of a list of definitions in the Protocol to the Convention. In our view this is essential.

33. On balance, we propose that the concept of a centre of administration should remain the primary criterion for a State's jurisdictional competency, but we wish to emphasise the necessity for a compr ehensive definition. Before reaching this decision our attention was drawn to the Convention on the Mutual Recognition of Companies and Legal Persons, signed by the original six Member States on 29 February 1968. That convention accepts that a company's registered office may be in a different State from that of its central management. The convention refers to the seat of a company's central management as its "real registered office", and Article 5 states:

> "the real registered office of a company or body corporate shall mean the place where its central administration is established".

It seems to us that this coincides with the concept inthe Bankruptcy Convention and the expression "Centre of Administration" is preferable.

34. Where the debtor is a company or firm there is a presumption that its centre of administration is the place of its registered office or registered place of business, but this presumption may be rebutted by evidence. It will still be open to the courts of Member States to declare that the centre of administration of a company is situated in a State other than that of its registered office. It has been suggested that this presumption should be transformed into an absolute rule, as is the case in the proposed Statute for European Companies. But, in our view there is some force in the argument that a company's registered office may not be the centre of its business and economic activities.

35. We appreciate that the right to redargue the presumption admitted in Article 3(2) introduces an element of uncertainty, and increases the possibility of delaying tactics being used. But we can see the force of the argument that, for example, an English registered company havings its main business interests and the majority of its creditors in another Member State, should be wound up in that State. It should also be noted that Article 220 of the EEC Treaty envisages a convention for the transfer of the registered office from one country to another. It would then be possible for an English company, with all its business interests in this Country, to transfer its registered office to another Member State. The right to appeal against the presumption in Article 3(2) will ensure that such a transfer does not affect the location of any subsequent liquidation proceedings.

36. However, we can see no valid reason why a debtor company should be allowed to rebut the presumption that its registered office is its centre of administration. The address of a company's registered office is required to be mentioned on all its business forms and letters and it seems to us that this is impliedly, its centre of administration. We note that by section 9(4)(d) of the European Community Act, 1972 it is the address for service. We propose therefore that the right to rebut the presumption in Article 3(2) should not be open to the debtor.

37. We agree with the German delegation's proposal that a provision should be added to Article 3 to the effect that for the administration of a deceased insolvent's estate, "debtor" will mean'the deceased". An additional advantage of this codicil will be to make it quite clear that the Convention applies to such administrations.

38. The Convention adopts as a subsidiary criterion of jurisdictional competence the concept of an "establishment". Although this is a novel concept in United Kingdom law, we appreciate that it is a well known criterion for jurisdiction on the Continent. It is not defined in the Convention, but the Report indicates that it must be understood to refer to a "secondary business premises, an agency or a branch." The use of the word "agency" in the English translation of the Report is unfortunate because, not only would it be unacceptable for an agency as we understand it to be considered an establishment, but the Report goes on to indicate that this is not intended.

39. To avoid any confusion which might arise through using the word "establishment" in a multi-national context, we consider that a definition should be included in the list of definitions to be added to the Protocol. With this proviso we see no real difficulty in a concept which follows logically from the main principle.

Exorbitant Jurisdiction

40. We have given considerable thought to the question of exorbitant jurisdictions in conjunction with that afforded by Article 5. We see that the problem has been recognised in relation to the Judgments Convention. An Article has been included in that Convention which enables Member States to agree with non-Member States not to enforce against the latter's domiciliaries or residents judgments based on excessive jurisdictions (Article 59). The inadmissible jurisdictions are listed in Article 3(2) of the Judgments Convention.

41. It has been suggested to us that there are exorbitant grounds of jurisdiction in the bankruptcy laws of most Member States but we do not have specific information on this matter. However, we note that the Netherlands delegation in Brussels advocated the exclusion of any exorbitant effects from Article 5.

42. We are satisfied that to base jurisdiction solely on the location within the EEC of the debtor's centre of administration or, in its absence, an establishment would leave an unacceptable gap. Article 5 effectively closes this gap. It does seem to us that in practice, the requirement to exercise jurisdiction under Article 5 will rarely arise. However, the UK could be subjected to criticism by a foreign State, if one of that State's nationals was subjected to a Community bankruptcy involving exorbitant jurisdiction. We therefore draw attention to what is essentially a political matter and by a majority accept the requirement for Article 5.

43. Articles 6, 7 and 8 deal with cases where, within six months of the commencement of the bankruptcy proceedings, the debtor has transferred his centre of administration or an establishment to another country. In such cases jurisdiction is conferred upon the courts of the Contracting State which, but for the transfer, would have possessed it and, where the transfer is to another Contracting State, concurrently upon the courts of that State.

44. Article 6(2) deals with the position where the debtor transfers his centre of administration or establishment after having become subject to one of the analogous proceedings listed in Article 1(b) of the Protocol. The court in which such proceedings have been opened retains jurisdiction to supervise the course of the proceedings. It also retains jurisdiction to substitute a more severe measure, such as bankruptcy, unless and until a bankruptcy proceedings is opened in the State of transfer, resulting from new debts incurred after the approval of the arrangement or composition in the State of origin.

45. We can see no objection to these transfer rules which appear to be necessary in view of the freedom of establishment within the EEC. However it does seem from comments made to us that Article 6(2) should be redrafted to avoid ambiguity. It also occurs to us that Article 6(1), could, with advantage, be amended to read "....either the courts of the latter State or those of the State where the centre of administration was previously situated....."

46. Insofar as a transfer between Member States is concerned we consider that concurrent jurisdiction for a period of six months is reasonable. It is our view that the period should be kept to a minimum and we agree with the Report that creditors must be vigilant in this matter. We suggest that the period should run from the date of the presentation of the petition in the United Kingdom and we hope that it would run from similar, clearly identifiable dates in other Member States.

47. With regard to Section 11 of the Bankruptcy (Scotland) Act, 1913, a court in Scotland should decline jurisdiction in face of notice that a debtor had transferred his centre of administration or establishment to another Member State more than six months before the presentation of a petition.

48. As regards a transfer to a non-Member State, it has been suggested to us that the six months period is too short. The Insitute of Chartered Accountants of Scotland expressed the view that the period of one year presently allowed in Scotland was barely adequate. This view is supported by the Council of the Law Society of Scotland. We can see no reason why jurisdiction should not be retained for a year where the debtor has left the Community and we support this alternative proposal.

Non-Traders and Small Traders

49. The declared object of the Convention is to secure uniformity and unity between Member States in bankruptcy matters and this is plainly desirable if it can be achieved. A number of representations have been made to us concerning the considerable difficulties which

exist at present, in tracing and realising assets spread through a number of different countries. Steps taken to reduce such difficulties are to be welcomed.

50. However, there are fundamental differences of principle between the rules of bankruptcy law in Member States, which impose serious difficulties in devising a unified and uniform system. In Germany, Holland and the United Kingdom bankruptcy proceedings may be taken against all debtors. In France, Belgium and Luxembourg non-traders may not be made bankrupt and in Italy this prohibition is extended to include small businesmen, whose income is less than the taxable minimum.

51. A further anomaly exists at least in France where the term "commercant" has a narrower and more technical meaning than "trader". It applies only to a person carrying on a business of a commercial character as his habitual profession and in his own name. The directors and managers of companies therefore are not "commercants"; neither is a farmer, and debts arising from dealings in land may be regarded as civil and not commercial. French law does allow the extension of the bankruptcy of a company to its directors and managers (see Articles 11 and 12 and paragraphs below) but even this provision is not straightforward because it does not apply in the three departments of Alsace-Lorraine.

52. Article 9 provides for a possible shift of jurisdiction if a debtor who is a non-trader has his centre of administration in a country which prohibits the bankruptcy of a non-trader. This Article permits other Member States in which the debtor has an establishment (or, in the absence of an establishment, where the law of the State so permits) to declare such debtors bankrupt. Where, under Article 9, a bankruptcy is declared in a Contracting State other than the State of the centre of administration, that bankruptcy will be recognised in the Contracting States other than the State of the centre of administration.

There it takes no effect and such assets as the bankrupt may possess in that State are not available to the liquidator. It is presumed that they may be attached by creditors in other Contracting States in the ordinary way.

53. The rule in Article 9(2), that proceedings opened under Article 9 jurisdiction will not take effect in the State in which the debtor has his centre of administration, could well deny the liquidator, on behalf of the general body of creditors, access to the main assets. Creditors may take individual action against such assets of course, but such action could produce unfairness as between creditors and almost certainly would be detrimental to creditors in other Member States.

54. Some examples may serve to highlight the apparent illogicality in the rules:

(a) If a non-trader has his centre of administration in England or failing a centre in the EEC, he has an establishment in England, his bankruptcy can be pronounced in England and will be effective in all Member States.

(b) If this debtor has his centre of administration in France, and an establishment in England his bankruptcy can be pronounced in England and will be effective in the other Member States with the exception of France.

(c) If the same debtor has two establishments within EEC territory, one in England and the other in France, his bankruptcy can only be adjudicated in England but it will be effective in all Member States including France (Articles 9 and 56).

55. As may be expected in a country whose laws do not distinguish between traders and non-traders, we have received considerable criticism of the fact that such distinction persists in the Convention. We have noted that Germany, supported by the Netherlands, proposed that the distinction should be eliminated, but the proposal was defeated by the other four original Member States. We understand that the Working Panel in Brussels intend to reconsider the matter before submitting its final report to the Council of Ministers. At that time, of course, the Panel will be taking into consideration opinions expressed by the three new Member States and in those circumstances, the views expressed on behalf of the United Kingdom could be decisive.

56. Some of the criticism which we have received is to the effect that the Convention does not go far enough in achieving uniformity. To retain a distinction between traders and non-traders is a case in point. It is apparent from the Report that the working party which prepared the Convention acknowledged that unification, or at least harmonisation of applicable national legislations would be ideal, but they realised that to achieve it would take a very long time. We share this view.

57. After full discussion we have come to the conclusion that the rights of certain Member States to distinguish between traders and non-traders in their national laws should be respected and indeed supported, in so far as the Bankruptcy Convention is concerned. We can see no great advantage to be gained by taking issue in this matter and in these circumstances the jurisdiction afforded by Article 9 is necessary. It does occur to us, however, that the scope of Article could, with advantage, be extended to include other lacunae in jurisdiction, in addition to those relating to non-traders and small traders. We suggest this could be achieved by amending Article 9(1) as follows:

"Where the courts of a Contracting State which have jurisdiction under Article 3 are unable to declare a debtor bankrupt by reason of their substantive law, the bankruptcy may be declared by the courts of one of the other Contracting States in the terms of Articles 4 or 5 if the debtor has an establishment in that State, or, in the absence of an establishment, if the law of that State so permits."

<u>Jurisdiction to declare associated persons bankrupt</u>

58. Articles 10 to 12 of the Convention provide that the courts of a Contracting State in which a company or firm[1] has been declared bankrupt, have exclusive jurisdiction in the situations specified in those Articles to declare bankrupt members of the firm or persons who have directed or managed the company and may do so irrespective of the location of the centre of administration of the member or other person. Article 10 permits such an assumption of jurisdiction in cases where the member of a company or firm has unlimited joint and several liability for its debts. Articles 11 and 12 confer jurisdiction in the circumstances set out in Articles 1 and 2 of the Uniform Law respectively.

59. In the first case, where a firm or company has been made bankrupt and it is found that the person responsible acted as if it was his personal business or pursued personal gain under its cover, that person may also be declared bankrupt and made liable for all or part of the company's liabilities, provided his actions contributed to the company's insolvency. By virtue of Article 11, the individual's bankruptcy will be dealt with by the courts of the State in which the company had been declared bankrupt.

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[2] The Uniform Law is considered in paragraphs

60. Under the terms of the second uniform law, in conjunction with Article 12, the courts of the State in which a firm or company has been declared bankrupt, have exclusive jurisdiction to entertain actions concerning any liability incurred through mismanagement by those responsible for the management of the firm or company. If such person is ordered to bear all or part of the company's liabilities and fails to do so, the courts of that State have jurisdiction to declare him bankrupt.

61. The effect of those provisions is that in the bankruptcy of a company or firm in another Member State, a director of the company or partner of the firm may be declared bankrupt by the courts of that Member State, notwithstanding that his own centre of administration is in England, Scotland or Norther Ireland. This will entail, in general, the application of foreign law to most matters concerned with the bankruptcy including the conditions under which it is effective against third parties.[1] In dealing with Articles 11 and 12, the Report justifies the departure from the Convention's own jurisdictional principles as follows:

> "Concern to ensure the good administration of justice made it imperative to give jurisdiction, as far as possible to the court that had pronounced the bankruptcy of the company."

62. The Report justifies the unifying law of Articles 1 and 2 as being to "avoid over-clever directors locating their personal centre of administration in a country where they might consider they would be sheltered from the consequences of their machinations." The Report reasons that the courts of the State in which the firm or company has been made bankrupt will be in the best position to assess the true over-all position.

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[1] Article 19.

63. The provisions of Article 10 would be inapplicable to partnerships without separate legal existence, such as in England and Wales. In Scotland, it is perfectly competent for a Firm to be made bankrupt though one or more of its members may well be solvent. Also, an unlimited company may be wound up in the UK without calling into question the solvency of its contributories. These circumstances would remain because Article 10 does not change national legislation in any way.[1] It follows that UK citizens or companies would only be in jeopardy if they were partners in a business failure which was centred in another Member State. Anyone entering into such a partnership would be foolhardy if he did not first of all enquire as to the possible consequences of a business failure.

64. It seems to us that the main difficulty with Article 10 is the implication that the bankruptcy of members having unlimited liability might be automatic. The Report does indicate that before adjudication, an individual would be summoned to appear and given an opportunity of preparing a defence. In our view this is not sufficient; bankruptcy should only occur where the court has found that the member is liable, but has failed to discharge the debts of the firm or company.

65. We understand that the Working Panel in Brussels would be sympathetic to an amendment such as that proposed at the end of the last paragraph, It is our view that the amendment is vital to acceptance of Article 10.

66. It has been suggested to us that the bankruptcy of a partner or member arising under Article 10 should be dealt with in the State of his personal centre of administration. While we sympathise with this point of view, we do not consider that it is fundamental to acceptance of Article 10. However, we return to consideration of this matter below, in relation to Articles 11 and 12.

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[1] But see paragraphs concerning Article 13.

67. We are concerned to find that an implication of automatic bankruptcy also occurs in Article 1 of the Uniform Law. It seems that Germany and Holland also object to this concept and their delegations proposed that the court should ensure that all usual conditions for the opening of bankruptcy proceedings were met before pronouncing an adjudication under Article 1 of the Uniform Law.

68. In France, as soon as the Court finds a director or manager responsible for the company's debts, it declares that person bankrupt, without considering the question of his solvency. Indeed, it is assumed that he would be incapable of settling the company's debts. The French reaction to the German-Dutch proposal was that such an extension to the Uniform Law would unacceptably slow down proceedings. They thought it preferable to stipulate that national law would determine what additional requirements were necessary. The present position is that Germany has made a provisional reservation against the adoption of this article of the Uniform Law into its own legislation.

69. The bankrupty of a person found liable under Article 1 of the Uniform Law could only be pronounced in the UK following failure to pay a quantified debt. This is also the case in Denmark. We understand that France, supported by Belgium, Italy and Luxembourg, is strongly averse to any such extension of the Uniform Law. While we sympathise with this view which is presumably based on problems which are inherent in those countries, we consider that the German-Dutch proposal must be strongly supported.

70. It has been suggested to us that the jurisdiction afforded by Article 11 should only permit the courts of the State in which the company has been made bankrupt, to entertain actions concerning any liability arising under Article 1 of the Uniform Law. The liquidator should be required to pursue any resultant liability, if necessary to bankruptcy, in the forum of the person concerned. This would accord with the basic principles of the Convention, be fair to the debtor's private creditors, just to the debtor and ensure that the proper appli-cable law was applied in the realisation of assets. Moreover, it should be remembered that the "person" being adjudged liable under Article 1 could be a substantial holding company whose bankruptcy would be of national concern. We find much to commend this proposal and believe that it might enable Germany to withdraw its reservations concerning Article 1.

71. It would appear likely that in most cases occurring under Article 1 of the Uniform Law a problem should not arise, because the centres of administration should all be in one State. Where a person's centre of administration was in another State, his personal creditors would not be debarred from taking bankruptcy proceedings against him in that State, provided their action preceded any action under Article 11. What it amounts to, therefore, is that where a person is managing or directing a firm or company in a Member State other than that in which he has his own centre of administration, he may be made bankrupt in either State; but a bankruptcy could only arise in the State where the business was conducted, if he was found liable under Article 1 of the Uniform Law. Moreover, all of his creditors would participate in which ever bankruptcy took precedence and was therefore valid under the Convention. In the circumstances we concede, though with some reluctance, that the jurisdiction afforded by Article 11 may be accepted provided a liability under Article 1 of the Uniform Law has been quantified and the person found liable has failed to pay. [1]

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[1] See remarks concerning Article 12 at paragraph

72. We accept the provisions of Clause 1 to Article 12, which enable the courts of the State where the company has been made bankrupt to entertain actions founded on the liability incurred by its managers or directors by virtue of their management. For the reasons given in paragraph 70, we have some reservations about the second clause which gives those courts exclusive jurisdiction to declare such persons bankrupt, irrespective of the location of their own centres of administration, if they have failed to discharge that liability. We understand that the principle object of Article 2 of the Uniform Law was to enable directors and managers who were not in business on their own account, to be declared bankrupt in those States which prohibit the bankruptcy of non-traders. Having made it possible under Article 2 to make such persons bankrupt in any Member State, regardless of whether they are in business on their own account, there would not seem to be a requirement for the exclusive jurisdiction afforded by Article 12(2).

73. We understand that this matter has been referred to the Working Group who have tentatively agreed that Article 12(2) should be amended so as to give jurisdiction to the Courts of the State in which the person has his own centre of administration. For reasons similar to those set out in paragraph 71, we would accept, albeit reluctantly, the jurisdiction afforded by Article 12(2). However, we are pleased to hear of the proposed amendment and we consider it should be supported.

74. If the amendment to Article 12(2) is adopted, so that the general rules of jurisdiction (Article 3 et seq) apply in the case of bankruptcy proceedings arising from Article 2 of the Uniform Law, then we feel that the exclusive jurisdiction given under Article 10 and in particular under Article 11 should be re-examined. It may be that some Member States have strong reasons, of which we are unaware, for requiring such exclusive jurisdiction. If this is not the case and it is simply a matter of convenience, then in our view it would be preferable if the general rules of jurisdiction applied in all cases.

75. It is perhaps worth noting that if any or all of Articles 10, 11 and 12 were amended so as to leave the question of bankruptcy for the forum of the person concerned, the possibility of concurrent actions with those of his private creditors would be avoided.

76. Articles 10, 11 and 12 are complemented by Articles 13 and 14. Article 13(1) deals with cases in which the law of the State of the bankruptcy of the company or firm does not permit of the bankruptcy of the persons referred to in Articles 10 and 11 (the person might be a non-trader or the law of the State of the bankruptcy might not permit of the declaration of the bankruptcy of a person with liability for the debts of the concern) and provides that such persons "may be declared bankrupt by the courts of the Contracting States in accordance with the rules of jurisdiction in Articles 3-8". It has occurred to us that this rule might be objectionable to those countries where a partnership has a separate legal existence and where the bankruptcy of such a firm does not necessarily imply the bankruptcy of individual partners. A strict interpretation of Article 13(1) would enable a creditor of the partnership in another Member State to bankrupt such partners. However, we have been assured by our Scottish colleagues that the risk of this happening was acceptable.

77.1 Article 13(2) makes it clear that, where the affairs of the persons referred to in Article 10, 11 and 12 are already being administered in bankruptcy in one of the Contracting States, those proceedings shall preclude the opening of a fresh bankruptcy under those Articles.

78. The need to include the provisions of Article 13 arises from the special, exclusive jurisdiction given by Articles 10, 11 and 12. If these Articles are amended so as to allow the general jurisdictional rules to apply, then Article 13 can be deleted. If it is decided that the exclusive jurisdiction in Articles 10, 11 or 12 is essential then we consider that Article 13 is both necessary and acceptable.

79. Article 14 provides that in the cases referred to in Articles 11, 12 and 13, the liquidator of the firm or company proves in the bankruptcy of the manager or director on behalf of the general body of creditors. We consider this to be a sound and useful provision.

Rules to prevent conflicts of jurisdiction

80. Article 15 lays down 2 rules to deal with conflicting claims of jurisdiction. Firstly, a judgment based on the existence of a centre of administration will take precedence over a judgment based on the existence of an establishment. In its turn, the latter will take precedence over the opening of a bankruptcy pursuant to national law. Secondly, in the case of concurrent jurisdictions under the rules of the Convention, only the judgment given first will be recognised and take effect. Article 16 deals with conflicting disclaimers and in effect, prohibits a court from disclaiming jurisdiction on the grounds that there exist bases of jurisdiction which the court of another State refuses to recognise.

81. A feature of both provisions is that each requires a court which is seized of an application to declare a debtor bankrupt, to investigate whether the jurisdiction of the courts of another Member State prevails over its own, and to pronounce upon the question ex proprio motu. It has been represented to us, in particular by the College of Justice in Scotland, that the practicable difficulties in the way of operating this provision successfully in the UK are extremely serious and in their view it is dubious whether it could be achieved. They point out that the courts of England and Wales, Scotland and Northern Ireland are accustomed to an adversary procedure and are not accustomed to determining questions of jurisdictional competence of their own motion, except to a limited extent such as in matrimonial proceedings. Further, that the courts do not have available the means of conducting any elaborate investigations at their own hand. Moreover, the need for such an investigation might impose delay in cases where urgency is often of the essence. We suggest that these difficulties may be alleviated

to some extent by inserting clauses in Articles 15(1) and 16(1) to the effect that it is the duty of all parties to bring relevant facts to the notice of the courts.

82. In accepting the principles of Article 16 we propose that the second clause be amended to read:

> "Where a court of a Contracting State has declared that it has no jurisdiction under Articles 3 and 4, that judgment shall be treated as conclusive evidence of the fact by the courts of other Contracting States."

Articles arising from the bankruptcy

83. Article 17 gives to the courts of the State of the bankruptcy exclusive jurisdiction to determine a number of questions which may arise in the course of the bankruptcy proceedings, being essentially questions which flow directly from the fact of the bankruptcy. The report points out that the meaning and importance of the idea of "actions arising or deriving directly from the bankruptcy" differs perceptibly as between Member States. It was necessary, therefore, to provide a common list of actions and disputes which would be for the exclusive jurisdiction of the Courts of the State of the bankruptcy, otherwise certain actions would have been governed neither by the Judgments Convention nor the Bankruptcy Convention. In considering the various actions, which are listed in Articles 17, it should be remembered that this is purely a jurisdictional rule and that it does not lay down the applicable law. Where the applicable law is that of the State of the bankruptcy (see Article 19(2)) it will include its rules of private international law.

84. We have received a number of criticisms concerning the inclusion of immoveable property in clauses 1 and 2 of Article 17. We appreciate that the question is not concerned with the validity of the act according to the law of the situs, but that it is concerned only with whether or not the act could be invoked against the general body of creditors, having regard to the suspect period and in particular, the Uniform Law. To this extent therefore, it would seem that these two clauses are acceptable. However, it has been suggested to us that it would be worth considering whether some provision might be

made enabling the Court of the bankruptcy to obtain the opinion of the Court of the situs under an enactment similar to the Foreign Law Ascertainment Act 1861. In addition, we suggest that it is essential that adequate protection of bona fide third parties is provided.

85. We note that the report at page 57 states that for the transfer of immoveable property situated in Germany, the provisions of German law must be respected. This also applies in respect of the separate countries of the United Kingdom and we would imagine that it is also applicable to other Member States. We cannot stress too strongly our view that the applicable law in dealing with all aspects of immoveable property must be the law of the situs and that this should be made specifically clear in the Convention.

86. Article 17(3) confers upon the Courts of the bankruptcy jurisdiction to determine:

> "Applications to set aside acts done by the debtor in fraud of his creditors, even those based upon provisions other than those of the bankruptcy law".

The report explains that this is designed to confer upon the Courts of the State of the bankruptcy jurisdiction to entertain "Paulian" actions, that is to say, actions to revoke acts executed by the debtor in fraud of his creditors, which are not caught by a specific period of relation-back. Moreover, by Articles 19(2) and 35(2) those courts are to apply their own law, including rules of private international law, to the substantive issues before them. Wehave been concerned in case the operation of this provision might lead to transactions which were thought, when entered into in the United Kingdom, to be irrevocable, being re-opened in terms of a foreign system of law. We have received a number of comments expressing similar views. The Association of British Chambers of Commerce think the Convention should be restricted to Bankruptcy Law and the College of Justice in Scotland considers it undesirable that acts which are not vulnerable under Bankruptcy Law, should be liable to be set aside by virtue of this paragraph. The Association of Certified Accountants are of opinion that the uniformity of substantive law is

essential in respect of Paulian actions and the national laws of all Contracting States should be revised to provide for such actions; but on the other hand the Institute of Chartered Accountants of Scotland considers that from a practical point of view the principle of applying, so far as practicable, one system of law to any one bankruptcy should be adhered to. We are satisfied that the Court of the bankruptcy should have jurisdiction to entertain actions arising under this clause, but we would point out that it could encounter difficulties in applying the provisions of a foreign applicable law. For example, a foreign court might have difficulty in applying the provisions of Section 172 of the Law of Property Act.

87. Article 17(4) provides that the Courts of the State of the bankruptcy are to have exclusive jurisdiction to determine:

> "Disputes relating to the sale by the liquidator of the moveable property of the bankrupt, where non-compliance with the rules determining the powers of the liquidator is alleged."

We consider the principles of this clause to be unobjectionable.

88. Article 17(5) confers upon the Courts of the State of the bankruptcy power to deal with:

> "Claims for the recovery of moveable property from the estate of the bankrupt".

This jurisdiction coincides with the usual rules giving jurisdiction to the Court of the defendant, in this case the liquidator representing the general body of creditors and in our view is acceptable.

89. Article 17(6) confers upon the Courts of the State of the bankruptcy exclusive jurisdiction to entertain proceedings concerning:

> "Claims against the spouse of the bankrupt under bankruptcy law".

Concern has been expressed to us that the provisions of this clause could cause inconvenience and even hardship to the spouse of the bankrupt, who might be required to defend an action in a foreign court under foreign law.

It has been suggested that, ignoring questions of possible fraud, regard should be had to the increasingly enlightened views as expressed not only in recent Acts of Parliament but also in decisions handed down by English Courts, and that it would be desirable to provide that a spouse in England, if technically subject to the law of another Member State, should not have rights inferior to those accorded by the law of this country. It has also been suggested that it would be undesirable to introduce the provisions of Article 17(6) so long as there is no uniformity of domestic law regarding the conditions under which claims against the spouse of the bankrupt may be valid; it could be productive of much inequity and hardship if transactions, good under a particular system of domestic law were to be invalidated as a result of the application of a foreign bankruptcy law. We have considered this matter with some care. We note that the report specifically states that this clause relates solely to matters proper to the law of the bankruptcy and does not relate to other actions which the liquidator might bring against the bankrupt's spouse. In our opinion Article 17(6) should be accepted. This is in accord with several general comments which have been made to us, to the effect that, given acceptance of the concept of a European community, citizens of one Member State who trade in another must be prepared to accept the disadvantages along with the advantages which accrue from being in the community.

90. Article 17(7) confers exclusive jurisdiction on the courts of the State of the bankruptcy to hear:

> "Complaints regarding professional misconduct on the part of the liquidator, and disputes relating to his accounts."

The principle of this provision seem unexceptional, though we consider that the word "misconduct" is out of place. The Article should more clearly apply to claims based on negligence and might read:

> "Complaints regarding to the professional conduct of the liquidator .....".

91. Article 17(8) confers exclusive jurisdiction on the Courts of the bankruptcy to determine:

> " Disputes relating to the admission of debts, with the exception of fiscal debts or debts similarly recoverable, social security debts and debts arising under contracts of employment".

The concession to the Courts of the bankruptcy of exclusive jurisdiction to determine "other than in the excepted fields" questions relating to the admission of debts, preferences and securities clearly imposes upon creditors in other countries certain difficulties which Article 30 attempts to mitigate and which are considered in the context of that Article. The principle, however, has the obvious attraction of convenience for the liquidator in a multi-national bankruptcy seeking to marshall debts arising in different countries under different systems of law.

92. The conferring of jurisdiction in relation to such disputes is thought to be without prejudice to the application by the Courts of the State of bankruptcy of the ordinary choice of law rules. Indeed, this is made explicit by Article 41 in relation to general rights of preference and by Article 43 in relation to secured rights and special rights of preference. It is not made explicit, however, in relation to the admission of ordinary debts and in our view this too should be made explicit. With regard to the excepted matters, Article 17(8) provides that the Courts or Authorities "normally having jurisdiction" shall determine the amount of the debt and the extent of such preferential rights as it may enjoy. These Courts are not otherwise specified: in the case of fiscal or social security debts they are presumably the Courts of the State imposing the debt. In relation to debts arising out of contracts of employment, the matter is less clear and should be clarified in the negotiations to avoid any risk of conflicts of jurisdiction. We understand that the Department of Trade has already taken note of the fact that it will be necessary for someone in this country to be given power to deal with the excepted claims arising under Article 17(8) in bankruptcies occuring in other Member States. It is perhaps worth recording that the Institute of Chartered Accountants of Scotland, in accepting that the provisions of sub-paragraph 8 are probably as good as can be achieved in the short term, is of the view that in the long term such preferences should be uniform throughtout Member States.

93. Article 17(9) provides the Courts of the State of the bankruptcy with exclusive jurisdiction to determine disputes in which it is sought to terminate current contracts when the termination is based on bankruptcy law, with the exception of contracts of employment and leases of immoveable property. We understand that the report will be amended to define the scope of the expression "contracts of employment" and we consider that this sub-paragraph is unobjectionable.

94. It appears from the report that paragraphs1-9 of Article 17 are intended to be a limitative enumeration of questions exclusively referrable to the Courts of the State of the bankruptcy. In our view this should be made clear in the text of the Convention. We have given careful consideration to the possibility of there being important omissions in the list. The report makes it clear that there are several deliberate omissions. These include:

(i) Claims which are not founded upon the voidability of transactions under bankruptcy law for the recovery of moveable property in which the bankrupt has an interest;

(2) actions where the liquidator claims by no higher right than the bankrupt;

(3) actions relating to immoveables and real rights in immoveables other than those referred to in Article 17 Clauses 1, 2 3 and 6;

(4) actions to annul acts which the debtor has purported to execute after the bankruptcy and which are inconsistent with the vesting order in favour of the liquidator.

It is intended that jurisdiction in relation to these matters should be governed by the European Judgments Convention.

95. We do not consider that there are any other important matters which should be included in Article 17. However it has been reported to us by the Association of Certified Accountants that in their view the Court having jurisdiction in the bankruptcy should have jurisdiction to hear applications from the liquidator or trustee for directions.