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BASIC POLICIES OF THE CONVENTION

8.1 The formal justification of the Bankruptcy Convention lies in Article 220 of the Treaty establishing the European Economic Community and, specifically, in the need to secure the reciprocal enforcement of bankruptcy judgments in Member States of the Communities. But its practical justification lies in the defects of the present system of administering insolvent estates with international connections. In general, bankruptcy judgments have merely local effects. This territorial limitation of necessity leads to multiple bankruptcies and that, in turn, to a variety of difficulties. These include placing upon creditors, whose claims have not been satisfied out of local assets, the burden of presenting claims to liquidators in countries other than their own, placing upon the "principal" liquidator the difficult task of gathering in assets situated in other countries without an international conceded title to do so, difficulties and anomalies in relation to the operation of rules of relation-back with regard to assets in different countries, and inequalities in the distribution of assets as between preferential and ordinary creditors in different countries. All this ~~seems likely to~~ has increased the expenses of the trustee or liquidator, and ~~to~~ diminish the estate available for distribution among creditors.

8.2 Faced with these difficulties the draftsmen of the Convention have prepared an ambitious scheme to channel bankruptcy jurisdiction within the European Communities to a single and appropriate court, to secure that the liquidator appointed by that court has virtually exclusive authority to administer the insolvent estate, wherever situated within the Communities, to simplify the tasks of the liquidator by achieving a measure of harmonisation as to the effects of a bankruptcy order and by authorising him, apart from the harmonised rules, to apply the rules of his own system, including those relating to his powers as liquidator, both when dealing with/

with the recovery of the bankrupt's estate and when pronouncing upon claims made against it.

8.3 Such a scheme, if practicable, would be highly desirable. It is however, clearly not without difficulties, many of which have been identified in this Paper. Some of them were recognised by the draftsmen of the Convention who attempted to meet them by specific derogations from or exceptions to its basic principles. Some of the exceptions narrow the scope of the Convention, e.g. by limiting the persons or bodies to which it applies.[1] Other exceptions permit a court which would not otherwise be regarded as the appropriate court to declare a bankruptcy when the appropriate court cannot do so.[2] The main exceptions, however, are from the principle that the effects of bankruptcy are exclusively a matter for the law of the State of the bankruptcy. These exceptions relate to the effects of bankruptcy in a contract of employment (Article 36) on contracts for the lease of immoveable property, and contracts for the lease of hire of moveable property subject to registration (Article 37). There are also important exceptions to the principle last mentioned in relation to fiscal debts, secured debts, and preferential claims (Articles 41-44). On the whole, however, these limitations and exceptions are few and only ~~seriously~~ weaken the Convention's unity of principle ~~only~~ in relation to preferential claims.

8.4 The question, arguably, is less whether these exceptions are too extensive than whether they go far enough. It is arguable that, in its present form the Convention will cause hardship to individuals by its thorough-going extrapolation of the principles of the unity and universality of a Community bankruptcy. The Convention may mean, as we have seen, that a person, who otherwise might be declared bankrupt in the United Kingdom, may be immune from bankruptcy proceedings there, either because/

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[2] Cf. Article 9 - piccoli imprenditori

and in particular the mode and place of adjudicating upon the existence amount and preferential status of claims in respect of fiscal debts social security debts and debts arising out of contracts of employment.

because he has not committed an act of bankruptcy in the State of his centre of administration, or is the subject of stale bankruptcy proceedings in another Member State. The Convention does mean that, where a person or company has been declared bankrupt in another Member State, even though the bulk of his or its business interests are in the United Kingdom, the courts of the United Kingdom have no jurisdiction in the bankruptcy or winding-up. It also means that creditors in the United Kingdom must present their claims to a foreign liquidator whose acts effectively, they are in no position to control. In the case of "associated bankruptcies" under Articles 10 to 12 of the Convention, it means that the debtor himself may be convened to a forum inconvenient from his point of view and which may apply to him, and even to his spouse, rules which neither could readily have foreseen. We give two illustrations only : the debtor's right to retain after-acquired property, and even personal earnings, would appear by Article 33(2) to be governed by the law of the State of the bankruptcy; again, by Article 29, any safeguards in relation to the redirection of the mail of the debtor, wherever he may reside, are left entirely to the law of the State of the bankruptcy.

8.5 These brief summaries by no means exhaust the possible advantages and disadvantages of the Convention in its present form. Some commentators, while accepting in many respects the advantages of such a Convention, have asked whether the objects of the Convention could not be substantially achieved by a less radical departure from the existing principle of territoriality of bankruptcy. ~~Indeed, alternative schemes have been sketched out by Alain Hirsch[1] and Louis F. Ganshof[2].~~

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[1] 6 Cahiers de Droit Europeen, 1970, pp. 50-66

[2] 7 Cahiers de Droit Europeen, 1971, pp. 146-189

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8.3 Faced with these difficulties the draftsmen of the Convention have prepared an ambitious scheme to channel bankruptcy jurisdiction within the European Communities to a single and appropriate court, to secure that the liquidator appointed by that court has virtually exclusive authority to administer the insolvent estate, wherever situated within the Communities, to simplify the tasks of the liquidator by achieving a measure of harmonisation as to the effects of a bankruptcy order, and by authorising him, apart from the harmonised rules, to apply the rules of his own system, including those relating to his powers as liquidator, both when dealing with/

with the recovery of the bankrupt's estate and when pronouncing upon claims made against it, and (4) to simplify the task of the foreign creditor in presenting his claim in such a liquidation with the least complication and expense and legal assistance or representation, including legal costs, of his prosecuting his claim.

8.4. Such a scheme, if practicable, would be highly desirable. It is however, clearly not without difficulties, many of which have been identified in this Paper. Some of them were recognised by the draftsmen of the Convention, who attempted to meet them by specific derogations from or exceptions to its basic principles. Some of the exceptions narrow the scope of the Convention, e.g. by limiting the persons or bodies to which it applies;[1] Others exceptions permit a court which would not otherwise be regarded as the appropriate court to declare a bankruptcy when the appropriate court cannot do so.[2] The main

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8.6. The question, arguably, is less whether these exceptions are too extensive than whether they go far enough. It is arguable that, in its present form the Convention will cause hardship to individuals by its thorough-going extrapolation of the principles of the unity and universality of a Community bankruptcy. The Convention may mean, as we have seen, that a person, who otherwise might be declared bankrupt in the United Kingdom, may be immune from bankruptcy proceedings there, either because/

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Draft as at 20th November 1974

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8.3 Faced with these difficulties, the draftsmen of the Convention have prepared an ambitious scheme, the salient objects of which may be summarised as (1) to channel bankruptcy jurisdiction within the European Communities to a single and appropriate court, (2) to secure that the liquidator appointed by that court has virtually exclusive authority to administer the insolvent estate, wherever situated within the Communities, (3) to simplify the tasks of the liquidator by achieving a measure of harmonisation as to the effects of a bankruptcy order, and by authorising him, apart from the harmonised rules, to apply the rules of his own system, including those relating to his powers as liquidator, both when dealing with the recovery of the bankrupt's estate and when pronouncing upon claims made against it, and (4) to assist the foreign creditor in presenting his claim to such a liquidator with the least complication and expense, including the avoidance or reduction of the legal costs of prosecuting his claim.

8.4 Such a scheme, if practicable, must be highly desirable. It is, however, clearly not without difficulties, many of which have been identified in this Paper. Some of them were recognised by the draftsmen of the Convention, who attempted to meet them by specific derogations from or exceptions to its basic principles. Some of the exceptions narrow the scope of the Convention, e.g. by limiting the persons or bodies to which it applies; (see Article 1(2) and Protocol, Article I(b)). Others permit

a court which would not otherwise be regarded as the appropriate court to declare a bankruptcy, when the appropriate court cannot do so (see Article 9).

8.5 The main exceptions, however, are from the principle that the effects of bankruptcy are exclusively a matter for the law of the State of the bankruptcy, such as (1) those relating to the effects of the bankruptcy upon a contract of employment (Article 36), and upon contracts for the lease of immoveable property, and for the lease or hire of moveable property subject to registration (Article 37), and (2) those relating to fiscal debts, quasi-fiscal debts, social security debts, secured debts, and preferential claims (Articles 41-44), and the exclusion of the adjudication on such debts from the jurisdiction of the court of the bankruptcy. On the whole, however, these limitations and exceptions are few, and only seriously weaken the Convention's unity of principle in relation to preferential claims; there is also, the Committee believes, a case for arguing that some of such exceptions are, from the practical aspect, and in relation to the preservation of national judicial sovereignty, beneficial rather than prejudicial on balance.

8.6 The advantages to be conferred by the Convention would seem to be of real value from the points of view of the general body (or bodies) of creditors, whether viewed from the national or from the overall E.E.C. aspect; they

are also, the Committee believes, of real value from the point of view of the individual creditor in a multi-State bankruptcy, and may even to some extent benefit individual debtors by protecting them from multiple bankruptcies. But these advantages are not to be acquired except at ~~without paying for them~~ a price, and that price is represented by certain disadvantages, both from the point of view of the general body (or bodies) of creditors, and also from the point of view of the individual citizen of a Member State, whether he be a creditor, a debtor, a debtor's spouse, etc.

8.7 It can be argued that the Convention, in its laudable pursuit of unity and universality, may cause hardship and even injustice to such individuals, for example by exposing a debtor to bankruptcy proceedings in a distant or inconvenient forum, by reason of his capacity or actions as a director, manager or controller of an insolvent trading concern based in another State, or by exposing his or her spouse to rules affecting their matrimonial property, which neither of them could necessarily have foreseen; again, the proposed procedure for the re-direction of a debtor's mail might be regarded as oppressive.

8.8 From the point of view of the general body (or bodies) of creditors, their entitlement and ability to control the actions and the administration of a foreign-based liquidator may seem at present not to be strong enough, or at least not to be adequately enunciated ~~spelt out~~. The introduction of a multi-

State right of preferential claim against local-based assets (whether in the wider Convention form or in the more restricted form suggested by the Committee at para.5 above) may cause concern by reason of its novelty and possible complexity. The revolutionary conferment on creditors for fiscal and quasi-fiscal debts of a right of proof across frontiers, even though it be on an unsecured basis, may seem likely to diminish the funds available for other unsecured creditors. There is, of course, also involved a certain sacrifice of "national" jurisdiction, both in relation to the forum for obtaining the bankruptcy of debtors whose commercial activities have been in part carried on in the U.K., although their centre of administration (and therefore the exclusive court for making them bankrupt) lies in another State, and in relation to the exclusion of certain disputes within the bankruptcy from adjudication by the court of the bankruptcy.

8.9 It is, in the Committee's opinion, for their readers, and for the business, financial and legal communities of the U.K. from which their readers are drawn, as a whole, and in each of the component parts of the Kingdom, to weigh up for themselves the advantages and disadvantages which have been briefly summarised above, and have been displayed in greater detail in the preceding sections, together with such other advantages or disadvantages as may occur to the individual reader, and thereafter to strike their own balance. They should then form the best conclusions which they can, and

communicate them, together with their reasons, to the Committee. From those reasons and those conclusions, the Committee must, as soon as practicable, present to Her Majesty's Government the advice called for in the Committee's terms of reference set out in paragraph 1.1 above, which is now urgently required by the Secretary of State for Trade.

8.10 The Committee, having already studied the Convention exhaustively for over 12 months, feel entitled to conclude by suggesting to their readers a principle which may help to guide their approach to the Convention, regarded as a whole. This Convention (like any other judicial and commercial treaty, but perhaps in this case to a higher degree) must surely be founded upon an attitude of mutual trust between each of the signatory States (and their respective nationals) in the integrity and diligence of their respective courts and administrative systems. By signing and ratifying such a Convention, the U.K. would be undertaking to its fellow Member States and to their nationals, to afford them the justest, fairest and most efficient administration of their rights in the U.K., whether those rights be individual or collective. They would in return be entitled to expect to receive from those States and their nationals a like degree of justice, fairness and efficiency.

8.11 There does not seem to the Committee to be any prospect, as at this date and at this stage of the E.E.C.'s

development, of envisaging, let alone of drafting, a wholly new and different system for inter-E.E.C. insolvency administration (a system which all seem to agree to be in some form essential). But the long-established and highly experienced insolvency administrators of the U.K. (whom the Committee understand to be much admired in other States) and the communities which they serve, have surely much to contribute to the proper fashioning of this new, and potentially valuable, judicial and economic instrument. It is as a vital foundation for the negotiation by the U.K. of its participation in that instrument that the views of the readers are so much needed, and are now urgently awaited by the Committee and by Her Majesty's Government.

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