THE EC REGULATION ON INSOLVENCY PROCEEDINGS

A Commentary and Annotated Guide

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SECOND EDITION

Edited by

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FOREWORD

The reader of this book will already be aware that the European Insolvency Regulation, in the seven years from its entering into force, has changed cross-border insolvency law in Europe more than all the treaties, case-law and academic writings in innumerable decades before. As a consequence of this, the enactment of this European law has attracted global interest and all of a sudden the developments, interpretations and application of its rules became a trend-setter in this field of law for the rest of the world. Nowadays, a decision of the European Court of Justice (ECJ) about how the 'Centre of Main Interests' (COMI) is to be understood is a frame of reference for Australian, Brazilian or US courts. This stands in stark contrast to the times before when the cross-border insolvency situation in Europe was observed and commentedon, if at all, only occasionally and within small groups of insiders with rarely any impact or influence on other jurisdictions.

But it is not only this effect on the rest of the world which makes the Regulation such a remarkable and almost unique piece of legislation. In addition to that, within Europe itself, it has dramatically changed the attitude of the relevant actors—not only judges, practitioners and academics, but also actual and potential insolvency debtors—in this field towards the neighbouring jurisdictions and has caused a near—explosion of interest in their laws. Moreover, this mutual interest—inspired also by the Regulation's intent to suppress forum shopping which, as a matter of fact, had the contrary effect of a kind of awakening kiss—has led to a remarkable flexibility among those stakeholders; 'migration' has, thus, become a term of art in international insolvency law in almost no time at all. It is in reaction to this development that some domestic legislators have suddenly unfolded a formerly unknown activity, the amending, improving, and/or modernizing of their laws: The English CVA, for instance, is a model which is more and more copied, enhanced, or refined by other legislators in Italy, France, Greece, Netherlands—and, maybe soon, in Germany. In this way, the member states' laws converge without becoming uniform; there is an ambition to make domestic law better than that of the neighbours—an ambition which might improve the general standard all over Europe, if not the world.

Even that is not enough to describe this success story: who would have dared to predict only ten years ago that it is getting more and more common that foreign experts are welcome speakers on previously purely national insolvency congresses

and symposia? That they are asked even by the legislators for their advice? That they are invited to become part of the team of co-authors in commentaries on this Regulation? It is this very question that brings us to the present book. It is hard to find any other practical (as opposed to a purely scholarly) work on insolvency law which had such a far reaching influence in jurisdictions outside of the United Kingdom on daily work in relation to the Regulation. This commentary not only became standard-setting within England but also in probably each one of the Member States. Judges, practitioners, academics, and all other persons concerned used this book as guidance which is offered in a highly competent manner.

Given this fact, it is greatly to be welcomed that this new edition has arrived. Taking into account the fact that the development in this area of law is so rapid and, furthermore, taking into account the fact that the ECJ's decisions have such a far reaching effect, it is inevitable that the first edition has to be updated to reflect the last seven years' achievements; these are not just the authoritative determinations of the ECJ but also those problems, thoughts, and discussions developed throughout the Member States which might lead in the future to new disputes that, ultimatively, will have to be decided by the European Court. It is, thus, fair to assume that—after the initial concentration on the question of jurisdiction determined by COMI—the next phase will give rise to more substantive problems such as the applicability of employment law, the scope and mechanism of rights in rem, and the exact application of the claw-back rules, to name but a few. It is equally fair to state at this point of time that it is desirable that the present book will keep pace with these changes of focus and that not merely this second edition will see the light of day but many more to come.

Professor Christoph G Paulus
Dean of the Law Faculty of the Humboldt-Universität zu Berlin
23 January 2009

PREFACE

When the first edition of this work appeared in 2002, there was very little case law to cite and the contributors to the book had the difficult task of interpreting the Regulation with the assistance of the Virgos-Schmit Report and the Recitals, together with a limited volume of writings and talks on the subject. Since the first edition, there have been a number of significant cases, not only in the national courts, but also two reported decisions of the European Court of Justice, some further references to the ECJ and, too late to discuss in the text, which refers in detail to the Advocate General's Opinion, the ECJ's decision in the *Frick Teppichboden* case on 12 February 2009. There has also been much further writing and speaking in relation to the Regulation and the case law. The volume of material is now such that it would be impractical to include references to all of it, even if the contributors' linguistic abilities enabled them to do so. The EU has expanded and the Regulation now applies to 26 Member States with 21 language versions.

In order to keep the size of this volume within manageable proportions, and to maintain it as an attempt concisely to state the legal position as we saw it, we have focussed on what we believe to be the main cases and articles available in English or in translation into English, although a number of references to foreign language sources are also included. Not all the case law which touches on the Regulation is of real significance in interpreting it and therefore we have exercised a degree of selection even amongst the material available in English or translation into English. Likewise, in the case of articles and books, we have had to be selective and to focus on what we considered to be the most significant material.

Since the first edition, there have come into force the Directives dealing with credit institutions and insurance undertakings and these have been dealt with in a companion volume published by Oxford University Press in 2006: Moss & Wessels, *EU Banking and Insurance Insolvency*. Unfortunately, no such similar directive has appeared in respect of other types of proceedings excluded by Article 1(2) of the Regulation, namely 'investment undertakings which provide services involving the holding of funds or securities for third parties' and 'collective investment undertakings'. The unfortunate gap left in the case of 'investment undertakings' is illustrated by the recent case of *LBIE*, the principal Lehman Brothers company in the UK, which was an 'investment undertaking' and therefore excluded from the Regulation, but not included in any Directive.

The second edition retains the pattern followed by the first edition of having a series of narrative chapters giving an account of the principal features of the Regulation and a larger chapter providing an article by article commentary on the Regulation as a whole.

Chapter 1 by Professor Fletcher sets out the history of the Regulation and precursors and brings it up-to-date by reference to the Member States, now numbering 26, which are parties to the Regulation.

Chapter 2 by Stuart Isaacs QC and Richard Brent on the mode of interpretation of the Regulation as a community legal instrument is updated.

In Chapter 3, Professor Fletcher sets out the scope and jurisdiction of the Regulation. In Chapter 4 he sets out the choice of law rules. In each case, account is taken of developments in case-law since the first edition.

Chapter 5 by Gabriel Moss QC, Daniel Bayfield and Georgina Peters deals with recognition and enforcement, not only under the Regulation, but under the three other bases available in England for recognizing or assisting foreign proceedings and foreign insolvency practitioners. The changes in statute and case law are taken into account.

In Chapter 6, Stuart Isaacs QC, Felicity Toube, Nick Segal and Jennifer Marshall deal with the effect of the Regulation on cross border security and *quasi* security, updating these subjects in the light of further case-law and analysis.

Chapter 7 by David Marks QC deals with the regulation of financial services and markets in the EU in the light of the implementation of the Directives dealing with the reorganisation and winding up of credit institutions and insurance undertakings. Although the types of proceedings dealt with here are outside the scope of the Regulation, knowledge of these areas is important for understanding the operation of the Regulation and its relationship to credit institution, insurance undertaking and other regulated activity insolvencies.

Chapter 8 by Gabriel Moss QC and Tom Smith, with the assistance of additional commentary by Professor Michael Bogdan, Justice Timo Esko, Professor Ian Fletcher, Stuart Isaacs QC, Professor Alberto Piergrossi, Professor Bob Wessels and Alex Wood deals with the Regulation on an article by article basis, adding references to the significant case law developments.

Appendix 1 contains the up-dated text of the Regulation, as amended by reason of the accession of new Member States and changes in the insolvency proceedings in various States. Appendix 2 contains the Virgos-Schmit Report, an essential source of reference in the interpretation of the Regulation.

We have been able to include some references to material towards the end of 2008, although in essence the text tries to state the law as at October 2008.

There are two judgments of particular interest which have come too late to be included in the book.

In *Nortel Networks SA* [2009] EWHC 206(Ch) the English High Court, which had opened main proceedings in respect of a number of EU registered companies in the Nortel group, authorised the sending of Letters of Request to local EU courts asking them to ensure that the administrators were given notice of any application to open secondary proceedings. The judgment refers with approval to the view in the *Stojevic* case in Austria to the effect that Article 31(2) implies a duty on courts as well as liquidators to co-operate with each other. The judgment cites the decision of the Versailles Court of Appeal in the *Rover* case to the effect that even where there is jurisdiction to open secondary proceedings, these should not be opened unless they serve a useful purpose. The judgment also refers to the ruling in the Austrian *Collins & Aikman* decision to the effect that a stay under Article 33 is only a stay of the process of liquidation and not the secondary proceeding itself. The three cases cited are dealt with in the book.

The ECJ decision in *Christopher Seagon, in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH, v Deko Marty Belgium NV*, (Case C-339/07) upheld the Advocate General's Opinion, which is dealt with in the book, in concise terms, holding that the courts of a Member State which opens main proceedings have jurisdiction to try a claim to avoid a transaction brought against a defendant in another Member State.

The first edition enjoyed widespread sales throughout the UK and Europe and has the distinction of being cited by the Advocate General's Opinions in the first two cases on the Regulation in which the ECJ has given judgments, namely *Eurofood* and *Staubitz-Schreiber*. It has also been cited widely in the English case law.

We are very grateful to all our contributors who made the second edition possible. We are also grateful for the continued support and assistance (and patience) of Oxford University Press, including their energetic and able marketing department. We are grateful also to a number of others knowledgeable in this field who have contributed ideas and suggestions, which appear in various places in Chapter 8. We also express our thanks to the organisers of conferences which have facilitated the discussion and debate relating to the Regulation, such as INSOL Europe and the European Academy of Law. We are always happy to receive suggestions relating to the book and any significant case law or articles which any of our readers feel we have overlooked or should take into account in any future edition.

One of the great problems of the subject is that no central registry of cross-frontier EU insolvency proceedings has been set up. This not only leads to situations where purportedly main proceedings can be opened in ignorance of each other in two different Member States, as in the *Stojevic* case, but also makes research and

interpretation difficult and uncertain. It is to be hoped that the EU with its vast resources can remedy this situation. Meanwhile, we are happy to both receive and share news of significant case law developments with our readers. The text of this second edition shows the benefits of some of that sharing of information and we hope it will continue into the future.

We should finally mention the unfortunate impression that may have been given at the start of the case law that English courts were unjustifiably ready to find that the 'centre of main interests' of companies registered in other Member States were located in the UK. This misimpression appears to have been rectified by showing that the English courts look at the relevant criteria set out in the Regulation and the case law and make a proper judgment on the evidence available to them without any preference for the English jurisdiction. The fairness of the English procedure has been underlined by cases such as *Stojevic*, in which the opening of bankruptcy proceedings was set aside several years after the opening, on evidence being presented to the English court that there had been no jurisdiction in the UK, and the *Hans Brochier* case where the English court accepted at the prompting of the English administrators themselves that the opening of main administration proceedings in England had been unjustified because COMI had not effectively been moved from Germany.

We would hope that this type of result will reinforce the mutual respect and trust that is necessary for the working of the Regulation.

In practice, mutual trust and cooperation can best be developed by frequent cordial encounters both at conferences and by visits to each other's jurisdictions. Once judges, practitioners and lawyers have met, it is to be hoped that they will be more ready to trust each other and to cooperate in the way envisaged by the Regulation, in the interests of creditors and the public.

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17 February 2009

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Bob Wessels Bob Wessels is a leading insolvency lawyer in the Netherlands. He has his private practice in Dordrecht. He is Professor of International Insolvency Law, University of Leiden Law School. Prior to this chair he was Professor of Civil and Commercial Law, Vrije University in Amsterdam for twenty years. He is member of the Netherlands Royal Committee on Renewal of the Dutch Insolvency Act and Chairman of the Academic Forum of INSOL Europe. Since 1987 he is Deputy Justice at the Court of Appeal, The Hague. He acted as Special Technical Consultant to the IMF, the World Bank and the European Commission (TAIEX) advising in Indonesia (Jakarta), Georgia (Tblisi) and Estonia (Tallinn) on implementing their new insolvency laws. He advised in international insolvency related questions concerning e.g. Dasa Aerospace (EADS), Short Brothers, Royal Aircraft

Fokker, United Pan-Europe Communications (UPC), Yukos Oil, KPNQuest, BenQ Mobile, OOO Promnefstroy and Landsbanki (Icesave). He is the single author of: *Wessels Insolventierecht* (Insolvency Law), a 10 Volume series, which has been published between 1999–2003, by Kluwer, The Netherlands. Since 2006 seven volumes have been published in a second edition. Publications in English include 'Current Topics in International Insolvency Law', Kluwer Law Publishers, Deventer, 2004, 626 pp and 'International Insolvency Law', Kluwer, The Netherlands, 2006, 670 pp.

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LIST OF ABBREVIATIONS

AG	Advocate General (EC)
COMI	Centre of main interests
CVA	Company voluntary arrangement
CVL	Creditors voluntary liquidation
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
ERA	European Academy of Law
EU	European Union
EWHC	High Court of Justice of England and Wales
EWHC (Ch)	Chancery Division of the High Court of Justice of England and Wales
EWHC (Com)	Commercial Court, part of the Queens Bench Division of the High Court of Justice of England and Wales
EWCA or CA	Court of Appeal of England and Wales
FSA	Financial Services Authority
HL	House of Lords (supreme court for England and Wales, Scotland and Northern Ireland)
IRWR	Insurers (Reorganisation and Winding Up) Regulations 2004
PC	Privy Council (supreme court for certain British Dependent Territories and certain British Commonwealth countries)
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States

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HISTORICAL OVERVIEW: THE DRAFTING OF THE REGULATION AND ITS PRECURSORS

A. Preliminary

1.01 This chapter provides a brief account of the protracted process which resulted in the adoption of Council Regulation (EC) 1346/2000.[1] That project had begun as a proposal to conclude a Convention among the Member States of the European Economic Community (EEC), to regulate the conduct of insolvency proceedings as between themselves. The need for such arrangements was foreseen at the time of drafting the Foundation Treaty of the EEC, and was indeed covered by the terms of a specific provision of that Treaty.[2] Successive attempts to implement that provision, pursued first by the Commission and later by the Council, ended in failure, although at various times it had seemed possible that agreement could be achieved among the states then participating.

[1] Council Regulation (EC) 1346/2000 [2000] OJ L160/1.

[2] Treaty Establishing the European Economic Community, signed in Rome on 25 March 1957, commonly known as the (first) Treaty of Rome. Article 220(4) of that Treaty commits the Member States to negotiating a series of conventions for the benefit of their nationals, including one to secure 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitral awards'. The logical and legal bases for standardizing the intra-Community treatment of insolvency matters are more fully explored in IF Fletcher, *Conflict of Laws and European Community Law* (1982) chs 1, 2, and 6, esp at 187–90.

1.02 The last hope of bringing the project to a successful conclusion appeared to have been extinguished when, in May 1996, a finalized Convention that had been signed by 14 of the 15 members of what had by that time become the European Union, failed to come into effect due to the withholding of the signature of the United Kingdom. This had the unfortunate consequence of causing the text, negotiated by and apparently acceptable to all 15 states, to lapse. However, in a final demonstration of collective resolve the Council of Ministers, under the consecutive presidencies of Germany and Finland, revived the project in the form of a Regulation, thereby transforming it into a directly applicable legislative act under Community law. In its final iteration, the text was adopted as a Regulation of the EC Council on 29 May 2000. Having been adopted in that form the Regulation automatically entered into force on the appointed day—31 May 2002—in all the 14 Member States which were then participating in the legislative progamme promulgated under the provisions of the EC Treaty (Denmark being for this purpose a non-participating state by virtue of its permanent exemption, under the terms of the Maastricht Treaty, from the effects of legislation adopted under Part IV of the European Community (EC) Treaty in its amended form). Subsequent increases in the membership of the European Union in May 2004 (when 10 states simultaneously acceded to membership) and again in January 2007 (when the accessions of Bulgaria and Romania brought the total membership of the EU to 27 states) have brought about the situation where the Regulation on Insolvency Proceedings is currently applicable in 26 states, with the position of Denmark continuing unchanged in this respect.

The principal phases of the evolution of the EC insolvency project are set out below.

B. History of the Convention Project: Evolution of the Text

1.03 Over the period from 1960 to 1996 the Insolvency Convention project featured on the agenda of the institutions of the European Community/European Union, particularly the Commission and the Council. During those years, work advanced in various stages of irregular duration, interspersed by periods of almost total quiescence. As the work progressed, the evolving text bore a succession of different titles, as reflected in the following, abbreviated account. The most intense periods of activity may be broadly divided into two principal phases, of which the first can be subdivided into two parts. The first part of Phase I occurred in the years prior to February 1970, when a group of experts drawn from the original six Member States,[3] convened by the European Commission, produced a text published as the

[3] The original six members of the European Communities (including the Coal and Steel and Atomic Energy Communities, as well as the Economic Community) were Belgium, France, (West) Germany, Italy, Luxembourg, and the Netherlands.

Preliminary Draft Convention.[4] Following the accession of the first three additional Member States from 1 January 1973,[5] work was resumed on the basis of the 1970 text, with a view to its being adopted by all nine members. During this second part of Phase I, numerous modifications were made to the original text, partly as a reflection of the general thrust of critical comments published after 1970, and partly in response to particular concerns of the new participants in the negotiations. The essential features of the Preliminary Draft were nevertheless largely carried through into the Draft Convention submitted to the Council in April 1980 for further study and potential adoption.[6] However, sustained resistance on the part of several Member States resulted in the discreet abandonment of further attempts to promote the adoption of the 1980 Draft, although no formal announcement was made of this. Several years of inactivity and uncertainty ensued.

1.04 The initiative which resulted in a relaunching of the project was taken by the Council of Ministers which, in May 1989 with the Community's membership already enlarged to 12 and soon destined to grow to 15,[7] established a new working party on the Bankruptcy Convention under the chairmanship of Dr Manfred Balz. Phase II was pursued with much vigour, and was also characterized by a greater openness in that the emerging versions of the text were given a considerable measure of publicity and exposure to informed comment, in marked contrast to the prevailing taste for secrecy which had attended most of the developments during Phase I. One source of inspiration for those engaged upon the task of shaping the Phase II text was the recently concluded Istanbul Convention

[4] E Comm Doc 3.327/1/XIV/70–F, dated 16 February 1970. An explanatory report, known as the Noel-Lemontey Report, was published as E Comm Doc 16.775/XIV/70–F. English versions of both texts were later published under the same documentary reference numbers, but substituting the suffix-letter 'E' in place of 'F'. The English version of the text of the Preliminary Draft Convention was published as Appendix 10 to the Report of the Bankruptcy Convention Advisory Committee, in August 1976 (Cmnd 6602). The chairman of the Advisory Committee was Kenneth Cork. He, subsequently, as Sir Kenneth Cork, was chairman of the Insolvency Law Review Committee whose report, generally known as the Cork Report, was published in June 1982 (Cmnd 8558). To avoid confusion, the report of the Advisory Committee is sometimes referred to as the Cork Report No 1.

[5] Denmark, the Republic of Ireland, and the UK together joined the European Communities as of 1 January 1973. Norway, which had also negotiated terms of accession, resiled from taking up membership following a negative outcome of its national referendum held for that purpose.

[6] E Comm Doc III/D/72/80. The text of the Draft EEC Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings was published in EC Bull Supp 2/82, together with a report by J Lemontey. The text was also published by the Department of Trade in April 1980 and is reproduced as Appendix C in Fletcher (n 2 above). See also [1981] OJ L391/23, for the Commission Opinion on its suitability for adoption.

[7] Greece became the tenth member of the EC in January 1981; Spain and Portugal joined in January 1986. A further three accessions took place in January 1993, when Austria, Finland, and Sweden became members of what had, by that time, become known as the European Union, in consequence of the coming into force of the Treaty on European Union (the Maastricht Treaty) of 7 February 1992: [1992] OJ C224/1.

produced under the auspices of the Council of Europe, and opened for signature on 5 June 1990.[8] In addition to adapting some innovations of the Istanbul text, the working party resurrected certain features of the Phase I concept, while expunging or modifying others in the interests of achieving a more workable, and politically acceptable Convention in terms of the existing realities among a community of 15 states whose domestic laws exhibit numerous differences in matters concerning credit, security, and insolvency.

1.05 During the course of the working party's cycle of activity, the European Community officially transformed itself into the European Union (EU) following the ratification of the Treaty of Maastricht, and a further impetus was imparted to such unifying projects as the Convention on Insolvency Proceedings. At a meeting of the EU Council of Ministers on 25 September 1995, the finalized text of the Convention was tabled for approval and, if possible, immediate adoption. The more cautious—and in an EU context somewhat novel—course was taken of an 'initialling' of the text by all 15 Member States, thereby precluding any further negotiation or textual amendment. It was agreed that after a brief interval to allow governments to study this final version the Convention would be opened for signature for a limited period of six months, within which it would have to be signed by all the 15 states, as required by Article 220 of the Treaty of Rome, or otherwise lapse.[9]

1.06 This arrangement was carried into effect at a further meeting in Madrid on 23 November 1995, on which date 12 states signed the Convention.[10] Within the following months, two of the remaining three members—Ireland and the Netherlands—added their signatures. During that period, an approved and revised version of the Explanatory Report to the Convention was put into circulation, thereby overcoming one of the technical obstacles to acceptance of the text of the

[8] European Convention on Certain International Aspects of Bankruptcy, ETS No 136. This Convention is discussed in IF Fletcher, *Insolvency in Private International Law* (2nd edn, 2005), ch 6. The text of the Istanbul Convention is reproduced in ibid, app III.

[9] Insolvency Convention (1995), Art 49(2), (3) (see also section D below). Community Conventions under Art 220 ECT (as originally numbered; now numbered as Art 293 of the Consolidated EC Treaty) are negotiated by all existing members of the Community (now the EU) as at the time of their adoption, and require the ratification of all members in order to enter into force. Indeed, the Convention of 29 February 1968 on the Mutual Recognition of Companies has never entered into force, for want of the necessary complement of ratifications. Once a Convention is in force, a requirement is imposed upon states which subsequently join the Community/Union to negotiate their accession to it as soon as practicable, as one of the terms of membership. Article 50 of the Insolvency Convention (1995) confirmed this requirement.

[10] The 12 states which signed the EU Convention on the day it was opened for signature (23 November 1995) were: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Portugal, Spain, and Sweden. The text of the Convention as opened for signature is reproduced in IF Fletcher, *Insolvency in Private International Law* (1st edn, 1999) app II. See also (1996) 35 International Legal Materials 1223.

Convention that had been raised by some members of the Council at the session in September.[11] The state of uncertainty as to whether the United Kingdom would become a signatory before the expiry of the six-month time limit on 23 May 1996 was maintained by the terms of a Report of the House of Lords Select Committee on the European Communities dated 26 March 1996.[12] The Committee's concluding opinion and recommendation, while acknowledging the generally favourable views of many of those whose evidence it had received, nevertheless advocated a cautious approach, and the need for further study and consideration, before a final decision should be taken by the Government.[13] This proved to be ominous, and when the deadline for completion of signatures passed on 23 May, the signature of the United Kingdom remained outstanding for reasons which only subsequently became fully apparent.[14]

1.07 For some time, as already stated, the EU Insolvency Convention languished in an uncertain limbo. When, in 1999, the project was revived in the form of a Regulation, the substantive provisions of the Convention's text were incorporated with only a handful of alterations, other than essential drafting adjustments. For this reason, the evolution of the provisions during the successive phases of the Convention project—but especially during Phase II—is of more than merely historic interest. Indeed, in the absence of any official guide to the interpretation of the Regulation as finally enacted, the process by which the text of the Convention arrived at its concluded state in the autumn of 1995 merits careful study.

[11] The Report on the Convention on Insolvency Proceedings, prepared by Professor M Virgos and ME Schmit (hereafter in this book referred to as the 'Virgos-Schmit Report' and reproduced at app 2), was circulated as EU Council Doc 6500/96, DRS 8 (CFC), bearing the date 3 May 1996. It was not officially published, and remains unapproved by the Council, with the consequence that it is technically not of the status of *travaux préparatoires*, either in relation to the Convention itself or to those provisions of Regulation 1346/2000 which are directly derived from the Convention. It is nevertheless a valuable aid to understanding the intended meaning of those provisions. An earlier, English version of the Virgos-Schmit Report, bearing the reference coding 11900/1/95 REV 1, was published as Annexe B to a Consultative Document, *EC Convention on Insolvency Proceedings*, published in February 1996 by the Insolvency Service of the Department of Trade and Industry. The latter version should be regarded as having been superseded by the revised text of 3 May 1996. Many invaluable insights into the Convention's intended effects can be found in M Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70 American Bankruptcy LJ 485.

[12] *7th Report*: *Convention on Insolvency Proceedings* (HL Paper (1995–96) 59). The chairman of the Select Committee was Lord Hoffmann.

[13] ibid paras 35–42. The minutes of oral and written evidence supplied to the Select Committee are annexed to the Report, separately paginated (1–52).

[14] Although the pretext for non-signature by the UK in May 1996 was the disagreement between the UK and its EC partners over the agricultural crisis caused by the BSE epidemic, it subsequently transpired that the UK Government had concluded that the Convention's failure to make clear and unambiguous provision for its application to the colony of Gibraltar was an insurmountable obstacle to UK acceptance of the text. Regulation 1346/2000, as an Act of the EC Council, applies to Gibraltar under usual principles of Community law.

C. The Phase I Draft Convention (1960–1980): Principal Features

1.08 It might be supposed that, in the light of its subsequent abandonment, the Draft Convention that evolved over the years from 1960 to 1980 is primarily of historic interest. Nevertheless, it is as well that some account of its principal features, and also the reasons for its ultimate failure, should be recorded, partly to provide a better understanding of what was to transpire in Phase II of the project but also in the hope that the same errors will not be repeated in the course of some future project of this kind. A detailed analysis of the text will not be undertaken, however.[15]

1.09 The destiny of this first phase was effectively shaped by the circumstances under which the project began its life, during the early years of existence of the EEC itself. This was a period of rapid advance along the path towards European integration, with a Community of manageable size (consisting of the six founding members) being guided by a Commission whose zeal for the task entrusted to it was, for the

[15] For detailed discussion of the Preliminary Draft Convention of 1970, see: J Noel and J Lemontey, 'Aperçus sur le projet de convention européenne relative à la faillite, aux concordats et aux procédures analogues' (1968) 4 Revue Trimestrielle de Droit Européen 703; A Hirsch, 'Vers l'universalité de la faillite au sein du marché commun?' (1970) Cahiers de Droit Européen 50; L Ganshof, 'L'élaboration d'un droit européen de la faillite dans le cadre de la CEE' (1971) Cahiers de Droit Européen 146; M Hunter, 'Draft Bankruptcy Convention of the European Economic Community' (1972) 21 ICLQ 682, and 'Draft EEC Bankruptcy Convention—A Further Examination' (1976) 25 ICLQ 310; KH Nadelmann, 'Common Market Bankruptcy Draft Convention—Foreign Assets and Related Problems' in *Conflict of Laws, International and Interstate* (1972) 340, and in (1970) Riv Dir Int Priv e Proc 501; the same author, 'Rehabilitating International Bankruptcy: Lessons Taught by Herstatt and Company' (1977) 52 NYULR 1, 27–32; K Lipstein, *The Law of the European Economic Community* (1974) 284; WC Hillman, 'An American Lawyer Looks at the Common Market Bankruptcy Convention' (1974) 48 American Bankruptcy LJ 369; J Lemontey, 'Perspectives d'unification du droit dans le projet de convention CEE relative à la faillite' (1975) Revue Trimestrielle de Droit Européen 172; J Noel, 'Lignes directrices du projet de convention CEE relative à la faillite' (1975) Revue Trimestrielle de Droit Européen 159; J Farrar, 'EEC Draft Convention on Bankruptcy and Winding Up' [1977] JBL 320; IF Fletcher, 'The Proposed Community Convention on Bankruptcy and Related Matters' in K Lipstein (ed), *Harmonisation of Private International Law by the EEC* (1978) 119 (also published in (1977) 2 EL Rev 15). From the UK perspective, the Report of the Bankruptcy Convention Advisory Committee (n 4 above) is of enduring value: see esp the 'Note of Reservations' by AE Anton at 105–28. For critical assessments of the 1980 version of the Draft Convention, see J Thieme, 'Der Entwurf eines Konkursubereinkommens der EG-Staaten von 1980' (1981) 45 Rabels Z 459; KH Nadelmann, 'A Reflection on Bankruptcy Jurisdiction: News from the European Economic Market, the United States and Canada' (1982) 27 McGill LJ 541; the same author, 'Bankruptcy Jurisdiction: News from the Common Market and a Reflection for Home Consumption' (1982) 56 American Bankruptcy LJ 65; IF Fletcher, *Conflict of Laws and European Community Law* (1982) ch 6 at 187–249; D Lasok and P Stone, *Conflict of Laws in the European Community* (1987) ch 10 at 397–413.

first and perhaps only time in its history, matched by a generally favourable political climate across the Community.

1.10 The committee of experts originally formed in July 1960 to undertake the task of fulfilling the obligations imposed by Article 220 of the Treaty of Rome,[16] took an early decision to regard insolvency and related matters as a special subject requiring separate treatment. Thereafter, work continued towards the preparation of what was to become the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 1(2) of which expressly declares that the Convention shall not apply to: 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. A parallel group of experts drawn from the six Member States was therefore convened by the Commission to develop a Bankruptcy Convention which, it was envisaged, would complement the Brussels Convention and thereby accomplish the task of 'simplification of formalities governing the reciprocal recognition and enforcement of judgments' mentioned in the fourth indent of Article 220.

1.11 Although it was accepted that the ultimate shape and content of the Bankruptcy Convention would be determined by the special characteristics of its subject-matter, the fundamental approach followed by the expert negotiators closely matched that of the main, and faster-moving, project relating to civil and commercial judgments. In particular, the innovative approach embodied in the Brussels Convention of superimposing a unitary set of rules of direct jurisdiction in place of the variety of nationally-evolved rules previously applied by the individual Member States in relation to matters governed by the Convention, was emulated in the terms of both the Phase I versions of the Bankruptcy Draft as published in 1970 and in 1980 respectively.[17] Thus, the EEC Convention was conceived as a 'double', or 'direct' Convention, a radical advance upon anything previously attempted in the history of multilateral treaties in the field of bankruptcy.

1.12 Advocates of the use of a 'direct' type of Convention could legitimately emphasize its suitability for use within a community of states pursuing an integrationist programme whose aims included the creation of an internal market based upon the so-called 'four freedoms', namely the free circulation of persons, services, goods, and capital. To attain this goal, it was necessary to address the problem of distortion caused to the commercial and economic environment of the Community by differences in the Member States' legislative and administrative provisions. In this context, both the Brussels Convention and the proposed Bankruptcy

[16] See n 2 above.
[17] See 1970 Draft (n 4 above) Title II (Arts 3–17); 1980 Draft (n 6 above) Title II (Arts 3–16).

Convention could be viewed as having an important role to play in terms of providing for the free circulation of judgments in a way that complements the freedoms expressly established by the Treaty of Rome. By imposing uniform codes of rules for the exercise of jurisdiction in international cases, the Conventions would enable the recognition and enforcement of judgments and orders to become virtually automatic processes, with minimal scope allowed for parties to challenge or resist at the enforcement stage. The Member States, and the courts and officials operating within them, would be obliged to give 'full faith and credit' to the legal determinations of equivalent institutions belonging to sister states.[18]

1.13 By opting for this more audacious, and dirigiste, model for the Bankruptcy Convention the negotiators simultaneously assumed a more exacting responsibility in the matter of the technical quality of the Convention's design. Under a 'direct' Convention, all interested parties are compelled to rely almost totally on the integrity of the legal process at the point where jurisdiction is first exercised: there is only a limited possibility to rectify any misapplication or misuse of the Convention's provisions, and the expense of doing so can be considerable. Not only must the rules for allocation of jurisdiction be intrinsically sound and sensible, but also they must be well drafted so that their meaning and effects are as clear and unambiguous as possible, in the interests of enabling parties to understand their legal position and arrange their affairs with adequate certainty.

1.14 Unfortunately, the jurisdictional provisions of both of the principal Phase I texts failed to match these exacting, but vital, requirements. What was proposed was a three-tier hierarchy of jurisdictional criteria linking the debtor to the territory of the state in which proceedings could be opened. The first rank was accorded to the contracting state in which the debtor's 'centre of administration' (*centre des affaires*) is situated, the courts of that state being declared to have 'exclusive jurisdiction to declare the debtor bankrupt'.[19] The second rank was intended to apply to situations where the debtor's centre of administration is not located in any of the contracting states. In that event, the courts of any contracting state in which the debtor has an establishment are awarded jurisdiction to declare the debtor bankrupt.[20] Thirdly, where neither the centre of administration nor any establishment is situated in a contracting state, an 'open season' is effectively declared by authorizing the courts of any contracting state whose law so permits to declare the debtor bankrupt. However, whereas the 1970 Draft would have allowed such

[18] The rationale behind the programme of legal harmonization of the EEC/EU, including the 'full faith and credit' concept in relation to civil and commercial judgments, is explored in Fletcher (n 2 above) in chs 1, 2, and 4. The application of these arguments to the area of bankruptcy is addressed in ibid, ch 6 at 187–94.

[19] See Art 3(1) of both the 1970 and 1980 versions of the Draft (the wording is identical).

[20] See Art 4(1) of both the 1970 and 1980 versions (the wording is again identical).

bankruptcies to enjoy the full advantages of recognition and enforcement throughout the Community, the 1980 text was modified so as to exclude such bankruptcies from falling within the scope of the Convention.[21]

1.15 Even in this modified form, however, the proposed jurisdictional scheme was fraught with perils and uncertainties. Thus, as regards the primary criterion based upon the location of the debtor's 'centre of administration', there was scope for divergent approaches to be adopted by the courts of different states when applying the concept to the facts of actual cases. Although each version of the Draft supplied a definition of the expression as meaning 'the place where the debtor usually administers his main interests', this merely raises a whole series of further questions.[22] Similarly, with the secondary tier of jurisdictional competence, based upon the presence of an establishment, the Draft failed to meet the requirement that it should embody sensible principles, and above all that it should respect the need for certainty. The 1970 Draft did not contain any definition of 'establishment', while the 1980 text merely offered the inadequate pronouncement that 'an establishment exists in a place where an activity of the debtor comprising a series of transactions is carried on by him or on his behalf'.[23] Given that this could result in the courts of several contracting states having concurrent jurisdiction, the sensitive issue of priority demands a carefully designed rule to promote the fairest and most efficient solution, rather than one which rewards pre-emptive tactics on a 'winner takes all' basis. Sadly, the Phase I Drafts promised no such outcome.

[21] See Art 5 in the respective versions of 1970 and 1980. It may be observed that the earlier text was apparently intended to duplicate the effect of Art 4 of the Brussels Convention of 27 September 1968 (in force from 1 February 1973) which, controversially, allows the courts of contracting states to deploy their full repertoire of domestic rules of jurisdiction—including those of an exorbitant nature—against those defendants in civil or commercial proceedings who happen not to be domiciled in any of the contracting states. Judgments in such cases are nevertheless accorded the benefit of full faith and credit throughout the EC/EU territorial area. For trenchant criticism of this aspect of the Brussels Convention see eg KH Nadelmann 'Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft' (1967) 67 Columbia L Rev 995; 'The Outer World and the Common Market Experts' Draft of a Convention on Recognition of Judgments' (1967–68) 5 CML Rev 409; and 'The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?' (1968) 82 Harvard L Rev 1282; P Hay 'The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments: Some Considerations of Policy and Interpretation' (1968) 16 AJCL 149, esp at 160–2.

[22] See Art 3(2) of the 1970 Draft; cf Art 3(2) and (3) of the 1980 Draft. Although both versions embody a rebuttable presumption, in the case of firms, companies, and legal persons, that the registered office is the place where the debtor's main interests are usually administered, the manner of rebutting this presumption, and the degree of proof needed, are left uncertain. Given the scope for different views regarding what amount to a debtor's 'main' interests, the potential instability of this basis of jurisdiction was disturbing. See also the various approaches offered by Arts 6 and 7 of the 1970 and 1980 Drafts respectively for cases where there has been a transfer of the centre of administration.

[23] See Art 4(2) of the 1980 Draft.

Instead of a qualitative test to determine the most appropriate forum, purely mechanical rules were proposed which would have awarded Community-wide supremacy to the proceedings which were chronologically the first to open.[24] Worse yet—and surely the height of absurdity as a rule for adoption by a Community of supposedly sophisticated states—was the 'tie-breaking' provision for cases where proceedings were commenced on the same day in different courts having coordinate jurisdiction: it was solemnly proposed that precedence should be determined by the alphabetical order of the place names of the courts concerned![25]

1.16 The shortcomings of the jurisdictional rules of the Phase I Drafts were compounded by the unsuccessful attempt to simulate the embodiment of the twin principles of unity and universality of bankruptcy, and to misrepresent the degree to which they had genuinely been absorbed into the substance of the provisions to which the contracting states would be committing themselves.[26] If the proclamations within the texts themselves were taken at face value, proceedings opened according to the primary or secondary rules of jurisdiction would constitute the sole proceedings permitted to take place throughout the contracting states, and would have automatic effect in relation to the debtor's property anywhere within those states. By virtue of the choice of law rules within the Draft Convention, whose effect is generally to require the application of the law of the state in which proceedings are opened (the *lex concursus*) for most purposes associated with the proceedings and the administration and distribution of the estate,[27] it ought to follow that the rights of all creditors—secured or unsecured; preferential or non-preferential—would be determined by the provisions of the *lex concursus*. In reality, the negotiators arranged matters somewhat differently, so that the rights of secured and preferential creditors belonging to any of the contracting states could continue to be governed by the law of the *situs* of any secured property, and by the local law of the state under which a creditor's preferential status, and its relative ranking, was generated.[28] The negotiators had discovered at an early stage of their deliberations that the existing domestic laws of the original six Member States of the EEC differed from one another so fundamentally in such matters as their treatment of security, and the rights of preferential creditors, that it was impractical

[24] See Arts 15(2) and 52(1) of the 1970 Draft; Arts 13(2) and 58(1) of the 1980 Draft.

[25] See Art 52(2) of the 1970 Draft; Art 58(2) of the 1980 Draft.

[26] See Art 2 (both Drafts), which bears the heading: *Unity of the Bankruptcy*, and Art 33 of the 1970 Draft and Art 34 of the 1980 Draft, both headed *Universality of the Bankruptcy*. For discussion of the two principles of unity and universality, see Fletcher (n 8 above) ch 1 esp at paras 1.11–1.13.

[27] See Arts 17, 18, 19, 20–22, 28, 30, and 32 of the 1970 Draft; Arts 15, 17, 18, 20–22, 29, 31, and 33 of the 1980 Draft.

[28] See Section VI of each of the two Drafts: Arts 40–46 of the 1970 Draft; Arts 43–52 of the 1980 Draft.

to attempt an alignment and harmonization of substantive laws for the foreseeable future.[29] However, the very same reasons which made it politically unacceptable for the Member States to abandon deeply embedded national traditions towards the treatment of these issues, made it equally unthinkable for any of them to accept the subordination of the rights and expectations of its own, local creditors to the regime of the *lex concursus*, where this happened to be that of some other state.

1.17 The theoretically elegant precepts of the scheme based upon unity and universality therefore yielded to the political imperatives of the shared desire on the part of the participating states to defend local practices in matters of the preferential treatment of certain types of claim in the process of distribution on an insolvency. This was achieved by means of an inelegant, and cumbersome, arrangement whereby the existence and ranking of preferential rights would be determined by the law of each contracting state under which a creditor was eligible to invoke such personal advantage, but only with respect to such assets as were actually situated in that state on the day when the bankruptcy opened.[30] This would have entailed the creation of a series of sub-estates, for accounting purposes, formed from each pool of assets realized in each of the states concerned. The sheer complexity of the exercise was truly horrifying, and would have resulted in much wasteful expenditure of administrative resources.

1.18 Even less palatable, however, was the cynical proposal for the manner of dealing with any assets recovered in non-contracting states, and with the claims of creditors from outside the frontiers of the European Community. Here, and here alone, the full rigours of the principles of unity and universality were to be applied, so that assets recovered from third states were to be amalgamated with those located in the *forum concursus* itself, and were likewise to be distributed in accordance with the rules contained in the *lex concursus*. It is surely distasteful, and also embarrassing, to have to acknowledge that such blatantly discriminatory treatment was considered by the authors of the successive versions of the Phase I Draft Convention to be an acceptable approach to the regulation of international insolvency, and was intended to be collectively embraced by an alliance of powerful, but not omnipotent, economically advanced states. Yet such was indeed the case, as the documentary evidence reveals. Fortunately, in the years after 1980, the tide of opposition to this fatally flawed, meretricious, and unworkable Draft gradually grew stronger, and it was consigned to oblivion.

[29] See a comparative survey by Professor M Sauveplanne, published in October 1963 as EEC Commission Doc 8838/IV/63–E.

[30] See Arts 40–46 of the 1970 Draft; Arts 42–52 of the 1980 Draft.

D. Phase II: The Convention on Insolvency Proceedings (1995) and its Relationship to the Regulation

1.19 As mentioned in section B above, the committee of experts convened by the Council in 1989 to relaunch the project for a Bankruptcy Convention[31] adopted an eclectic approach in going about its task. Drawing together the more satisfactory elements from the two models closest to hand—the Phase I Draft EC Convention and the Istanbul Convention which was opened for signature on 5 June 1990—the committee sought to combine these with fresh elements of its own devising. It also appears to have been guided by a strong instinct to provide a workable set of rules that respond to issues actually encountered in practice, rather than to pursue some impossible and almost abstract theory about the way in which to legislate for the problems of international insolvency. The finished text produced by the Balz committee is one which, while by no means devoid of imperfections, has many positive virtues which under normal circumstances would have ensured its implementation by all members of the European Union. Fortunately, the product of the committee's labours was retrieved from limbo and the Convention's substantive provisions were implanted into the text of Regulation 1346/2000. Those provisions will be examined in detail in the subsequent chapters of this work. This account of the history of the project will conclude with a summary of the structure and main features of the Convention as agreed and initialled by all the Member States in November 1995, and which came tantalizingly close to implementation in that form.

1.20 The finalized text of the Convention consisted of a total of 55 Articles, arranged into six chapters of varying length, together with three Annexes. It was self-evidently the product of an assessment on the part of the committee that there were minimal prospects in the foreseeable future of achieving any fundamental harmonization of the domestic laws of the 15 EU Member States in relation to credit, security, or insolvency matters. That being the case, the most important requirement in the context of the EU internal market was to establish clear rules to determine in which states insolvency proceedings are capable of being commenced, and what choice of law rules are to be applied in those proceedings in relation to the crucial issues typically to be encountered in a cross-border case. In that way, parties can arrange their affairs, and structure their business transactions, on the basis of reasonably dependable predictions concerning the

[31] Throughout this section the expression 'the Convention' denotes the European Union Convention on Insolvency Proceedings, opened for signature in Madrid on 23 November 1995 and signed by 14 of the 15 Member States (the exception being the UK) between that date and 23 May 1996, when the period permitted for signature expired (see paras 1.02 and 1.05–1.06 above).

substantive law by which their rights will be governed. The Convention therefore adopted the same strategic approach as the Phase I models, in that it was a 'direct' or 'double' Convention whose effect was to impose a uniform set of jurisdictional rules which must be applied in all the contracting states in cases falling within the ambit of its provisions.[32]

1.21 Having laid the ground rules for jurisdiction and choice of law,[33] the Convention addressed the practical concerns of the office-holder who is responsible for administering the insolvency proceedings (referred to throughout as 'the liquidator'),[34] by provisions for recognition of the proceedings and for enabling the exercise of the liquidator's powers in other contracting states.[35] The concerns of creditors involved in a multi-jurisdictional insolvency were also taken into account in various ways, including simplification of the procedure for proving their claims.[36] The special facility under Chapter III to enable secondary proceedings to be opened, with effects restricted to the territory of a single contracting state, offered important advantages for certain types of creditors.[37] Lastly, to ensure that the Convention received a unified interpretation from the outset, provision was made in Chapter V for the European Court of Justice to have jurisdiction to deliver interpretative rulings concerning the Convention and its various Annexes.[38]

From Convention to Regulation

1.22 In the transformation from Convention to Regulation, Chapters I to IV inclusive, comprising Articles 1 to 42, were directly transposed (with only two specific, albeit significant, exceptions),[39] but with drafting adaptations throughout the text to reflect the altered nature of the legal instrument itself.[40] As an EC legislative act,

[32] See Art 3 of the Convention, further discussed at paras 3.09 et seq below. This contrasts with the Istanbul Convention (n 8 above), which is an 'indirect' Convention containing rules for recognition and enforcement only.

[33] Choice of law rules are contained in Arts 4–15 inclusive, and are discussed in ch 4 below.

[34] Art 2(b) of the Convention.

[35] See Ch II of the Convention (Arts 16–26 inclusive).

[36] Ch IV of the Convention (Arts 39–42 inclusive).

[37] See Arts 27–38 inclusive.

[38] See Arts 43–46 inclusive.

[39] Art 5 was amended by inserting additional wording to indicate that the expression 'rights in rem' includes security effected in relation to 'both specific assets and collections of indefinite assets as a whole which change from time to time'. This amendment, proposed by the UK, was intended to ensure that the provisions in Art 5 are applicable to floating charges and to such security devices as fixed charges granted over receivables. The wording of Art 42 was amended at the request of Belgium, to accommodate the fact that the state has two official languages. The amendment makes it clear that a creditor is only required to provide a translation of his claim into one of the official languages of such a state.

[40] In addition to the replacement of references to 'this Convention' with 'this Regulation', references to 'the contracting states' (etc) throughout the text are replaced with references to 'the Member States' (etc).

the Regulation did not need to contain any express provisions relating to its interpretation by the European Court of Justice, and therefore the whole of Chapter V of the Convention was discarded. The concluding chapter of the text, 'Transitional and Final Provisions' (numbered as Chapter VI in the Convention and there comprising Articles 47 to 55) reappears as Chapter V of the Regulation (comprising Articles 43 to 47). Several of the former provisions were only relevant to an instrument in the form of a Convention, and were accordingly omitted from Chapter V of the Regulation. The three Annexes, labelled as A, B, and C, were retained intact in the Regulation as enacted in May 2000, save for the omission of references to Denmark and its legal institutions, and with some rephrasing of the listings of national procedures, reflecting developments during the interval between 1995 and 2000.[41]

1.23 There is one conspicuous contrast between the Convention and the Regulation which requires special comment. This concerns the elaborate series of numbered 'Recitals' (numbering 33 in all) which are placed at the beginning of the text of the Regulation. By contrast, the substantive Articles of the Convention of 1995 were preceded by a short Preamble, containing four unnumbered and somewhat routine paragraphs declaring the motivation and purposes which were to have supplied the basis for the Convention. The purpose of the extended sequence of Recitals to the Regulation is to furnish assistance in its interpretation by national courts, and by the European Court of Justice. Having apparently determined that it was contrary to settled practice to generate an officially sanctioned 'Explanatory Report' to a Community Act in the form of a Regulation, the EC Council perceived that it was nevertheless desirable to furnish some aids to construction and application of its substantive provisions. This was achieved by extracting a number of propositions from the Virgos-Schmit Report[42] and placing them alongside freshly composed material, so as to provide explanatory statements about certain aspects of the Regulation and its underlying objectives. This has resulted in a somewhat uneven and selective set of guiding statements, which can be employed in the familiar process of 'purposive' interpretation of Community

[41] In the case of Austria, in comparison to the Convention, one procedure was eliminated from the entry in Annexe A, relating to insolvency proceedings referred to in Art 2(a) of the Regulation. In the cases of Belgium, the Netherlands, and Sweden, an additional procedure was included in each state's listing in Annexe A of the Regulation. In the case of the UK, the entry in Annexe A of the Regulation no longer makes express mention of the administration of the insolvent estate of a deceased person in England and Wales or in Northern Ireland (or its Scottish equivalent—Administration by a Judicial Factor), but the omission was apparently effected on the basis that such proceedings are included within the references to 'Bankruptcy' (England and Wales, Northern Ireland) and 'Sequestration' (Scotland). On the other hand, the UK entry in Annexe A of the Regulation expressly refers to 'Winding up . . . subject to the supervision of the court', which is a procedure still available under the law of Gibraltar, although it was abolished within the UK by the legislative reforms of 1985–86.

[42] See n 11 above.

legal instruments.[43] Numerous issues will doubtless arise in practice for which the Recitals offer no clear guidance, thus leaving the Court to formulate its solution in accordance with what it perceives to be the most constructive way of attaining the overall goals mentioned in the Recitals.

Post-2002 developments

1.24 Since the Regulation entered into force on 31 May 2002 there have been several developments necessitating amendments to the original text. Some of these amendments have been effected on the initiative of one or more of the participating Member States in order to ensure that the provisions of the Regulation are aligned with the current provisions and terminology utilized in the insolvency laws of the states concerned. Internal revisions to domestic insolvency procedures may necessitate amendments to the entries listed in Annexes A, B, or C of the Regulation under the name of that state. Such amendments can be made using the procedure specifically established by Article 45 for amending the Annexes by qualified majority vote of the Council. That procedure was used for the first time on 12 April 2005.[44] Further instances of use of the amending procedure under Article 45 occurred on 27 April 2006,[45] and on 13 June 2007.[46] On each of the latter two occasions the convenient practice has been adopted of replacing the entire texts of all three Annexes so as to provide a consolidated version of the text of each one, as in force from the date on which the amending Regulation took effect. As future amendments are made to the Annexes using the same procedure, care should be taken to consult the most recent version of the text.

1.25 Separately from the above amendments made using the in-built procedure of Article 45, the Regulation on Insolvency Proceedings has undergone additional amendments in consequence of the successive enlargements to the membership of

[43] Issues of interpretation of the Regulation are discussed in ch 2 below.

[44] Council Regulation (EC) 603/2005 [2005] OJ L100/1 effective from 21 April 2005. Among the amendments made were changes to the entries for the UK in Annexes A and B (where the words 'including appointments made by filing prescribed documents with the court' were inserted in the references to administration, so as to reflect the amendments to the administration procedure made by the Enterprise Act 2002), and also to Annex C (where the office of provisional liquidator was added to the list of office holders fullfilling the definition of 'liquidator' for the purposes of Art 2(b)). The latter addition appears to have been prompted by the example of the proceedings before the Irish courts during 2004 in *Re Eurofoods IFSC Ltd* [2004] BCC 383, in which the significance of the inclusion of the office of provisional liquidator in the equivalent entry for Ireland in Annex C became strongly apparent. This point was also a material factor in the subsequent ruling by the EJC in its judgment dated 2 May 2006 in which the expression 'decision to open insolvency proceedings' for the purposes of Art 16(1) of the Regulation was construed as including a decision involving 'divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation': Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR I-3813, at para 54 of the judgment.

[45] Council Regulation (EC) 694/2006 [2006] OJ L121/1 effective from 7 May 2006.

[46] Council Regulation (EC) 681/2007 [2007] OJ L159/1 effective from 21 June 2007.

the European Union that took effect in 2004 and 2007 respectively.[47] In each instance, under the terms of the relevant Treaty and Act of Accession the newly joining Member States became fully subject to all existing provisions of Community legislation (the so-called *acquis communautaire*), including Regulation 1346/2000. Accordingly, special provisions were made in or pursuant to the Acts of Accession in each instance to amend the Regulation so that Annexes A, B, and C would include references to the relevant types of insolvency and winding-up proceedings, and also to the relevant types of office-holders under those proceedings, for each new Member State as of the date of entry.[48] The amending provisions also imported additional paragraphs into Article 44(1) of the Regulation to incorporate references to existing conventions to which any of the new Member States was a party, and whose effects were replaced by those of the Regulation in respect of proceedings opened after its entry into force for the state in question.

47 See section A above.

48 (a) The following 10 states joined the EU with effect from 1 May 2004: Cyprus; Czech Republic; Estonia; Hungary; Latvia; Lithuania; Malta; Poland; Slovakia; Slovenia. In the Treaty and Act of Accession signed in Athens on 16 April 2003, amendments to Regulation 1346/2000 are made by s 18A of Annex 2 to the Act of Accession, under the heading 'Cooperation in the fields of justice and home affairs': [2003] OJ L236/711–13.
(b) Bulgaria and Romania joined the EU with effect from 1 January 2007. In the Treaty and Act of Accession signed in Luxembourg on 25 April 2005 provision was made in Art 56 of the Act of Accession for the amendment of a large number of elements of EC legislation, including Regulation 1346/2000, by means of further Regulations. This was accomplished through Council Regulation (EC) 1791/2006 [2006] OJ L363/1, Annex 11A ('Judicial Cooperation in Civil and Commercial Matters'). Amendments were made to Art 44(1) of the Regulation on Insolvency Proceedings, and to Annexes A, B, and C thereto, with effect from 1 January 2007 (Art 2).