THE NORDIC BANKRUPTCY CONVENTION – AN INTRODUCTION

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1. INTRODUCTION

The Nordic Bankruptcy Convention (the "Convention") was entered into on 7 November 1933 between the Nordic countries, Denmark, Finland, Iceland, Norway and Sweden.[1] The Convention is still in force today and has over the years been applied successfully in the contracting States. The Convention is a rather short legal document that only comprises 17 articles. Nevertheless, the limited length of this paper makes it impossible to cover all of these articles in detail. The aim of this paper is therefore not to give a comprehensive account of the Convention, but rather to describe the most important features thereof, in order to explain how the Convention works.

The structure of this paper will be the following. First there will be a historic background, which is followed by a description of the most important provisions of the Convention. Some comments will thereafter be given on the experiences from the application of the Convention. This is followed by a description on how the application of the Convention has been affected by the entry into force of the Council Regulation (EC) No 1346/2000 of May 2000 on insolvency proceedings (the "Insolvency Regulation"). Thereafter some comments are made on the future prospects for the Convention. Finally, the paper will be ended with some concluding remarks.

2. THE HISTORIC BACKGROUND OF THE CONVENTION

The background to the birth of the Convention was that representatives from the Nordic countries saw that it would be beneficial to enter into a bankruptcy convention in order to deal with bankruptcies with Inter-Nordic elements, since the number of such bankruptcies was believed to increase in the future due to the growing and already abundant trade between the Nordic countries. The negotiations that preceded the Convention were smoothened and facilitated by the fact the Nordic countries to a large extent share the same legal traditions and have legal systems with significant similarities.[2] The Convention could therefore, after a relatively short negotiation period, be entered into between the contracting States on 7 November 1933. The Convention has thereafter been subject to a minor and a major revision. The minor revision was made in 1977, and the major revision was made in 1982. The major revision amended several articles of the Convention and that Convention text is still applicable today. However, the structure and the main principles of the Convention remained unchanged in the revision. The revisions of the Convention are important to note, because Iceland has not yet signed the amended Convention text.[3] The initial wording of the Convention is therefore still applicable between Iceland and the other contracting States. The original Convention text has been made publicly available and is quite well circulated.[4] Non-

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[1] The Convention is a rare example of a multilateral bankruptcy convention. Bankruptcy conventions are normally bilateral and there are only a very limited amount of multilateral conventions. Other notable multilateral bankruptcy conventions are e.g. the Code Bustamente Code (Convention on Private International Law of 1928), which has been ratified by 15 Latin American States, and the Montevideo Treaty of 1940, which was has been adopted by Argentina, Paraguay and Uruguay. For a further description of these conventions, see Wood, Philip R., Principles of International Insolvency, Sweet & Maxwell, London (1995), p. 293 ff. Another more recent example of a multilateral bankruptcy convention is the OHADA Treaty, which has been concluded between several African States and entered into force in 1999.

[2] Borch, Ole, & Schjatvet, Jan, *The Inter Nordic Estate Convention – A Multilateral Insolvency Treaty in Action*, A paper presented at the 10th Biennial Conference of the Section on Business Law (IBA), Hong Kong (1991), p. 2 f.

[3] Mellqvist, Mikael, EU:s insolvensförordning m.m. – En kommentar, Norstedts Juridik AB, Stockholm (2002) p. 36.

[4] An English translation of the original Convention text has been published in League of Nations, *Treaty Series*, Vol. CLV, p. 115, and has also been published on the webpage of the International Insolvency Institute, at <<www.iiiglobal.org/international/treaties/nordic_treaties.pdf>>, visited on 20 March 2004.

Nordic lawyers must however note, as previously stated, that the original Convention text is only applicable in Inter-Nordic bankruptcies that involve Iceland. In all other Inter-Nordic bankruptcies the revised Convention text is applicable.[5] The following presentation will therefore be based on the revised version of the Convention (the Convention text is attached to this paper as an Appendix).[6] Unless stated otherwise, all references to article numbers are to the Convention.

3. THE PROVISIONS OF THE CONVENTION

3.1 The structure of the Convention

Conventions are often divided into single and double conventions.[7] A single convention only covers recognition and enforcement of foreign legal decisions, whereas a double convention also contains jurisdictional rules. The Convention is a single convention and as such, it only has provisions regarding recognition and enforcement of bankruptcy decisions, and it does not contain any rules regarding which of the contracting States that shall have jurisdiction to issue bankruptcy declarations. Furthermore, the Convention does not contain any definition of what it is that constitutes a bankruptcy. This is instead governed by the domestic legislation in the Nordic countries. There might therefore be slightly different bankruptcy definitions in the contracting States. A contracting State is nevertheless required to recognise and enforce a bankruptcy declaration from another contracting State, even if that declaration concerns a situation that would not constitute a bankruptcy event in the first-mentioned State.

The Convention is based on the principle of universality.[8] In fact, the whole purpose of the Convention is to endorse the universality principle in Inter-Nordic bankruptcies. In short, this is done through the implementation of the following three principles:

(1) A bankruptcy opened in one Nordic country comprises all assets and liabilities that a bankruptcy debtor possesses also in the other Nordic countries;

(2) The law of the country in which the insolvency proceedings are opened (the lex concursus) is applicable unless any specific exception is stated in the Convention; and

(3) The bankruptcy administrator is authorised to dispose of all the assets of the bankruptcy estate, regardless of in which Nordic country the assets are situated.

As previously stated, the Convention is only applicable on bankruptcy declarations. Other court or administrative orders that might be insolvency related, such as liquidations and corporate reorganisations, are therefore not governed by the Convention.[9] Furthermore, the

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[5] An English translation of the amended and current Convention text has been published in the United Nations, *Treaty Series*. The changes made in 1977 can be found in the United Nations, *Treaty Series*, vol. 1102, p. 181, and the later changes can be found in the United Nations, *Treaty Series*, vol. 1419, p. 384. However, it must be noted that the English version is just a translation and that the binding convention languages are Danish, Finnish, Icelandic, Norwegian and Swedish, see article 17 section 5.

[6] The attached text has been printed out from a database containing the United Nations, Treaty Series (date of printing is unknown).

[7] For examples of this terminology, see Bogdan, Michael, Internationell Konkurs- och Ackordsrätt, PA Norstedt & Söners Förlag, Lund (1984) p. 330, with further references stated therein.

[8] For a description of the principle of universality and the related counter principle of territoriality, see e.g. Omar, Paul J., The Landscape of International Insolvency Law, published in: International Insolvency Review, Vol. 11:173-200 (2002), or Guzman, Andrew T., International bankruptcy: In defence of universalism, published in: Michigan Law Review, Vol. 98:2177 (2000).

[9] However, there is one exception in which the Convention is applicable on a non-bankruptcy proceeding and that is public liquidations of banks in so far as such a liquidation precludes a bankruptcy proceeding according to the law of the State in which the bank is situated, see Article 12 section 1.

Convention is only applicable on domiciliary bankruptcies, *i.e.* bankruptcy declarations that have been issued by a court in the jurisdiction in which the bankruptcy debtor is domiciled (or where a legal person has its registered office)[10]. The Convention is therefore not at all applicable on non-domiciliary bankruptcies. In such bankruptcies, it is instead the national laws in the Nordic countries that decide the international aspects of the bankruptcy. In these situations there might be several non-domiciliary bankruptcies within the Nordic region.[11]

Finally it should be mentioned that the Convention is applicable on bankruptcy declarations regarding both natural and legal persons. This is not explicitly stated in the Convention, but can nevertheless be derived from some of the provisions of the Convention.[12] Furthermore, the Convention is applicable on all sorts of legal entities. If a legal entity can be declared bankrupt in one of the contracting States, then the Convention is applicable and the declaration must be recognised and enforced by the other contracting States. Bankruptcies concerning legal entities such as banks and insurance companies, which often are subject to tailor-made insolvency rules,[13] can therefore be subject to the application of the Convention, under the condition that these legal entities can be declared bankrupt in any of the contracting States.

3.2 Immediate recognition

A domiciliary bankruptcy declaration that has been issued in any of the Nordic countries is immediately recognised in all of the other contracting States, without the need of any exequatur proceedings.[14] Such a bankruptcy declaration has therefore immediate effect in all Nordic countries. From this follows, that if a domiciliary bankruptcy has been declared, then there can be no other concurrent bankruptcy proceedings in any of the other Nordic States. A domiciliary bankruptcy proceeding will therefore consequently comprise all of a bankruptcy debtor's property that is situated within the Nordic area.

3.3 Lex concursus

The fact that there will be only one bankruptcy proceeding in the whole Nordic region makes the question of applicable law very important. The Convention gives a strong position to the law of the jurisdiction in which the bankruptcy was declared (the lex concursus). Unless otherwise provided in the Convention, the lex concursus shall determine the effects of the bankruptcy in the following matters:[15] (1) divesting the bankruptcy debtor of the administration of his property; (2) the extent of the assets and the property therein comprised or capable of being re-incorporated therein in consequence of annulment proceedings; (3) the bankruptcy debtor's rights and obligations during bankruptcy; (4) the administration of the bankruptcy debtor's property and transactions in respect thereof; (5) the rights of creditors in respect of the payment of their claims; (6) the allocation of assets; (7) the composition with creditors or other mode of settlement.

[10] Article 13.
[11] Wood, Philip, *supra* note 1, p. 293.
[12] See, particularly Article 13, which refers to the domicile of both natural and legal persons.
[13] See *e.g.* the European insolvency documents; Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings; and the Directive 2001/24/EC of the European parliament and of the council of 4 April 2001 on the reorganisation and winding-up of credit institutions.
[14] Article 1 section 1.
[15] Article 1 section 2.

3.4 Exceptions from the lex concursus

3.4.1 Motives for the exceptions from the lex concursus

Even though the Convention strongly supports the application of lex concursus, there are several exceptions according to which the law of another Nordic State is applicable instead of the law of the State in which the bankruptcy was declared.[16] Because the lex concursus is favourable for the State in which the bankruptcy was declared and for the creditors situated in that State, the exceptions try to acknowledge and protect the legitimate interests of the other contracting States and the creditors that are situated in these States. This is done through the use of the following principles (*i.e.* exceptions from the lex concursus).

3.4.2 Assets exempted from the bankruptcy estate

The first exemption from the lex concursus states that such of the bankruptcy debtor's property as, under the law of the country in which it is situated, is not liable for seizure for any claim, shall not be included in the bankruptcy estate.[17] These assets are therefore unaffected by the bankruptcy proceeding and are not subject to the lex concursus. Instead the bankruptcy debtor is entitled to keep the excluded assets according to the provisions in the State in which the assets are situated.

3.4.3 Real property, registered ships, ships under construction and aircrafts

The second exemption from the lex concursus relates to the validity against the bankruptcy estate of certain acts performed by the debtor (e.g. transfer of title or hypothecation) regarding real property, registered ships, ships under construction or aircrafts.[18] According to the Convention, the law of the contracting State in which the real property is situated shall decide the legal effects of such actions. Similarly, the legal effects of acts regarding registered ships, ships under construction or aircrafts shall be settled in accordance with the law of the contracting State in which these assets have been registered.[19]

3.4.4 Rights acquired through executionary measures

The third exemption from the lex concursus concerns rights acquired through executionary measures. The Convention stipulates that the effect of bankruptcy on rights acquired through measures of execution shall be settled in accordance with the law of the State in which execution has taken place.[20] Furthermore, the Convention states that the effect of the bankruptcy on the right to take proceedings for compulsory execution by measures of execution shall be determined by the law of the State in which such an execution takes place.[21]

3.4.5 Third party rights

The fourth exception from the lex concursus concerns third parties' rights to collect payment for claims against the bankruptcy debtor that are secured either by assets that have been mortgaged or pledged by the debtor or by assets over which third parties have a retention

[16] These exceptions from the lex concursus are stated in Articles 1 and 4-7.
[17] Article 1 section 3.
[18] Article 4 sections 1-2.
[19] Ibid.
[20] Article 4 section 3.
[21] Article 5 section 2.

right.[22] In these cases the applicable law is the law of the State in which the assets were situated when the debtor was declared bankrupt.

3.4.6 Realisation of assets that are part of the bankruptcy estate

The fifth exception from the lex concursus states that the procedure for the sale of property that belongs to the bankruptcy estate shall be determined in accordance with the law of the State in which the property is situated.[23]

3.4.7 Preferential rights

The sixth exception from the lex concursus concerns preferential rights against particular assets that, at the bankruptcy declaration of a debtor, is situated in another contracting State than the State in which the bankruptcy was declared.[24] According to the Convention, the law in the State in which the assets were situated when the debtor was declared bankrupt governs such preferential rights and the ranking between these preferential rights. There is also a specific rule regarding preferential rights in ships and ships under construction. According to that rule preferential rights in these assets shall be decided by the choice of law provisions in the maritime laws of the contracting States.[25] Furthermore, there are special rules regarding preferential rights for taxes, fees and duties that have been levied against the bankruptcy debtor by another contracting State than the State in which the bankruptcy proceeding is being held.[26]

3.5 The authority for bankruptcy administrators

Bankruptcy administrators, or bankruptcy officers as they are called in the Convention, are authorised to dispose of all the assets of the bankruptcy estate, regardless of in which Nordic country the assets are situated. When bankruptcy administrators are acting in respect of property that is situated in other States than the State in which the bankruptcy was declared, then the administrators may request the assistance of the authorities of these States to the same extent as domestic bankruptcy administrators.[27] The courts of the contracting States are also, at the request of a bankruptcy administrator in one of the other States, required to assist the bankruptcy administrator concerning property that is situated in their jurisdictions.[28] The courts are upon such a request, required to make an inventory of the bankruptcy property that is situated in their territory and to take provisional measures regarding that property until the administrator can take care of the assets.

3.6 Miscellaneous

The Convention contains several provisions regarding where assets shall be deemed to be situated. For instance, claims in bearer form that are held by a bankruptcy debtor is regarded as situated in the State in which they are being kept, whereas other claims are regarded as

[22] Article 5 section 1.
[23] Article 6.
[24] Article 7.
[25] Article 7 section 2.
[26] Article 7 section 3. For an example of the rather complicated calculations regarding preferences for tax and duties, see Bogdan, Michael, *The Nordic Bankruptcy Convention, a Healthy Sexagenarian*, in: Boele-Woelki, K, et al. (eds.), Comparability & Evaluation: Essays on Comparative Law, Private International Law, & International Commercial Arbitration, in Honour of Dimitra Kokkini-Iatridou, Aspen Publishers, The Hague (1994), p. 32 f.
[27] Article 3 section 2.
[28] Article 3 section 1.

situated in the State in which the bankruptcy was declared.[29] Furthermore, registered ships, ships under construction and aircrafts are deemed to be situated in the State in which they are registered, except as regards the application of Article 6 of the Convention (see subsection 3.4.6 above).[30] It should also be noted that the Convention is not applicable on questions regarding the fulfilment of unfulfilled contracts to which the bankruptcy debtor was a party at the time of the bankruptcy declaration.[31]

4. EXPERIENCES FROM THE APPLICATION OF THE CONVENTION

As previously stated the Convention has been in force and applied in the contracting States for over 70 years. Due to the large amount of economic and personal interchange between the Nordic countries there has undoubtedly been a large amount of bankruptcies with Inter-Nordic dimensions in which the Convention has been applied.[32] Despite this there is almost no published case law of any relevance in any of the Nordic countries.[33] According to one of the leading Nordic scholars, Professor Michael Bogdan, the absence of case law proves the successfulness of the Convention.[34] This opinion has not been challenged in the Nordic legal doctrine. It is therefore reasonable to regard the Convention as a successful legal document that has facilitated Inter-Nordic bankruptcies for a long period of time.

4. THE CONVENTION AND THE EUROPEAN INSOLVENCY REGULATION

On 31 May 2002 the Insolvency Regulation entered into force in all of the current EU Member States except Denmark.[35] The Insolvency Regulation is therefore in force in two of the five Nordic countries. It is applicable both in Finland and Sweden, but not in Denmark, Iceland and Norway. This is important to note because the entry into force of the Insolvency Regulation has affected the application of the Convention. This is because the Insolvency Regulation replaces the Convention in insolvency matters between Finland and Sweden.[36] The Convention is however still applied in all Inter-Nordic bankruptcies that are not limited to only Finland and Sweden. Nevertheless, there is a potential risk that the facilitation of Inter-Nordic bankruptcies might become more difficult due to the Insolvency Regulation.[37] One example of this is the fact that the Insolvency Regulation accepts secondary proceedings, whereas the Convention gives immediate effect to the first bankruptcy decision and does not accept secondary proceedings. Another possible source of conflict could also be the cases, in which the Insolvency Regulation and the Convention are applied concurrently, i.e. in Inter-Nordic bankruptcies that in addition to Sweden and Finland also affect at least another Nordic State.

6. THE FUTURE PROSPECTS FOR THE CONVENTION

As stated above, the Insolvency Regulation has affected the application of the Convention and there are concerns that this will make Inter-Nordic bankruptcies more complicated. In the future the importance of the Insolvency Regulation might increase even more at the expense

[29] Article 8 section 1.
[30] Article 8 section 2.
[31] Article 9.
[32] However, there seems to be no public statistical data that shows the exact number of insolvency proceedings in which the Convention has been applied.
[33] Bogdan, Michael, *Sveriges och EU:s internationella insolvensrätt*, Lund, Norstedts Juridik (1997), p.142 f.
[34] Bogdan, *supra* note 24, p. 34.
[35] For the position of Denmark, see Recital 33 of the Insolvency Regulation.
[36] Article 44 (j) of the Insolvency Regulation
[37] Mellqvist, Mikael, *supra* note 3, p. 36 f.

of the Convention. This is because Denmark might change its current position and adopt the Insolvency Regulation in a not too distant future. Furthermore, both Iceland and Norway are members of the European Economic Area, and as such they might in the future adopt the Insolvency Regulation. Such a development would of course bring an end to the application of Convention. Needless to say, there are several challenges ahead for the Convention. Representatives from the Nordic States are therefore engaged in discussions regarding whether or not the Convention ought to be revised due to the Insolvency Regulation and the related insolvency directives concerning insurance undertakings and credit institutions.[38] However, the preliminary view among the Nordic countries is that no immediate revision of the Convention is necessary at this time.[39] The Finnish government has nevertheless been appointed to consider this matter more thoroughly.

7. CONCLUDING REMARKS

The Convention has been in force in over seven decades and has successfully facilitated bankruptcies with Inter-Nordic elements. It is an excellent example of the good results that can be achieved through a multilateral bankruptcy convention. Materially, the Convention is based on the principle of universality, but it also has some exceptions from that principle in order to safeguard the interest of local creditors. The success of the Convention should probably be attributed to the fact that the contracting States have similar legal systems and are devoted to, and recognise the importance of, legal co-operation within the Nordic region. Another important fact that probably has played a major importance for the success is the shortness and simplicity of the Convention. It goes without saying that more extensive and complicated conventions provide more potential pitfalls and possible obstacles for a smooth implementation. The Convention with its simple structure and strong support for the universality principle has stood the test of time and the Convention can therefore provide inspiration for future legislators on how to solve some of the intricate legal problems that exist in international insolvency law.

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