be considered as given in the context of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons or analogous proceedings within the meaning of subparagraph 2 of the second paragraph of Article 1 of the Convention.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 22 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 7 FEBRUARY 1979 [1]

Mr President,
Members of the Court,

In March 1974 proceedings were begun for the winding-up of the French limited liability company "Fromme France Manutention", Paris, after the German parent company had become insolvent. The applicant and appellant on a point of law in the main proceedings, in which the present request for a preliminary ruling originated, was appointed "syndic [liquidator or trustee for the creditors]".[2] Since the assets of the French company were not sufficient to pay its debts, in June 1974, on application by the "syndic", the defendant and respondent on a point of law in the main action, who had been managing director of the German parent company and — apparently since 1971 — also managing director of the French company, was as *de facto* manager of the French company made a party to the proceedings for the winding-up of that company. This was done pursuant to French Law No 67-753 of 13 July 1967 on the "règlement judicaire [administration of the affairs of an insolvent person, firm or company expected to continue in business under the supervision of the court]", [2] the "liquidation des biens [the winding-up of an insolvent person, firm or company not expected to continue in business]", [2] the "faillite personnelle [mandatory or optional deprivation or prohibition by the Court of the exercise of rights required to carry on business when the

1 — Translated from the German.

2 — Translator's note. The English terms given do not purport to be exact equivalents of the French terms, since concepts in the different legal systems are not identical.

debtor or manager has been imprudent or dishonest]" [1] and "banqueroutes [ordinary and criminal bankruptcies]", [1] Article 99 whereof reads:

"Lorsque le règlement judiciaire ou la liquidation des biens d'une personne morale fait apparaître une insuffisance d'actif, le tribunal peut décider, à la requête du syndic, ou même d'office, que les dettes sociales seront supportées, en tout ou en partie, avec ou sans solidarité, par tous les dirigeants sociaux, de droit ou de fait, apparents ou occultes, rémunérés ou non, ou par certains d'entre eux.

L'action se prescrit par trois ans à compter de l'arrêté définitif des créances. En cas de résolution ou d'annulation du concordat, la prescription, suspendue pendant le temps qu'a duré le concordat, recommence à courir. Toutefois, le syndic dispose à nouveau, pour exercer l'action, d'un délai qui ne peut en aucun cas être inférieur à un an.

Pour dégager leur responsabilité, les dirigeants impliqués doivent faire la preuve qu'ils ont apporté à la gestion des affaires sociales toute l'activité et la diligence nécessaires."

"[If the règlement judiciaire" or the "liquidation des biens" of a legal person discloses that the assets are insufficient the court may on the application of the 'syndic' or even if its own motion order that the debts of the company shall be borne in whole or in part, with or without joint and several liability, by some or all of the *de jure* or *de facto* managers, apparent or concealed, paid or unpaid, of the company.

The right to make such an application is barred on the expiration of the period of three years from the date when the final list of claims is drawn up. If the scheme of arrangement is terminated or declared void the period of limitation suspended for the duration of any scheme of arrangement begins to run again. Nevertheless the 'syndic' is allowed a further period, which may under no circumstances be less than one year, within which to make his application.

In order to discharge their liability the managers involved must prove that they managed the company's business with the requisite energy and diligence.]"

The Commercial Court, Paris, granted the application. The order was partially varied in March 1976 by the Court of Appeal, Paris. Pursuant to the latter's decision the defendant has to pay FF 743 563.15 of the liabilities of the French company amounting to FF 859 575.39 which are not covered by the assets, and also to bear the costs of the appeal, — less a lawyer's charges. The Court of Appeal also confirmed the order of the Commercial Court in so far as it declared, pursuant to Article 108 of the before-mentioned Law No 67-563, that the defendant had lost the right to direct, manage, conduct or supervise a commercial undertaking.

In order to be able to enforce this order, against which an appeal to have it set aside has been lodged, in the Federal Republic of Germany — at any rate in so far as the order for payment against the defendant is concerned — the "syndic" pursuant to Article 31 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (often referred to as the "Convention on jurisdiction and enforcement") applied for leave to have that order enforced there. The judge of the competent court, the President of the First Zivilkammer [Civil Chamber] of the Landgericht [Regional Court] Limburg/Lahn granted this application in April 1977 but ordered that the enforcement might not go further than protective measures, until the creditor produced a certificate that execution could proceed without any restriction and that, so long as the execution might not go further

1 — Translator's note. The English terms given do not purport to be exact equivalents of the French terms, since concepts in the different legal systems are not identical.

than protective measures, the debtor could effect a stay of execution by giving security in the sum of FF 743 563.15.

However on appeal by the defendant this order was set aside by an order of the Oberlandesgericht [Higher Regional Court] Frankfurt of 7 September 1977 and the application for the issue of a writ of execution refused on the ground that the order against the *de facto* manager of an insolvent company in accordance with the beforementioned French Law is founded on the insolvency of the company and is part and parcel of the winding-up proceedings. Consequently such a matter forms part of bankruptcy or winding-up and does not fall within the scope of the Convention on jurisdiction and enforcement which in Article 1 thereof is defined as follows:

"This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal.

The Convention shall not apply to:

1. ...
2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;"

The applicant in the main action considers that this classification is wrong. In his view it is important to note that Article 99 of the French law provides for a special form of liability *under civil law* and the "syndic" must bring a *civil action* against the person or persons liable. He therefore appealed to the Bundesgerichtshof [Federal Court of Justice].

Since the Bundesgerichtshof finds that the interpretation of Article 1 of the Convention on jurisdiction and enforcement which I have quoted is not entirely free from doubt it has, pursuant to Article 3 of the Protocol annexed to this Convention upon which the High Contracting Parties have agreed in connexion with its interpretation, stayed proceedings and referred the following question to the Court for a preliminary ruling:

Is a judgment given by French civil courts on the basis of Article 99 of the French Law No 67-563 of 13 July 1967 against the *de facto* manager of a legal person for payment into the assets of a company in liquidation to be regarded as having been given in bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies or other legal persons and analogous proceedings (subparagraph 2 of the second paragraph of Article 1 of the Convention) or is such a judgment a decision given in a civil and commercial matter (first paragraph of Article 1 of the Convention)?

My view on this question is as follows:

1. The respondent has expressed misgivings as to the wording of the question. They are that the Court is wrongly asked to classify the proceedings taken under Article 99 of the French Law No 67-653, that is to say, to bring them within the concepts of the Convention on jurisdiction and enforcement. This is nothing but an invitation to the Court to apply the law which it is not empowered to do in a reference for an interpretation and moreover such application also concerns the interpretation of national law, namely the French Law which has been mentioned.

That view must be endorsed and it must be confirmed that the Court's only task — and the question has to be construed in this way — is to give an abstract interpretation of Community law and to this end if necessary to extract the essential criteria according to subparagraph 2 of the second paragraph of Article 1 of the Convention on jurisdiction and enforcement. On the other hand it also goes without saying

however that this must only be done with reference to the issues in the main action and that here the special features of the national rules under consideration, in so far as they are not disputed, can definitely be taken into consideration.

2. A preliminary observation can be made without any difficulty. Although subparagraph 2 of the second paragraph of Article 1 of the Convention on jurisdiction and enforcement reads 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, this certainly is not to be taken as indicating that the law to be applied is, for example, the national law either of the State in which the judgment was given or of the State where enforcement is sought. On the contrary we are concerned with a concept of Community law which has to be interpreted independently, to be precise, taking into account the objective and system of the Convention and also the general legal principles which can be found in this field in the Member States. In my view, which is also shared by all the parties to these proceedings, this point was settled by the findings relating to the concept "civil and commercial matters", which is also found in Article 1 of the Convention, in the Court's judgment of 14 October 1976 in Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG* v *Eurocontrol* [1976] 2 ECR 1541. If this applies to the basic concept which demarcates the scope of the Convention then logically it can only be assumed that the same applies to the concepts which specify the exceptions to the scope of the Convention. In the interest of a uniform application of the Convention they must naturally be given a uniform definition as well. Any other view would be contrary to the recognizable common intention of the parties to the Convention on jurisdiction and enforcement when they drew it up their intention being that the scope of this convention should be the complement to that of the Convention on Bankruptcy which was in preparation at the time (cf. Schlosser, Konkurs und konkursähnliche Verfahren im geltenden Europarecht [Bankruptcy and winding-up and analogous proceedings in current European law], in Festschrift für Friedrich Weber [commemorative publication for Friedrich Weber], 1975, p. 396).

3. Before I turn my attention to the interpretation of the concept "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" allow me now first of all to summarize what has been stated in these proceedings about the development and the distinctive features of the statutory liability in Article 99 of the French Law No 67-563 of managers of legal persons, which apparently is not found in a similar form in the legal systems of other Member States.

As far as I can see originally provision was simply made for the liability of managers of legal persons in France — and presumably also in the legal systems of all the Member States — in the Companies Acts. According to those Acts members of the Board of Directors of an Aktiengesellschaft [incorporated public company] — the same applied to Gesellschaften mit beschränkter Haftung [limited liability companies] — were liable under general principles of law for mistakes and negligence in the management of the company, their liability being the same as that of a paid agent under the Code Civil [Civil Code].

Then in 1940 there was a change in the law relating to incorporated public companies, which from 1953 also applied to limited liability companies, to the effect that a legal person's liabilities which have been ascertained in

winding-up proceedings, could, if the assets were insufficient, be imposed on to the managers of the legal person. Even this modification — so we were told — was in fact based on liability for mistakes and negligence. The change consisted in essence of a reversal of the burden of proof, this liability being avoidable only if the manager concerned could prove that he had shown the diligence and energy expected of a paid agent. Furthermore the liability was not linked to a findings of damage and according to the case-law it also attached to *de facto* managers of the legal person; the court was able to decide in the matter whether the managers of a legal person and which of them had to bear the liabilities.

The French Law No 67-563 went a step further. As is stated in the legal opinion produced by the respondent this Law further reinforced those elements of the law on the winding-up of the affairs of companies which relate to the liability of the managers of legal persons. According to that opinion there is no reference to the general legal principles of the law of obligations — and this applies equally to *de jure* and *de facto* managers; reference is no longer made to the energy and diligence of a paid agent. Accordingly it is no longer sufficient — and it is therefore better to talk about a presumption of liability than about a presumption of negligence — to prove that there was no mismanagement; on the contrary the manager of a legal person has to show that he made every effort to look after its interests. It must in addition be borne in mind — this emerges clearly from the wording of Article 99 of the French Law which I have just quoted — that the manager of a legal person can be proceeded against not only on the application of the "syndic" for the "faillite" or "règlement judiciaire" but also by the court having jurisdiction in the winding-up of its own motion. Furthermore a notable feature is that the application is barred on the expiration of the period of three years from the date when the final list of claims is drawn up, that the court in the event of non-compliance "prononce le règlement judiciaire ou la liquidation des biens de ceux des dirigeants à la charge desquels a été mis tout ou partie du passif d'une personne morale [shall order the 'règlement judiciaire' on the 'liquidation des biens' of those managers who have been made responsible for all or part of the assets of a legal person]" (Article 100) and that the court "peut prononcer la faillite personnelle ou l'interdiction de diriger, gérer, administrer ou contrôler, soit toute entreprise commerciale, soit seulement une personne morale, contre le débiteur ou, s'il s'agit d'une personne morale commerciale, contre les dirigeants de droit ou de fait, apparents ou occultes, rémunérés ou non" [may order the 'faillite personnelle' of the debtor or, if the debtor is a legal person engaged in business of the *de jure* or *de facto* managers, apparent or concealed, paid or unpaid, or prohibit the said debtor or managers from directing, managing, conducting or supervising either any commercial undertaking or a legal person alone]" (Article 108).

4. I would also like to make some preliminary observations on the method of interpretation.

(a) As is known the Commission with reference to the Jenard Report on the Convention on jurisdiction and enforcement has stressed the need to give a broad interpretation to the provisions defining its scope, because it is a general agreement, and conversely to give the exceptions specified a narrow construction in order to ensure its efficacy.

In this connexion it is to be noted, without this assertion having to be restricted in principle, that it is at least doubtful whether it also applies to a field such as bankruptcy and winding-up which is also covered by a convention, or to be more precise by a convention in

respect of which, even if the original intention to bring it into force at the same time as the Convention on jurisdiction and enforcement could not be achieved, it can be assumed that preparation will be completed in the foreseeable future. In this field — if I correctly understand the position the finding in the Jenard Report was made in another connexion — account has to be taken of the fact that there will in the not too distant future be a legally effective set of uniform Community rules similar to the Convention on jurisdiction and enforcement. On the other hand it must not be forgotten that a broad interpretation of the Convention on jurisdiction and enforcement carries within it the danger of encroaching on the field within which Convention on bankruptcy is to be concluded.

However in any case it must be said in connexion with the claim that the Convention on jurisdiction and enforcement is to be given a broad interpretation, that to circumscribe its scope to this extent cannot be justified if, according to the nature of the matter, that is to say according to the subject-matter of the field to be demarcated, it appears to be unwarranted.

(b) Furthermore the Commission's reasoning conveyed the impression that the main point of its argument is unequivocally based on the Preliminary Draft of a Convention on bankruptcy and winding-up which has been produced to the Court.

I also consider that to be questionable and take the contrary view that the determinative starting point for interpretation is to be sought in the Convention which is already in force. Even if it may in fact be assumed that many of the provisions of the Preliminary Draft will probably be reproduced in the final version of the future Convention there can however be no certainty that they will be. This is shown by Article 12 of the Preliminary Draft which was quoted in the proceedings. It read originally as follows:

"The courts of the Contracting State in which a firm, company or legal person has been declared bankrupt shall have exclusive jurisdiction to entertain actions concerning the liability incurred by the persons specified in Article 2 of Annex I by reason of their management. Actions may be brought only by the liquidator of the firm, company or legal person."

After discussions which took place in November 1978 because some delegations had made reservations we now on the other hand have to proceed on the basis of the following wording of which there is for the time being only the version in French:

"Les juridictions de l'État contractant où a été prononcée la faillite d'une société ou personne morale sont exclusivement compétentes pour connaître des actions relatives

(a) à la responsabilité encourue en raison de sa gestion par tout dirigeant de cette société ou de cette personne morale pour réparer le dommage subi par elle,

...

[The courts of the Contracting State in which a firm, company or legal person has been declared insolvent shall have exclusive jurisdiction to entertain actions concerning

(a) the liability incurred by reason of his management by any manager of this firm, company or legal person for the purpose of making good the damage which it has suffered,

...]"

Calling in aid the Preliminary Draft of a Convention on bankruptcy and winding-up can therefore only be effected with the utmost caution and be limited at best to confirming that it results in the validation and substantiation of an interpretation of the Convention on jurisdiction and en-

forcement which has been arrived at essentially by a different route.

The same applies of course to the view recorded in the minutes of discussions on 15, 16 and 17 November 1978, which moreover is shared by only a *majority* of the delegations that, if an order against a manager of a company in an action for a declaration of liability does not lead to "liquidation collective [a creditor's winding-up]" [1] it does not fall within subparagraph 2 of the second paragraph of Article 1 of the Convention on jurisdiction and enforcement, but is to be classified as a civil and commercial matter. It is all the more necessary to accept this since it is not entirely clear from the extract from the minutes whether in this connexion a distinction was drawn between general actions for a declaration of liability and those brought in the field of bankruptcy and winding-up.

(c) Finally it may also be noted in this connexion that some other facts, which have come to light during the proceedings, are undoubtedly not conclusive for the purpose of interpreting the Convention on jurisdiction and enforcement.

For instance the fact that the French provision, which is relevant in this case, was included in a law on bankruptcy and winding-up is certainly not in itself of importance.

This applies also to the determination of jurisdiction under national law since "the nature of the court or tribunal" in accordance with Article 1 of the Convention is not in question.

Finally this also applies to the fact that in the case of the application in question the wording used in civil actions was chosen and that the application was so to speak put forward in the guise of a civil action. On this point the representative of the Federal Government referred with justification to the liability of the heirs for the debts owing by the deceased, which, since the administration of estates has not been included in the Convention on jurisdiction and enforcement, is not covered by the Convention, notwithstanding the civil law wording chosen. In this connexion reference was also made to the concept "place of perfomance" used in the judgment of 14 October 1976 in Case 29/76 *LTU Luftransportunternehmen GmbH & Co. KG* v *Eurocontrol* [1976] 2 ECR 1541, which did not exclude the presumption of a dispute governed by public law.

5. If we now consider how the concepts "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" in Article 1 of the Convention on jurisdiction and enforcement are to be understood the starting point chosen by the respondent is, in my view the correct one. According to him the first thing to do is to determine the essential nature of the bankruptcy, winding-up or analogous proceedings with reference to the principles applicable in the legal systems of the Member States. In this way one comes to the conclusion that the purpose of such bankruptcy and winding-up proceedings is to get in and realize under the supervision of an officially appointed liquidator or trustee in bankruptcy the assets of the insolvent company or property of the person unable to meet his debts in order to pay off the creditors on a *pro rata* basis. The essential concern of such a proceeding is to get in the entire assets or property of the insolvent company or debtor by adopting a procedure specially designed for this purpose.

The finding in the Jenard Report that individual proceedings connected with bankruptcy or winding-up are to be regarded as bankruptcy or winding-up proceedings if they arise directly out of

1 — See Note 1, p. 747.

the bankruptcy or winding-up is useful. Moreover Article 22 (4) of the relevant Benelux Treaty, which has not yet entered into force, uses such wording. In the corresponding bilateral treaties such as the Franco-Belgian Treaty of 8 July 1899 or the Belgo-Netherlands Treaty of 28 February 1925 the determinative question is whether the claim put forward is founded in bankruptcy or winding-up, whether the legal consequence of the claim put forward is provided for by the law of bankruptcy or winding-up (cf. Schlosser *loc. cit.*, p. 406). So with individual actions the question is whether there is a very close material connexion with bankruptcy or winding-up proceedings so that those rules and special features as it were determine the nature of the proceedings.

The latter undoubtedly applies to rights such as those arising out of the invalidation of certain assignments and payments prior to bankruptcy or winding-up which are peculiar to bankruptcy and winding-up and which are therefore granted under the law of bankruptcy and winding-up and are not merely general rights modified for the purpose of bankruptcy and winding-up. I draw the Court's attention to the Report on the Preliminary Draft of a Convention on bankruptcy and winding-up by Noël-Lemontey, which in this connexion contains the conclusion that the rights to invalidate certain assignments and payments prior to bankruptcy or winding-up have their origin in bankruptcy and winding-up. I also refer to comparative law research by Schlosser in his treatise (page 407), to which I again refer, and which shows that such an opportunity of invalidating pre-bankruptcy assignments and payments is known in the law of bankruptcy and winding-up of all six original Member States of the Community.

However, the same must also be assumed to apply to rights, which, although they arise under the general law, are modified by the law of bankruptcy and winding-up to such a substantial extent as to suggest the conclusion that viewed as a whole their nature is entirely determined by the law of bankruptcy and winding-up. In my view this represents an intelligible formula enabling decisions to be given which is definitely supported by the conclusions of the Jenard Report. This formula also includes the liability created in Article 99 of the relevant French Law in this case. That liability presupposes the winding-up of a company; the court which made the winding-up order also has jurisdiction to consider it. The "syndic" may ask for a declaration of liability or the court may make the declaration of its own motion and the purpose of the declaration is to make the manager answerable for the company's debts and consequently not give compensation for specific damage. We also come across an unusual reversal of the burden of proof, which moreover is not limited to negligence and what is more is only discharged if it is proved that the person whom it is sought to make liable, has applied himself to the management of the business with the requisite energy and diligence. Last but not least it must also be borne in mind that if the company's debts are not paid the manager whom it is sought to make liable may himself be adjudicated bankrupt and penalties may be imposed upon him for specific bankruptcy offences.

Viewed in this way the interpretation given by the applicant in the main action that the application is simply a special application for a declaration of liability based on a particular rule concerning liability of civil and commercial law according to which liability arises if particular conditions are fulfilled can certainly not be regarded as convincing. A comparison between Article 244 and Article 248 of the French "Code des Sociétés [Companies Act]" surely refutes this interpretation. According to the first mentioned article the "administrateurs

[directors]" of a public company are liable for breaches of the provisions governing public companies, and of the Memorandum and Articles and for mistakes made in the management of the company and according to the commentaries they give rise to payment of compensation if "faute [negligence]" is proved. On the other hand Article 248 provides:

"En cas de règlement judiciaire ou de liquidation des biens de la société, les personnes visées par la législation sur le règlement judiciaire, la liquidation des biens, la faillite personelle et les banqueroutes, peuvent être rendues responsables du passif social dans les conditions prévues par ladite législation.

[In the event of a 'règlement judiciaire' or a 'liquidation des biens' of a company the persons specified by the laws relating to the 'règlement judiciaire', the 'liquidation des biens', the 'faillite personnelle' and 'banqueroutes' may be declared liable for the company's liabilities in accordance with the conditions laid down by the said laws]."

On the contrary more convincing is the respondent's interpretation which stresses that the real purpose of the proceedings in question is to get in all the outstanding assets of a company, so that there is a sort of restitution in kind in that the situation which would exist had it not been for the mistakes in the management of the company has to be re-established. If however the proceedings are for compensation for running down the assets it is in fact natural, having regard to the function of the proceedings under Article 99 of law No 67-563, to say that they are clearly part and parcel of the winding-up proceedings.

In support of the view that the issue is whether a claim arises out of bankruptcy or winding-up the representative of the Federal Government has referred lastly, with justification, to Article 27 of the Convention on jurisdiction and enforcement. This article provides in connexion with the recognition of judgments for the court of the Member State in which recognition is sought to consider certain preliminary questions, for example status. Although however this only applies to the matters mentioned in subparagraph 1 of the second paragraph of Article 1 to which the Convention does not apply and does not relate to the law on bankruptcy and winding-up, there is surely every reason to define with caution the scope of the Convention as far as concerns rights which are conditional upon an adjudication or winding-up order.

6. However I do not intend to end my examination of the case yet in that way without considering the Preliminary Draft of a Convention on bankruptcy and winding-up which has been mentioned and upon which the Commission's main argument had rested, in order to see whether it could upset the result which has so far been arrived at.

In the first place the Commission attaches importance to the fact that the Convention on bankruptcy and winding-up does not provide any general definition of the proceedings specified in subparagraph 2 of the second paragraph of Article 1 of the Convention on jurisdiction and enforcement to which the latter Convention does not apply. These proceedings on the contrary are listed in detail in a Protocol annexed to the Convention on bankruptcy and winding-up and the scope of that Convention is defined in this way. Since however — the Commission reasons — the proceeding under Article 99 of the French Law on bankruptcy and winding-up is not included in the list set out it cannot be assumed that it is intended to fall within the scope of a Convention on bankruptcy and winding-up. Although on the other hand Article 12 of the latter Convention mentions proceedings such as those instituted under Article 99 of the French Law that is done merely for the purpose

of establishing a particular jurisdiction but not to give expression thereby to the fact that they fall in general within the scope of the Convention on bankruptcy and winding-up. In any case it is significant that according to Article 61 of the Preliminary Draft of this Convention the recognition and enforcement of judgments in actions concerning liability referred to in Article 12 are to be governed by the Convention on jurisdiction and enforcement but this must be understood as being only *declaratory* having regard to the other conclusions already mentioned which are to be drawn concerning the Convention on bankruptcy and winding-up.

This argument seems to me — quite apart from the objections in principle to invoking the Preliminary Draft of a Convention on bankruptcy and winding-up as being determinative — to be unconvincing.

As far as I am concerned the conclusion that only those proceedings expressly mentioned in the Protocol annexed to the Convention on bankruptcy and winding-up can be regarded as forming part of bankruptcy and winding-up is not convincing. It is clear that only the so-called basic proceedings are for the most part mentioned there. Consequently the question whether any particular proceedings fall within the Convention on bankruptcy and winding-up must also be deducible from other provisions, otherwise such proceedings which arise directly out of bankruptcy and winding-up and to which according to the beforementioned Jenard Report the Convention on jurisdiction and enforcement is simply not intended to apply would be governed by that Convention.

On the other hand as far as concerns the value and significance of the reference in Article 61 of the Preliminary Draft of a Convention on bankruptcy and winding-up it cannot only be pointed out in connexion with the view that the provision is only declaratory that it can scarcely be assumed that the legislature is providing for the incorporation in the Convention of a superfluous and consequently rather confusing provision. In particular it must not be overlooked that Article 61 also refers to the proceedings set out in Article 17 of the Convention on bankruptcy and winding-up. However it is quite certain judging by a number of them — I call attention again on this point to the beforementioned treatise by Schlosser — that they are typical proceedings in bankruptcy and winding-up. Thus it is reasonable not only to find in Articles 12 and 17 of the Convention on bankruptcy and winding-up rules for determining jurisdiction but also to assume that they are intended to give expression to the inclusion of these matters in that Convention, and furthermore Article 59 (4) of the Convention on bankruptcy and winding-up supports this view. This suggests that the reference in Article 61 of the Convention on bankruptcy and winding-up be regarded as substantive.

Moreover this interpretation of the Convention on bankruptcy and winding-up seems also to be in every way appropriate. It leads to the conclusions that only when the general recognition of bankruptcy and winding-up has been secured by a specific convention can there also be recognition of judgments concerning rights, which are conditional on a valid bankruptcy or winding-up and which rank as rights arising out of the very essence of bankruptcy and winding-up.

7. I therefore suggest that the following answer be given to the question referred to the Court by the Bundesgerichtshof for a preliminary ruling.

In addition to the basic proceedings those proceedings connected with bankruptcy and winding-up proceedings which must be presumed to stem from bankruptcy or winding-up and arise directly thereout fall within the exception contained in subparagraph 2 of the second paragraph of Article 1 of the Convention on jurisdiction and enforcement. This applies to proceedings concerning rights which arise only under the law of bankruptcy and winding-up as well as to rights which exist under the general civil law but which in the law relating to bankruptcy and winding-up undergo such a decisive modification that, having regard to their specific object they are to be regarded as falling within the law of bankruptcy and winding-up.