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INFORMAL WORKING GROUP ON INSOLVENCY-RELATED ISSUES

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Informal Working Group on Insolvency-related Issues

Paper

(prepared by the Chairman of the informal Working Group)

Background to this Working Group Paper

1. During its fourth session from 21-25 May 2007, the Committee of Governmental Experts agreed to establish a post-sessional Working Group (chaired by the United Kingdom) to consider various "insolvency-related issues" arising from the text of the draft Convention as adopted by the Committee during the fourth session (UNIDROIT 2007, Study LXXVII, Doc. 94; hereinafter the "draft Convention").

Article 18 of the draft Convention

2. Article 18 is the principal insolvency-related provision in the draft Convention. The text of this provision is as follows:

> *Article 18*
> [*Effects of insolvency*]
>
> Subject to Article 24[1] and Article 33[2], nothing in this Convention affects:
>
> (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
>
> (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of an insolvency administrator.

[1] Article 24 concerns the Effect of debits, credits etc. and instructions on insolvency of operator or participant in securities settlement system.

[2] Article 33 (contained in Chapter VI - Special Provisions with respect to Collateral Transactions) concerns Top-up or substitution of collateral.

3. Apart from the discussion giving rise to the establishment of this Working Group,[3] it appears that Article 18 (previously numbered Article 16 in the text arising from the third session of the Committee of Governmental Experts, held in Rome from 6-15 November 2006; UNIDROIT 2006, Study LXXVIII, Doc. 57) has not given rise to much, if any, discussion in previous plenary sessions. Indeed, the text was hardly mentioned in the plenary session held in November 2006.[4] It would appear however, that the genesis of the current Article 18 is to be found during the discussions on the preparation of the preliminary draft Convention in May/June 2005, where it is apparent that the text of this provision was taken from the terms of the Cape Town Convention on International Interests in Mobile Equipment.[5]

Meaning of Article 18 – Blanket Exclusion of National Insolvency Law?

4. Article 18 states that, subject to the contents of certain specific Articles, nothing in the Convention affects rules applicable in insolvency proceedings relating to avoidance of transactions (sub-Article 18(a)) or rules of procedure relating to property under the control/supervision of an insolvency administrator (sub-Article 18(b)). The corollary/opposite is therefore that the Convention *does affect* all other rules of law applicable in insolvency proceedings and all other rules of procedure applicable in insolvency proceedings – the result being that under Article 18, *all insolvency provisions* under national laws are over-ridden/disapplied with the exception of the "carve-outs" set out in Articles 18(a) and 18(b).

5. It is relevant therefore to know *first*, what is the meaning/scope of the carve-outs, and *secondly*, what are the provisions of national insolvency law beyond those carve-outs (and which are over-ridden by the Convention). The draft Convention itself offers no guidance on either of the questions. However, the provisions of Article 30(3) of the Cape Town Convention may offer some assistance as to the meaning/scope of the carve-outs.[6]

Article 30(3) of the Cape Town Convention – Official Commentary on meaning of carve-outs

6. Professor Sir Roy Goode's Official Commentary on Article 30(3) of the Cape Town Convention

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[3] See paragraphs 172 to 174 of the Report of the UNIDROIT Committee of Governmental Experts for the preparation of a draft Convention on Substantive Rules regarding Intermediated Securities, on its fourth session, held in Rome, 21-25 May 2007 (UNIDROIT 2007, Study LXXVIII – Doc. 95). In particular, only three delegations made any interventions concerning the scope of this Article.

[4] See paragraph 69 of the Report of the UNIDROIT Committee of Governmental Experts for the preparation of a draft Convention on Substantive Rules regarding Intermediated Securities, on its third session, held in Rome, 6-15 November 2006 (UNIDROIT 2007, Study LXXVIII – Doc 58). In particular, it was stated that: "there were no observations on the substance of Article 12 [i.e. the precursor of Article 16 of the text emerging from the November 2006 meeting, and what is now Article 18 of the draft Convention]".

[5] See paragraph 191 of the Report of the 1st Committee of Governmental Experts Session, revised August 2005 (UNIDROIT 2005, Study LXXVIII – Doc. 23 rev.) In particular, it was stated that: "the Drafting Committee had, at the plenary's suggestion, introduced a new Article 13 [i.e. now Article 18] to the preliminary draft Convention. This made provision corresponding to that made by Article 30(3) of the 2001 Cape Town Convention which preserved the effect, as against the provisions of the draft Convention, of certain rules of insolvency law (relating to the avoidance of preferences and to fraudulent transfers) and of rules of insolvency procedure (relating to the enforcement of property rights)".

[6] Article 30 [Effects of Insolvency] reads: "1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention. 2. Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law. 3. Nothing in this Article affects: (a) Any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or (b) Any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator".

states that: "Paragraph 3 preserves the effect of certain specific rules of insolvency law, namely those relating to the avoidance of preferences and transfers in fraud of creditors, and of rules of insolvency procedure designed to limit the enforcement of security or other property rights in the interests of the general body of creditors (for example, by imposing an automatic stay on the enforcement of security and other *in rem* rights in order to facilitate a reorganisation)". This is helpful in two respects. *First*, it emphasises that the scope of the carve-outs as in Article 18(a) is limited,[7] and *secondly*, that bankruptcy stays/moratoria on enforcement are the type of insolvency procedure contemplated by the terms of Article 18(b).

7. However, one might question whether the reference to avoidance of *preferences* and *transfers in fraud of creditors* gives sufficient clarity/guidance in determining which types of insolvency-related provisions are within (and *a contrario* outside) the carve-out in Article 18(a). For example, in the UK, insolvency avoidance legislation specifically allows the avoidance of prior transactions that were not merely "preferences" (and which used to be called fraudulent preferences),[8] but also to avoid transactions that were undertaken at an "*undervalue*" - although one might not necessarily characterise these sorts of transactions as frauds on creditors.[9] **It is assumed that the words of Article 18(a) are intended to cover both preferences and such undervalues, but this ought to be clarified in the text.** Furthermore, there might be provisions of national insolvency law that *automatically* (as distinct from requiring any proof of intention to prefer or to defraud creditors on the part of the insolvent entity and/or the transferee entity) render all transactions, including any transfers of property, undertaken in a certain "suspect period" prior to insolvency as void or voidable, although there may be possible defences available to the transferee entity under which the transaction can be approved or validated by the courts.[10] **Again it is not clear whether these sorts of automatic avoidance provisions effected during a suspect period are insolvency-related provisions that are within (or outside) the carve-out in Article 18(a).**

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[7] In particular, Article 30(3) is said to be: "confined to the avoidance of preferences and transfers in fraud of creditors" and "it follows that other grounds of avoidance that would ordinarily be applicable cannot be invoked".

[8] I.e. transactions entered into by a debtor entity, whereby if the debtor entity were to go into insolvent liquidation, the beneficiary under the transaction is put into a position by reason of the transaction under which it is "better off" than it would have been had the transaction not taken place (typically, security being subsequently granted to a pre-existing creditor).

[9] I.e. transactions entered into by a debtor entity that can be characterised as "gifts" or undertaken for zero/nil consideration or for a consideration provided by the beneficiary of the transaction, the value of which is significantly less than the value of the consideration provided by the debtor entity (typically, transactions for the sale of an asset at a price well-below its real/market value).

[10] It is not clear why there should be any distinction (in terms of being *within* the carve-out and therefore, the operation of the relevant insolvency provision is preserved by the wording of Article 18(a)) between on the one hand, types of avoidance provision under national law that are indeed termed or called preferences/frauds on creditors whereby *specific transactions can be avoided* but subject very often to defences available (such as the transaction being carried out in good faith/no intention on the part of the debtor entity to give a preference) so that particular transactions are not avoided, and, on the other hand, types of avoidance provision under national law whereby *all transactions are automatically* avoided but subject again to equivalent defences (such as where the transaction is entered into for the purpose of carrying on the debtor entity's business in the ordinary course and was likely to benefit the creditors generally of the entity) so that particular transactions can be validated by the court. The wording of Article 18(a) currently appears to protect/carve-out the former type of avoidance provision but not the latter. However, in each case, the result is arguably the same – national insolvency law ensures (but by *different routes* – avoidance or validation of specific transactions on a case-by-case basis) that certain problematic transactions which do not benefit from a defence are rendered ineffective on insolvency grounds. In principle and logic therefore, both such types of avoidance provision (provided that in each case, a defence or ground for validation is available to protect transferee entities) ought to be within the carve-out. This would however, still mean that some types of "zero hour" rules where all transactions undertaken within a certain or specified period prior to insolvency are rendered automatically invalid or void, without the presence of guilt or complicity, or the availability of defences on behalf of the transferor or transferee, would not be within the carve-out. Again clarification on this point could be made in the text.

Article 30(3) of the Cape Town Convention – Official Commentary on scope of Insolvency Law

8. The Official Commentary does not however, offer any guidance as to what are the provisions of national insolvency law outside those carve-outs (and which are therefore over-ridden by the Convention). By ways of illustration, English law has recently adopted some formulations as to what might be the content of the *general law of insolvency*. In particular, under the UK implementation of the UNCITRAL Model Law on Cross-border Insolvency,[11] "British Insolvency Law" is defined by reference to any provisions under a *particular statute* (in this case, any provision in relation to England and Wales, and made by or under the Insolvency Act 1986).[12] An alternative approach is to be found in the UK implementation of the EU Settlement Finality Directive,[13] where the "general law of insolvency", although that term is not defined, includes any "law relating to the distribution of the assets of a person on bankruptcy [for individuals], winding up [for corporate entities] or administration of an insolvent estate" and includes "the powers of a relevant office-holder in his capacity as such and the powers of the court under the Insolvency Act 1986". That said, even these two statutory approaches as to what is the law of insolvency may not arguably cover more *general principles of law* (which at least under the English law and other common law systems) are capable of being applied in an insolvency but which may not have any express statutory or legislative basis (such as the principle of *pari passu* distribution, equality of treatment of claims, the effect of insolvency on corporate capacity and the authority of directors and management, prohibitions on post insolvency transfers or trafficking of claims against an insolvent entity, and corporate benefit issues).

9. To illustrate this issue, Article 30 [enforcement] is not expressly referred to in Article 18 and so is to be presumed to be subject to the general principle (i.e. currently, that the terms of the Convention over-ride provisions of insolvency law, save in the case of the carve-outs). Article 30 contains what appears to be a "strict" obligation, whereby a Contracting State *must* ensure that on the occurrence of an enforcement event, the collateral taker may realise the collateral securities provided under a security collateral agreement: (i) by selling them and applying the net proceeds of sale in or towards the discharge of the relevant obligations; or (ii) by appropriating the collateral security as the collateral taker's own property and setting off their value against, or applying their value in or towards the discharge of, the relevant obligations. This would appear to mean that the collateral taker is entitled to apply the proceeds of any realisation towards satisfaction of the relevant secured obligations notwithstanding that there may be a rule of law in an insolvency proceeding that would otherwise give certain categories of claim or expense some form of preferential treatment or rights of prior repayment before the repayment of the secured obligations/monies owed to the collateral taker.[14] **Leaving aside the possibility of a somewhat "constructive" interpretation,[15] one might question whether these sorts of preferential**

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[11] The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030).

[12] The Insolvency Act 1986 sets out various procedures relating to personal and corporate insolvency law, including the powers of various insolvency officials and covering both *liquidation* (being a form of dissolution procedure where the assets of an entity are gathered in and used to satisfy its debts/liabilities) and *administration* (being a form of reorganisation measure intended to lead to the restructuring or reorganisation of an entity with a view to it carrying on business as a going concern, or if that is not possible, for its debts/ liabilities to be discharged). The Act itself runs to over 440 individual sections/clauses and over 10 schedules, and is supplemented by numerous statutory instruments/secondary legislation and rules (the parts relating to preferences and administration – i.e. those areas expressly covered by the carve-outs in Article 18 – amount to some 12 sections and 20 sections respectively).

[13] Regulations 13, 14(1) and (2) of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (S.I. 1999/2979).

[14] These might include amounts due to employees in respect of redundancy and unfair dismissal, social security and pensions contributions, or amounts due from the insolvent entity in respect of payments of taxes, or payments and expenses incurred by the relevant insolvency official (these could be incurred either in specifically realising the security, or generally as part of administering the insolvency).

[15] One might try to argue that such claims/expenses are to be deducted as part of arriving at the "net proceeds" referred to in Article 30(1)(a)(i); but this does not appear to offer a complete (and therefore

claims should be disapplied in the case of a security/collateral interest over intermediated securities, and this ought to be clarified in the text.

10. As a consequence of the issues referred to above, it is to be questioned whether the blanket exclusion of the effect of insolvency as adopted in the current wording of Article 18 gives sufficient certainty (re scope of carve-outs and meaning of insolvency law) as to what provisions of law are being over-ridden by the Convention.[16] **Certainly, Contracting States should consider every provision of what might be termed their general insolvency law so as to be satisfied that (in the light of all of the provisions of the Convention) those provisions should be disapplied irrespective of whether or not their application is otherwise mandatory under their national legal frameworks.**

Justification for the approach under the current wording of Article 18?

11. The wording of Article 18 of the draft Convention finds its inspiration in Article 30(3) of the Cape Town Convention. However, the effect of Article 30(3) is more limited, in that it expressly overrides the effect of insolvency proceedings *only for the purposes of that Article* (as distinct from the entirety of the Convention having pre-eminence over national insolvency law as with the current wording of Article 18). The justification for such an approach might be that in relation to mobile equipment, it would defeat the intention of the Convention (i.e. to ensure the effectiveness of registration process) if the entirety of national insolvency law (save in the case of some limited exceptions/carve-outs) were to continue to apply.

12. However, one might question whether the effectiveness of the Convention on Intermediated Securities as a whole[17] would be similarly impaired by the operation of national insolvency provisions generally. In particular, it might be argued that the objectives of the Convention – to define and (arguably for the first time) to identify with certainty what are the constituent legal rights of interests in intermediated securities evidenced as "book entries", and the procedures for the transfer of such interests – are not undermined (and that the Convention would still deliver its objectives) notwithstanding the continued application of national insolvency law.

13. Indeed, one might query whether a provision based on Article 30(3) of the Cape Town Convention that applies to interests in tangible property (aircraft/helicopters) that physically move with frequency between different jurisdictions and which in this respect concerns the overarching effectiveness of a publicly available register of interests capable of being searched by third parties, is appropriate to be transposed into a regime for interests in intermediated securities which have an entirely different nature (arising in respect of the relationship between an investor and its intermediary). Query also whether the powers of the relevant insolvency official in relation to interests in intermediated securities should be any different (i.e. should not all usual provisions of insolvency law apply) from rights to any other asset or property that the insolvent entity might have a claim to or interest in.[18]

14. Obviously, one might either argue that normal insolvency law ought to apply to *all types* of property or asset belonging to an insolvent entity, or, that the interests of certainty in the transfer of rights in intermediated securities is paramount so as to justify the application of special rules in

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supportable) interpretation since no such reference to net proceeds is made in the second method of realisation for securities collateral (appropriation) contained in Article 30(1)(a)(ii).

16 As a consequence, the current wording of Article 18 places the burden on the Contracting State to determine the meaning and extent of (and any resulting uncertainty in relation to) its national insolvency law that might be over-ridden by the Article.

17 I.e. individual provisions would need to be examined separately.

18 Such as land/real property, or personal property (including bank accounts or any other contractual rights).

an insolvency (or rather the disapplication of most insolvency-related provisions). **This is essentially a policy question, which does not appear to have been addressed with any particularity in previous plenary sessions or working groups.**

An alternative approach – Blanket Protection of National Insolvency Law?

15. The scope of the "blanket over-ride" of insolvency law effected by the current wording of Article 18, could however be reversed. In particular, it could be re-worded such that, subject to specific Articles, nothing in the Convention affects the application of any provisions of national insolvency law. For example, this was the approach adopted in the Hague Securities Convention.[19]

16. One might however, argue that the Hague Convention was a *conflict of law* convention that was not intended to alter any substantive provision of national law – and so an express exclusion of any effect of that Convention on insolvency law in general is to be expected. The insolvency article from the Hague Convention is therefore not appropriate in the context of the UNIDROIT Convention on intermediated securities - which is precisely intended to identify and set forth *substantive rules* in relation to intermediated securities.

17. Furthermore, the disadvantage of adopting the blanket protection for national insolvency law is that the burden of determining the meaning and extent of (and any resulting uncertainty in relation to) such insolvency law is transferred to the persons seeking to rely on the Convention (since such laws may give rise to a result or conclusion that is contrary to that suggested by the text of the Convention). In addition, to adopt this approach would mean that each provision of the Convention might need to be re-examined from the perspective of whether the substantive result referred to therein is to apply in all cases and irrespective of national insolvency law.[20]

Another suggested approach – extension of carve-outs?

18. Standing between the retention of the current wording of Article 18 and its reversal so as to effect a blanket protection for national insolvency law, one might suggest that at least the wording of the current carve-outs should be clarified so that, for example, they additionally include undervalues, all provisions for avoidance of transactions and the ranking of categories of claims or expenses.[21]

Other Articles having insolvency-related effects

19. Article 18 currently contains two specific reservations or caveats from the general rule contained in the Article (i.e. from the blanket override of insolvency). In particular, it refers to the contents of Article 24 [effects of debits, credits etc. and instructions on insolvency operator or participant in securities settlement system] and Article 33 [top-up or substitution of collateral].

[19] Article 8(2) [Insolvency] states: "nothing in this Convention affects the application of any substantive or procedural insolvency rules, including any rules relating to – a) the ranking of categories of claims or the avoidance of a disposition as a preference or a transfer in fraud of creditors; or b) the enforcement of rights after the opening of an insolvency proceedings". It is to be noted here that preferential claims are here expressly included within the breadth of insolvency law/rules.

[20] This is particularly likely to be needed in the case of the Special Provisions with respect to Collateral Transactions in Chapter VI.

[21] I.e. as discussed in paragraphs 7 and 9 above.

Article 24

20. Article 24[22] appears to mean that irrespective of whether any invalidation, reversal or revocation of any instruction relating to transfers of securities or for the making of payments, or any credit or debit or designating entry in or relating to a securities account would otherwise occur under "*any rule applicable in an insolvency proceeding*" relating to a participant in a system,[23] the rules of the system (if permitted by the non-Convention law - presumably of that system) will be treated as binding and effective in respect of any such instructions entered into the system and the finality of settlement of a debit or credit or a designating entry that is, in either case, irrevocable under the rules of the system.

21. Two observations may be made. *First*, the effect of the rule set out in Article 24 is different from that as contained in say, the EU Settlement Finality Directive,[24] whereby although a "transfer order" (for the making of payments or the transfer of securities/an interest in securities) may not be revoked from the moment defined by the rules of the system,[25] the binding and enforceable nature (i.e. finality) of a transfer order is only effective notwithstanding the impact of insolvency laws to the extent that the transfer order concerned was entered into a system "*before the moment of opening of…. insolvency proceedings".*[26] The draft Convention does not however, contain any requirement as to instructions having entered the system prior to the onset of insolvency proceedings. **There is thus, as regards EU Member States, an extension effected by the wording of the draft Convention beyond that stipulated in the Settlement Finality Directive;[27] furthermore, that extension is contained in a section of the Convention which is mandatory and not subject to any opting-in or opting-out by a Contracting State.**

22. *Secondly*, under the terms of the EU Settlement Finality Directive, the primacy of the rules (and the recognition of the relevant governing law) of a "designated system" in this respect is recognised by all Member States, if that system has been designated by another EU Member State in accordance with the principles and criteria set out in the Directive. Each Member State therefore allows mutual recognition of systems designated in other Member States, and *vice versa*. However, the effect of Article 24 appears to be that each Contracting State ratifying/acceding to the Convention is accepting that the rules of a system[28] given effect to in another Contracting State,

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[22] Article 24 states that: "1. To the extent permitted by the non-Convention law, the following provisions shall have effect notwithstanding the commencement of an insolvency proceeding in respect of the operator of the relevant system or any participant in the relevant system: (a) any provision of the uniform rules of a securities settlement system or of a securities clearing system in so far as that provision precludes the revocation of any instruction given by a participant in the system for making a disposition of securities, or for making a payment relating to an acquisition or disposition of securities, after the time at which that instruction is treated under the rules of the system as having been entered irrevocably into the system; (b) a provision of the uniform rules of a securities settlement system in so far as that provision precludes the invalidation or reversal of a credit or debit of securities to, or a designating entry in, a securities account which forms part of the system after the time at which that debit, credit or designating entry is treated as irrevocable under the rules of the system. 2. Paragraph 1 applies notwithstanding that any invalidation, or reversal or revocation referred to in that paragraph would otherwise occur under any rule applicable in an insolvency proceeding".

[23] And in particular, where those insolvency proceedings in relation to the participant may commence or be ongoing in the place of incorporation of the participant or where that participant is carrying on business – which may be different from the jurisdiction of the relevant system.

[24] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on Settlement Finality in Payment and Securities Settlement Systems.

[25] Article 5 of the Directive corresponding to Article 24(1)(a) of the draft Convention.

[26] Article 3(1) of the Directive in contradiction of Article 24(1)(b) of the draft Convention.

[27] Furthermore, the rule in the Directive only allows a limited derogation ("exceptionally…shall be legally enforceable and binding only…") in relation to transfer orders entering into the system and carried out on the same day as insolvency.

[28] Defined in article 1(n) of the draft Convention as a system that is, *inter-alia*, operated by a central bank or is subject to regulation, supervision or oversight by governmental or public authority in respect of its rules and has been notified on the ground of the reduction of risk to the stability of the financial system as a securities settlement system in a declaration by the Contracting State, the law of which governs the rules of the system.

will be afforded the same level of recognition irrespective of the criteria or the requirements (if any) stipulated by the relevant other Contracting State that has declared the securities settlement system to have that status for the purposes of the Convention. **Contracting States should therefore note that by ratifying/acceding to the Convention, they are recognising the primacy of the rules of such a system as regards irrevocability of instructions and finality of settlement irrespective of what would otherwise be the effect of any rules of insolvency proceedings commenced in relation to such a participant if incorporated in their jurisdiction.**

Article 33

23. The effect of Article 33 is that any delivery of top-up or substitution of collateral in order to take account of changes in the value of the collateral or by reference to an increase in credit risk (such as by reason of rating agency trigger) or any other circumstances permitted by the non-Convention law, and a right to withdraw collateral securities provided that other collateral securities or other assets of substantially the same value are substituted, shall not be treated as invalid *solely* on the basis of the relevant provision of securities taking place in a prescribed period before, or on the day of but before, the commencement of an insolvency proceeding in respect of the collateral provider. This is indeed the effect of Article 8(3) of the EU Financial Collateral Directive.[29] Is it clear however, that the Directive is intended, whilst disapplying automatic "zero hour rules", to preserve the effect of insolvency-related provisions on preferences and transactions in fraud of creditors.[30] The Convention therefore, if it is to be consistent with/not go beyond the Directive, should clearly recognise that whilst automatic avoidance provisions are disapplied, voidance provisions such as preferences (and undervalues) and transactions in fraud of creditors are not.

24. If we examine the text of the draft Convention and the alternatives discussed in this Paper against this requirement, we find:

- The *current wording* of Article 18 is consistent with/delivers the same result as the Directive, since Article 33 (no automatic avoidance of top-up/substitution) does not in fact affect/contradict the operation of Article 18, which itself expressly preserves the effect of all provisions of insolvency law relating to preferences and transactions in fraud of creditors (i.e. the result achieved by Article 8(4) of the Directive).[31]
- The alternative approach for the wording of Article 18 (i.e. the scope of the "blanket over-ride" of insolvency law being reversed so as to produce a blanket *preservation* of insolvency law) would also be consistent with/deliver the same result as the Directive on the basis that the "subject to Article 33" wording would indeed carve-out zero hour rules from the

[29] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements.

[30] In particular, Article 8(4) of the Directive states that: "Without prejudice to paragraphs 1, 2 and 3 [i.e. the top-up/substitution provision], this Directive *leaves unaffected the general rules of national insolvency law in relation to the voidance of transactions* entered into during the prescribed period referred to in paragraphs 1(b) and in paragraph 3(i) [i.e. general suspect periods and zero hour periods starting on the day of commencement of winding-up proceedings or reorganisation measures]". Note that the term "voidance of transactions" would include preferences and undervalues, as both form the basis for the avoidance of transactions. Also Recital 16 of the Directive refers to the protection of top-up/substitution "against certain *automatic* avoidance rules" but that this does not prejudice the possibility of avoidance provisions or "questioning" under national law relating to transactions "intentionally done to the detriment of creditors (this covers *inter alia* actions based on fraud or similar avoidance rules which may apply in a prescribed period)".

[31] The only caveat to this analysis, is that if the current exclusions or carve-outs in Article 18 are indeed limited to preferences and transactions in fraud of creditors, then there is arguably *no need* for any express mention of Article 33 in the preamble to Article 18 (because "zero hour rules" would fall within the scope of other insolvency-related provisions already disapplied by Article 18 of the Convention). On the other hand, the fact that Article 33 is mentioned in the preamble to Article 18, could suggest that zero hour rules are already *within* the scope of the carve-outs. Obviously, the possibility of such contrary interpretations shows rather that the meaning of the carve-outs in this respect must be expressly clarified.

generality of the preservation of insolvency law effected by the amended words of Article 18.

- Any clarification of the wording of the carve-outs[32] would however, need careful consideration so as to ensure that the "subject to Article 33" wording (i.e. the over-riding effect of Article 33) was indeed preserved.

What the above analysis shows therefore, is that effect of the specific provisions of the Articles of the Convention cannot be ensured / made certain without first addressing the meaning / scope of Article 18 generally.

[32] I.e. so as to expressly extend them to additionally include undervalues, all provisions for avoidance of transactions and the ranking of categories of claims or expenses.