HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

January 16, 1975

Muir Hunter, Q.C.
3, Paper Buildings
Inner Temple
London, E.C. 4

Dear Hunter:

In the new edition of Graveson, Conflict of Laws (p. 543), I read: "Consequent on the accession of the U.K. to the European Economic Communities on Jan. 1, 1973, we are required under Art. 220 of the Treaty of Rome to enter into negotiations which will involve changes in the law of bankruptcy and widning-up of companies. It is probable that the provisions of a draft convention on this subject, to which reference will be made, will become part of English law."

My friend Graveson may know best. All that is required under Article 220 is, in so far as necessary, to engage in negotiations with a view to ensuring the simplification of the formalities governing the reciprocal recognition and execution of judicial deciaions. One thing may be said of the Market Committee draft: the formalities governing the reciprocal recognition of bankruptcy decrees will be messed up nicely.

Not speaking of the Market draft, new international efforts will have to be made. I trust that you are familiar with the current cases, including Herstatt and the Israel-English Bank. Minimum standards for domestic legislation should be develped. Jurisdiction should be available to bring local assets to equal distribution. The cases teach in a language which everybody understands what it wrong. Those who cash in today will lose the next time. They may as well finance research leading to more civilized conditions.

With best wishes,

Sincerely yours,

Kurt H. Nadelmann

Law School of Harvard University

Cambridge, Mass. 02138

February 28, 1975

Muir Hunter, Q.C.
3, Paper Buildings
Inner Temple
London, EC4Y

Dear Hunter:

Thank you for your letter of February 25, 1975.

I am sorry that I shall not be able to be around for the meeting on the 14th of March. The same day we have the meeting of the Advisory Committee on Private International Law in Washington.

The Consultative Paper is a marvellous comparative study. Nothing of this sort has ever been done before. I suppose that the Paper is no secret. If not, I will call it to the attention of our people.

As for the coverage of the EEC draft, what I think could have been included is consideration of the case where assets are located outside the Market. You will remember that I went into this in Milan. The English text of my paper is in the Nadelmann volume Conflict of Laws: International and Interstate (Nijhoff 1972).

I fully understand that a detailed technical study of the EEC draft is in order and politically necessary. However, I cannot agree that this is all that is needed. The U.K. interest seems to me to be much broader.

The rights and duties come from article 220 of the Treaty of Rome. Each member State has to do what is necessary to facilitate the formalities for reciprocal recognition of judicial decisions. For bankruptcy the language does not make much sense but the aim is clear.

The U.K. has relatively liberal rules on recognition of foreign bankruptcy decrees. Belgium and Luxemburg have liberal rules also. Dutch and German law forbids recognition of foreign bankruptcy decrees. In France and Italy, exequatur must be obtained and the creditors within the country have the advantage of being close. Details are in the Milan paper.

The U.K. thus has claims under the Treaty. German law allows an exception to the non-recognition rule by decree. The other countries have made exceptions in treaties. Whatever the fate of the EEC draft, a job has to be done. Bilateral discussion can produce improvements. Every interest exists in pointing at the situation, it would seem to me.

As you know, I do not think that a multilateral convention making a single administration mandatory for all cases is the answer. Certainly, the scheme is not workable for the relations between the civil law countries and England. I do not think that the civilians want this solution. Their concern is salvage of the project for the Six (plus Denmakk?) and I do not know whether they will succeed. I have not yet seen the addresses delivered by MM. Noel and Lemontey in Brussels in December. I knew of the meeting but decided not to go.

If the situation under article 220 is presented before going into the details of the EEC draft, I think that a better perspective can be gained of what is at stake. Also, the likelihood is that ideas for alternatives will come up. The reaction will not be entirely negative.

Because of our potential problem with our Northern neighbor I have been interested in the basic question for quite some time. While the bilateral way is easier, a general scheme for a multilateral convention could perhaps be sketched also just to see how it comes out. Even among the civilians, there are supporters for a scheme not making the single administration mandatory.

With respect to your specific question concerning the "cessation des paiements" problem (sec. 7.20-23), you may be interested in what has been suggested in this country by the now defunct Commission on the Bankruptcy Laws of the United States which filed its Report in 1973. "Acts of bankruptcy"would go. I enclose section 4-205 of their draft bringing the substitution. A bill is pending in the Congress based on the Commission's draft. What the chances of the bill are, is difficult to say.

Personally, I am inclined to think that it is best to deal with the basis for an adjudication and the rules for voidance of preferences separately. I take it that this happens under your law in the case of a company. I am aware of the French system but even there complications are not avoided. The special study may help in assessing the situation.

I trust that you will have a very interesting discussion. I have some hope that I may be in London at the beginning of May. You will tell me all about it.

With best wishes,

Sincerely yours,

Kurt H. Nadelmann

July 1975

11(1.2)

INSOLVENCY SERVICE
2-14 Bunhill Row
LONDON EC1

25 July 1975

Muir Hunter Esq Q C
3 Paper Buildings
Inner Temple
London EC4Y 7EU

Dear Muir

I thank you for your letter of 18 July, and I am very much obliged for the copy of the May/June issue of Credit Management giving a verbatim account of your address to the Conference of the Institue on the 12 March. I was interested to see your thinking on the rehabilitation of insolvent companies and in particular your comments of the difficulties facing an Official Receiver who is asked to continue the business of an insolvent company prior to the consideration by creditors or shareholders as to the appointment of some other liquidator. You will of course be well aware of the intrinsic difficulties of such a situation, and the need not to hazard the remaining corpus unless there are adequate indemnities against loss, and, if trading be continued, the need for sufficient liquid funds to provide the working capital for such trading, but nonetheless there are quite a number of cases each year where it is possible to maintain an entity for sale as a going concern. I fully agree that salvage opperations of the nature you envisage do require a very delicate judgment and evaluation of costs and benefits for which the underlying source material is often not available.

Yours sincerely

Chris Taylor

C A Taylor
Inspector General

6(1-?)

Department of Trade ~~and Industry~~
Insolvency Service
2-14 Bunhill Row London EC1Y 8LL

Telephone 01-606 4071 ext 124

MR MUIR HUNTER QC
HOTEL SANTA CATERINA
84011 AMALFI
ITALY

Your reference

Our reference

Date 13 August 1975

Dear Muir,

Thank you for your letter dated 10 August and in particular for your detailed comments on the draft of the Uniform Law Section. Sandy has also made detailed comments and my first impression is that the section can be re-drafted to include both sets of comments without too much difficulty.

[margin note: Defines what kind of proceedings]

I note your comments on the Protocol, which is to be discussed at the next meeting. But, do you not think the reference to some form of court order recording or registering a creditors' voluntary liquidation should be referred to in the section on "Scope", rather than in the list of proceedings in I(b)?

I made your apologies to the Chairman and members at yesterday's meeting. I hope to issue a 'report' within a few days, but briefly:

1 It was agreed to make a draft of the Final Report available to the Department by 6 October and to aim at submission of the signed document in January 1976.

2 I submitted your re-draft of paragraph 62 and additional paragraph 62A (Uniform Law) to deal with floating charges, and these were approved.

*· ~~3 The "Concluding Observations" draft was approved subject to a number of minor amendments. However, I am still searching for some way of incorporating most, if not all, of Sandy's note of dissent.~~

3. ~~4~~ The "Concluding Observations" draft was approved, subject to a number of minor amendments. Even so, I wish it was possible to incorporate Sandy's draft 'Note of dissent' into it to everyone's satisfaction. I know Sandy would welcome it, but we may be too far apart.

4. ~~5~~ The re-draft on "Jurisdiction" was approved with minor amendments, but subject to your approval of the English law expressed in paragraphs 3 to 11. David indicated that there were some inaccuracies.

5. ~~6~~ A start was made on "Recognition and Enforcement of Judgments" but it has been left for further consideration at the next meeting. Sandy is troubled (a) by the concept of (to quote him) "automatic enforcement, whatever that may mean"; (b) by the meaning of "recognition"; (c) by its meaning following the Black-Clawson case.

*. Sorry about the errors - my own Secretary is ill and her stand-in doesn't yet understand my ways!

6(7)

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Department of Trade and Industry

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MR MUIR HUNTER
CHEZ LA CONCIERGIERIE
LA ROSERAIE
DE ST JEAN
CHEMIN de FONTMERLE
ANTIBES O6 FRANCE

Your reference

Our reference

Date 26 August 1975

Dear Muir,

Thank you for your letter dated 17 August and the two cablegrams. I am returning your copy of "Concluding Observations", and enclose the agenda for the next meeting on 12 September.

The Committee considered your proposed paragraphs 15A and 17; they agreed that something along the lines of 15A should be added to 15, but thought it preferable not to add 17. I am most grateful for your other amendments which will be used in the Final Draft.

I issued copies of your Report on "Floating Charges and Receiverships" to members a day or two before the meeting. The matter was discussed and Sandy suggested that it might be prudent not to make too much fuss about Floating Charges, as the matter was under active consideration by the working party dealing with the draft Directive on "Non-possessory Securities". The Committee thought the matter was adequately covered by your paragraphs 62 and 62A in "Uniform Law", plus an amended paragraph 5 in "Preferences" (copy enclosed). However, Peter Avis said he would like your views and those of Frank Ryder to paragraph 5.

Drafts of the "Introductory" section, "Recognition and Enforcement of Judgments" and "Preferential and Secured Creditors" were all approved, subject to a number of amendments.

The Protocol was left for next time and at Kenneth's request, I agreed to re-draft it, if members would let me have comments on the original draft. In particular, Sandy thinks I(b)(d) is too wide, though I had thought it was most suitable. I enclose a copy of some proposed amendments to the Protocol section which I handed out on Friday. As you will see, I propose to expand paragraph 5 and support it by appendices. I should be very glad for your views. I know the Department is expecting us to do this and they are hopeful that we can make suggestions about pruning the U.K. lists.

I hope to start on some of the final drafts shortly, and I wonder if you have had a chance to look at paragraphs 3 to 11 of "Jurisdiction". The Report of the last meeting will follow shortly.

Best wishes

Yours ever

Trevor

ENC

6(7)

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MR MUIR HUNTER
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Your reference

Our reference

Date 27 August 1975

Dear Muir,

In forwarding the report of the 25th meeting, I am enclosing copies of the three drafts which were approved by the Committee, with agreed amendments noted thereon in manuscript, or attached. The "Introductory" and "Recognition" sections were re-drafts, which I had prepared especially for the 25th meeting. I did not think it was worth bothering you with them before the meeting.

My note at paragraph 8 in the report of the meeting is in answer to a suggestion that paragraphs 9 and 10 of the "Recognition" section are duplicates. The point dealt with in paragraph 9 was made by the Bar Council.

Best wishes

Yours ever

Trevor

T H TRAYLOR

ENC

6(17)

Department of Trade and Industry
Insolvency Service
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Mr Muir Hunter QC
Chez la Concierge
La Roseraie
De St Jean
Chemin De Fontmerle
Antibes 06 - France

Your reference
Our reference C/227
Date 3 September 1975

Dear Muir

Herewith re-drafts of the chapter dealing with the Protocol and associated appendices, which are due for consideration at the next meeting. The re-drafts incorporate proposed amendments which were issued at the last meeting.

I think Sandy is of opinion that Article I(b), item (d) is too wide; similar wording in paragraph 47 of "Scope" has also been criticised as being obscure. I should be grateful for proposed amendments, which should be in line with the Committee's views as given at the end of paragraph 32 on "Scope".

Muir has suggested that in paragraph 11, we should envisage the possible introduction of an Official Receivers' service in Scotland. I am not convinced that this is essential in our Report, but if it is, then we should also include Northern Ireland, as discussions for the introduction of such a service there are in hand.

I think it would be valuable if we could propose ways of reducing the lists of notices to be gazetted.

With best wishes

Yours ever

Trevor

T H Traylor

One can add things to the Protocol.

Could Lee/Legt get Ct's approval to dispense with OJEC gazetting on swearing that there are no extra-territorial creditors.

EUGENE F. COLLINS & SON

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AND AT
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OUR REF. AEC/DB YOUR REF.

18th September, 1975.

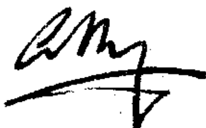
Muir Hunter Esq.,Q.C.,
Florian,
La Roseraie de St. Jean,
Chemin de Fontmerle,
ANTIBES 06600,
FRANCE.

Dear Muir,

Many thanks for your letter of 11th September. I am very interested in what you say about Floating Charges as our EEC Committee is also studying the Directive on Securities over Moveables at the moment. I will be very interested in seeing your Paper prepared for the Cork Committee.

I look forward to seeing you in Paris.

Yours sincerely,



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Muir Hunter, Esq., Q.C.,
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Inner Temple
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10 March 1976

Dear Muir,

I am sorry not to have written to you earlier, but I was awaiting information from the banking side.

It has been confirmed by our lenders that they would be considerably activated if in fact it was likely that debts due from abroad would have to be excluded from the maw of the Receiver. I understand that it is appreciated that other assets, such as stock or machinery that are abroad could be excluded. The thought, however, of debts being outside the ambit of such a charge would cause a reorientation of valuations.

Concurrently, as you probably know, the question is now being bandied around relating to reservation of title, not only by vendors abroad, but by vendors in this country. This means that in the event of insolvency or the appointment of a Receiver under a Floating Charge the items on which title is so reserved do not become available to the Receiver or Liquidator. This does not in any way impugn an earlier sale by the purchaser who has no title if the goods have been put into his possession by the vendor or probably if he is a mercantile agent. Nevertheless, as you are also no doubt aware, the proceeds can be traced to the advantage of the unpaid vendor if in fact the purchaser becomes subject to liquidation or the appointment of a receiver under a floating charge. The situation is sometimes further bedevilled by a reservation extending to earlier debts, or even to debts due to other members of a group.

This has been put forward as an important reason for banks and others involved in floating charges for considering their future position as to the extent to which assets otherwise thought to be available will be depleted.

The Working Party of which I am Chairman is likely to be meeting again in the next week or so, whereupon I will write to you again.

Yours sincerely,

F.R.RYDER

8(25)

INSOLVENCY LAW REVIEW COMMITTE
DEPARTMENT OF TRADE
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Telephone 01 – 606 4071 Ext 130

Secretary: **Cdr T H Traylor MBE**

M V S Hunter Esq

1 October 1979

Dear Muir

Interim Report

Herewith two copies of the draft interim report on Bankruptcy and Analogous Proceedings. I find that "Interim" is the correct designation because "First Report" is taken to mean that a series of reports will follow. There will, of course, be nothing to prevent a second interim report if we or the Minister so wish.

As regards length, this will probably produce not more than 10 or 12 pages of print which, with the possible addition of two or three appendices of statistics (which we are working on) is about right. A smaller report might be thought to be of insufficient substance to merit publication, particularly as our views on retaining the OR in the bankruptcy field may not be to the liking of either our political masters or some of the mandarins.

Please let me have your comments as soon as possible.

I hope you will forgive me for reminding you that the contents of the report remain confidential until it has been laid before the House.

On another matter, Alfred has asked me to let you know that the dinner has been fixed for the evening of Friday 18 January 1980. This is because the 17th would not have been convenient for the Chairman.

Yours sincerely

Trevor

T H TRAYLOR
Secretary to the Committee

Remove Scots law

C3404

Article 1

1. Where a person who, in fact or in law, openly or secretly, has directed or managed a company, a firm or entity which has been declared bankrupt and it is established that he has carried on activities for his own account under cover of the company, firm or entity and either

(1) has (wrongfully) dealt with the property of that company, firm or entity as if it were his own; or

(2) has (wrongfully) carried on a business at a loss for his own personal benefit,

the court may declare that person liable to pay all or such part of the debts of that company, firm or entity as it (the court) thinks fit.

2. Where any person has been found liable to pay the whole or any part of the debts of a company, firm or entity under paragraph 1 of this Article, or on other grounds has been found liable to pay compensation to a company, firm or entity which has been declared bankrupt, and fails to do so, [that person] may himself be declared bankrupt.

Delete Article 2

Insert Those activities
As per last 2½ lines of 1(1)

Those activities have led or contributed to the bankruptcy of the firm, company or legal person.

2 (2.8)

SCOTTISH LAW COMMISSION
OLD COLLEGE, SOUTH BRIDGE
EDINBURGH
EH8 9BD
Telephone: 031- 667 3437

Our ref: L3/268

2 July 1975

Muir Hunter Esq QC
3 Paper Buildings
Inner Temple
LONDON EC4Y 7EU

Dear Muir,

BANKRUPTCY CONVENTION

I have been rather pressed here since my return last week from a holiday in the Alps, but I have taken time to look at Trevor's draft on Scope. This appears to me to raise a number of questions. One point, however, does forcibly occur to me. In relation to "para-bankruptcy" proceedings, the text seems to be an argument directed towards their inclusion rather than, as we agreed, their exclusion. The only argument for exclusion is to be found at the end of para. 30. I think that the whole text here could with advantage be compressed, but that it should certainly conclude penultimately with a summary of the advantages and disadvantages of their inclusion before proceeding to a statement of the Committee's own conclusions on the matter. I have roughed out below an outline of the possible advantages and disadvantages. Could I ask you to have a look at this and suggest appropriate revisals.

I am copying this letter to Trevor for his information.

Yours ever,
Sandy

A E ANTON

Advantages of inclusion/

Advantages of inclusion

The principal arguments adduced for the inclusion of extra-judicial and purely contractual arrangements within the Convention are these:

(a) The situations which they cover, although not bankruptcy situations in the technical sense, are generally situations of practical insolvency.

(b) To include the procedures in the Convention would be to clothe the relevant trustees, liquidators and receivers with a formal title to recover assets abroad, to act there on behalf of the concerned creditors, and to resist attachments or diligence there.

(c) The inclusion of these procedures would preclude the risk of bankruptcy proceedings being taken in another Convention State and so terminating the voluntary proceeding in England and Wales or Scotland.

(d) Their inclusion would assure the publication of the fact of practical insolvency throughout the European Communities.

Advantages of exclusion

There are, on the other hand, a number of persuasive arguments against the inclusion of such procedures.

(a) While it is conceded that to include "para-bankruptcy" procedures in the Convention might clothe the relevant trustees, liquidators and receivers with a generally recognised title to the debtor's property, it is believed that in practice little difficulty is found in obtaining recognition of a debtor's voluntary assignment of his property abroad or the title of a voluntary liquidator. If, however, serious difficulty were to arise in practice, those concerned may have recourse to formal bankruptcy proceedings and so bring the matters within the scope of the Convention.

(b) The Convention is essentially one relating to jurisdiction, choice of law and, especially, enforcement of judgments in bankruptcy proceedings in the strict sense. Its provisions are designed to apply to such proceedings and are ill-adapted to situations where the debtor has not been adjudicated bankrupt. Article 1(2) of the Convention provides that:

> "In so far as not otherwise provided, the provisions relating to bankruptcy shall apply by analogy to the arrangements, compositions and other procedures listed in Article 1(b) of the Protocol."

A/

A rule providing for the application of other rules by analogy would seem to imply that those rules need not be applied when the analogy is inappropriate and that those rules, where applicable, may be modified to take account of relevant differences. But the propriety of the analogy is seldom clear having regard to the wide differences between judicial procedures for bankruptcy and what may be described as para-bankruptcy procedures. Is the principle of Article 1 appropriate to all such procedures? Would Articles 10 to 14 apply to voluntary liquidations? Do the rules in Articles 15 and 16 relating to conflicting claims or disclaimers of jurisdiction apply to a conflict between bankruptcy proceedings and the other proceedings referred to in Article 1(2)? Are all the exclusive jurisdictions in Article 17 to be applied in the case of those other proceedings? Is it appropriate in the case of all those proceedings to apply Article 21 relating to the staying of process by individual creditors? These examples could be multiplied. It is clear that the scheme of the Convention is ill-adapted to proceedings other than bankruptcy in the strict sense.

(c)/

(c) A further disadvantage of the inclusion of para-bankruptcy proceedings in the Convention is that their inclusion would require an application to them of the complex jurisdictional and other rules in the Convention, including possibly (though this is not clear) rules relating to advertisement. Their inclusion would deprive the United Kingdom unofficial procedures of their main advantage, their simplicity and informality.