PRELIMINARY DRAFT

16 July 1975

REPORT OF THE BANKRUPTCY CONVENTION ADVISORY COMMITTEE

To the Right Honourable Peter Shore, M.P., Secretary of State for Trade

1. We were appointed by your predecessor on 27 July 1973

> "to consider the terms of the Draft EEC Bankruptcy Convention and to advise the Department upon the effect of the implementation of the Convention in its present terms and to recommend such modifications as we consider necessary and practicable."

2. We now have the honour to submit our Report.

3. The membership of the Committee is set out in Appendix A. Also recorded are the names of the persons co-opted to assist us. Our special thanks are due to these gentlemen, some of whom acted as substitutes during the absence of standing members and all of whom have given us the benefit of their expertise and advice.

4. We held X meetings of the full committee and there have been a number of meetings of sub-committees to consider specific problems.

5. During August 1973 we issued copies of the original English translation of the draft Convention to representatives of a wide section of the professional and business community and invited their views. In the Autumn of 1974 we prepared a detailed consultative paper on the draft Convention; over 800 copies were issued to Government departments, trade unions, employers' associations, representatives of commerce and industry, professional organisations, the universities and, not least, to interested members of the public. At the same time we issued copies of an amended translation of the draft Convention which had been agreed by the EEC Commission in August, 1974. The consultative paper invited comments and in all more than X memoranda or letters have been received. Those who submitted memoranda are listed in Appendix B. This written evidence has been of the greatest possible assistance to us and we would here record our indebtedness to all who took part in it.

6. We have decided not to append to this Report the memoranda of comments on the draft Convention which we have received because of the reproduction difficulties which would arise in the limited time available. However, we have instructed our Secretary to make copies of the memoranda available to the Inspector General of the Insolvency Service. Should it be decided to publish this Report then we consider the memoranda also should be published.

7. We found it advantageous to have detailed reports prepared of the discussions at our meetings so as to be able to refer back to the numerous points raised, particularly in debates on important or contentious issues. These reports, which also recorded our preliminary views and recommendations, have been made available to the Inspector General and his staff and to the members of the Inter-departmental Working Party. To this extent, they have been kept in touch with our progress and our views throughout.

8. The legal basis of the Convention is Article 220 of the Treaty signed at Rome on 25 March 1957 establishing the European Economic Community. This provides inter alia that Member States shall enter into negotiations with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition of judgments of courts or tribunals and of arbitration awards. In 1959 the EEC Commission circulated a Note to Member States on the subject of Article 220 and the reciprocal enforcement of judgments. A Committee of Experts was appointed who proceeded with the drafting of a convention on jurisidiction and the enforcement of civil and commercial judgments. This convention, referred to in this Report as the European Judgments Convention, was signed by the original six Member States of the Communities on the 27 September 1968 and entered into force between the Six on 1 February 1973. The Committee of Experts had earlier come to the conclusion that the reciprocal enforcement of bankruptcy judgments presented special difficulties and a Working Party was set up to consider that matter separately which has met since 1963 under the Chairmanship of M. Jean Noel, Counsellor at the French Cour de Cassation. This Working Party prepared a Preliminary Draft Convention on Bankruptcy which was published on 16 February 1970, together with a Report prepared by M. Noel and M. Jacques Lemontey, which we shall refer to as the "N-L Report".

9. The Preliminary Draft Convention on Bankruptcy - which we shall refer to as "the Bankruptcy Convention" or as "the Convention" - contains 82 Articles and is supplemented by two Annexes. Annex I contains a Uniform Law dealing inter alia with the bankruptcy of persons responsible for the management of firms or companies, relation-back and set-off. The Uniform Law is designed, when the Convention comes into force, to replace the corresponding provisions of the national laws of Member States. The latter will therefore be amended even in the case of bankruptcies having no international consequences. These uniform regulations are already subject to certain reservations or options listed in Annex II. There is also a Protocol inter alia listing the proceeding in Member States to which the Convention applies, the courts in which actions shall be brought, etc. An Annex to the Protocol prescribes a form of International Certificate attesting the appointment of the trustee or liquidator. Finally, there is a proposed Joint Declaration in which inter alia Member States declare themselves ready to examine the possibility of conferring jurisdiction in certain matters upon the Court of Justice of the European Communities.

10. We feel it is right to place on record the difficulties which arose in dealing with an English text which was under continuous change until August 1974, and with a draft Convention in which most of the articles have been changing in substance throughout our deliberations. We do not refer to this by way of complaint, but because we feel that similar difficulties may well arise in other Community discussions, and we feel that some thought should be given to the problem.

11. There is as yet no strictly authentic English text of the draft Convention. The only authentic texts are those in the four original official languages of the European community, i.e., French, German, Italian and Dutch. We started with an English translation initially prepared for the Department and revised by the Foreign and Commonwealth Office. Throughout the following year or so, a translation committee met in Brussels with the object of amending the English translation, so that it conformed more with the underlying principles of the French text. Eventually a working English text was prepared by the translation services of the Communities and agreed to and issued by the EEC Commission in August 1974. This is the text which we issued with our Consultative Paper in November 1974.

12. The Commission's Working Party (which we shall refer to as the "Brussels Panel") has continued to meet and the delegations of the original six Member States have been in a position to put forward the views of their respective Governments on the Convention. We know that the U.K. delegation has with some difficulty, but quite properly, reserved its position throughout, but the fact remains that the Brussels Panel has considered and, it seems, provisionally accepted numerous amendments and alterations to the original draft text. As recently as mid-June 1975, we received a provisional document summarising the changes and proposed changes down to February 1975; the document is in French. We do not know what changes may have been proposed since February 1975.

13. It would be strictly in accordance with our terms of reference to adhere to consideration of the original English text, but such a course would be unrealistic and of little help to those persons who will be required to negotiate on behalf of the U.K. At the same time, to examine and report on all the changes emanating from Brussels would considerably delay the submission of our Report and we imagine that this would be a serious embarrassment to the U.K.'s Brussels delegation. Therefore, we have adopted a middle course. In general, we have concerned ourselves with the English text dated August 1974; but we have also had regard to amendments proposed by the Brussels Panel and where necessary, we have briefly commented on them, particularly where they have moved closer to our way of thinking.

14. Article 3(2) of the Act of Accession to the European Communities obliges the United Kingdom "....to accede to the conventions provided for in Article 220 of the EEC Treaty ..... signed by the original Member States, and to this end to enter into negotiations with the original Member States in order to make the necessary adjustments thereto". But it is clear that this obligation only applies to those Conventions which were signed on 1 January 1973, namely the European Judgments Convention and the Convention on the Mutual Recognition of Companies and Bodies Corporate. Accordingly, the United Kingdom may press for substantive modifications to the draft Bankruptcy Convention going beyond the mere adjustments to which reference is made in Article 3(2) of the Treaty of

Accession. It will be appreciated, however, that the original Member States, having spent almost a decade on the elaboration of the draft Bankruptcy Convention will be reluctant to modify it and will place a heavy onus upon new Member States which propose alterations of principle.

15. We emphasise at the outset the wide scope of the Convention which although called a "Bankruptcy Convention" in fact applies to practically all forms of insolvent administration of a compulsory character, whether of individuals, partnerships or companies. We may also stress that the acceptance of the Convention will call for radical changes in the laws of these countries, particularly in matters of bankruptcy and liquidation, but also in a number of questions of general law which assume importance in insolvency situations. The Convention is based on a series of novel principles with wide implications in relation to jurisdiction, choice of law and recognition of judgments in bankruptcy and associated matters. These principles include the rule that a bankruptcy order made in one Contracting State will exclude such an order being subsequently made in any other Contracting State; the rule that the liquidator under such a bankruptcy order has powers which extend to all Contracting States; rules which in broad terms have the effect that most disputed questions arising in the course of bankruptcy will be matters for the courts of the State of the bankruptcy and for the law of that State, even in relation to immoveables in other Contracting States, and rules securing the virtually automatic recognition and enforcement of judgments relating to such questions in other Contracting States.

16. The basic aim of the Bankruptcy Convention is to avoid the confusion and frequent injustice to individual creditors which may arise at present because a person or legal entity may be declared bankrupt in more than one State at the same time. It is true that creditors may prove in the several bankruptcies, but this is often difficult and adds to their expenses. Experience shows that, all too frequently, local creditors are at an advantage and, since the local assets are not necessarily related to the amount of local debts, there are frequently unequal distributions. The principal liquidator, too, may have difficulty

in obtaining the transmission of assets in States other than that of his appointment. In the Netherlands, for example, foreign judgments are not enforceable except by virtue of a treaty, and the Treaty between the United Kingdom and the Netherlands on the Reciprocal Enforcement of Judgments does not extend to bankruptcy judgments.

17. It is the United Kingdom as a whole which must eventually ratify the Convention and we have therefore tried to take account of the problems of all three of its law districts. For reasons of convenience this Report is framed mainly in terms of English law and legal language, but when necessary, we have drawn attention to Scottish or Northern Irish aspects separately.

18. We have not attempted to clothe our recommendations in statutory language because we assume that such amendments to the Convention as are pursued and in particular, such amendments as are necessary to our internal laws, will be done by others better qualified.

19. In referring to the more important statutes in this field we use a number of abbreviations. These include the following:

"1857 Act"	-	The Irish Bankrupt and Insolvent Act 1857
"1872 Act"	-	The Bankruptcy (Ireland) Amendment Act 1872
"1913 Act"	-	The Bankruptcy (Scotland) Act 1913
"1914 Act"	-	The Bankruptcy Act 1914
"1929 Act"	-	The Bankruptcy Amendment Act (Northern Ireland) 1929
"1948 Act"	-	The Companies Act 1948
"1960 Act"	-	The Companies Act (Northern Ireland) 1960

20. Our terms of reference relate only to consideration of the terms of the draft Bankruptcy Convention and make no mention of the negotiations which will be necessary in order to transform the draft into a form more acceptable to the United Kingdom. We shall be pleased to remain available to advise on matters concerning the negotiations as long as they continue, though we would expect this Report to be our main contribution.

APPENDIX A

Membership of the EEC Bankruptcy Convention Advisory Committee

Chairman:	Mr K R Cork, FCA (Messrs W H Cork Gully & Co.)
	Mr A E Anton, CBE, FBA (Scottish Law Commission)
	Mr P H Armour, MA, CA (Messrs Deloitte & Co.)
	Mr P G H Avis, AIB (Assistant General Manger, Midland Bank
	Mr C L Dodd (Messrs James & Charles Dodd, Solicitors)
	Mr Muir Hunter, QC
Secretary:	Mr T H Traylor, MBE, C de G (Department of Trade, Insolvency Service)

Persons co opted to assist the Committee:

Mr David Graham (Barrister-at-Law)

Professor J M Halliday, MA, LLB (Scottish Law Commission)

Mr J M Hunter, LLB, (Bankruptcy Registrar, Northern Irelan

Mr C J Jenkins (International Legal Adviser, Midland Bank)

Mr G A Weiss, FCA (Messrs W H Cork Gully & Co.)

LWA TTs LG 9/29/July 75 10(3.7)

PRELIMINARY DRAFT 29 July 1975

Superseded

THE PROTOCOL

1. The N-L Report indicates that the Protocol is intended to include the terminology of various bankruptcy and analogous proceedings in Member States, the titles of national authorities and other information which may be subject to change from time to time. The Protocol can be more readily amended than the revision procedure required for articles of the actual Convention. We have referred to the various articles of the Protocol as occasion demanded, in the main body of our Report and we now summarise the alterations and additions which we consider are necessary.

2. Article I(a)

Add: in the United Kingdom -

(a) Bankruptcy (England and Wales and Northern Ireland)

(b) Sequestration, including the sequestration of a deceased debtor (Scotland)

(c) Administration in bankruptcy of the estates of persons dying insolvent (England and Wales and Northern Ireland)

(d) Compulsory winding-up of companies

(e) Winding-up of companies under the supervision of the court.

Article I(b)

Add: in the United Kingdom -

(a) Compositions and schemes of arrangement under the Bankruptcy Acts

(b) Arrangements under the control of the court (Northern Ireland only)

(c) Deeds of arrangement approved by the court (Northern Ireland only)

(d) Arrangements, compromises and reconstructions of companies, whether or not during the course of liquidation, where the sanction of the court is required and where creditors' rights are affected.

(e) Creditors' voluntary winding-up of companies. [Where an order for registration of the winding up has been obtained?]

3. Article II This article gives lists of various national enterprises which have special liquidation procedures within their own State and which are therefore excluded from the scope of the Convention. The article also provides that bankruptcy or analogous proceedings may be opened against any listed undertaking in any other Member State whose law so allows. We do not have the necessary information on which to recommend the inclusion of any United Kingdom enterprises under Article II. However, we do not think that the Convention is appropriate for dealing with organisations exercising public functions, such as local authorities.

4. Article III We recommend that the advertisement of a bankruptcy judgment should distinguish between those proceedings which are universal and those proceedings which are pursuant to Articles 9 or 56 of the Convention.

5. Article IV Those matters which are normally gazetted in England and Wales, Scotland and Ireland should be listed. ✓

6. Article V Acceptable.

7. Article VI Add:

in England and Wales, the London Gazette

in Scotland, the Edinburgh Gazette and the London Gazette

in Northern Ireland, the Belfast Gazette and the London Gazette.

8. Article VII This article provides that service of documents under the Convention is to be in accordance with the procedures laid down in conventions and agreements between Member States. It also provides that a Member State may make a declaration that it does not wish to allow process and other documents to pass direct from court to court.

9. In commenting on Article 4 of the Protocol to the European Judgments Convention, which has identical provisions, the Kilbrandon Committee remarked:

"At first sight, we see no serious difficulties of principle about allowing this to happen, especially if only the superior courts of the United Kingdom (and the Secretary of State, for maintenance orders) are concerned. But its technical and administrative implications need further consideration. We are not able to express a definite view on it at present, and since it is not a question for the negotiations proper we do not think we need do so."

10. We have come to similar conclusions with regard to Article VII and would add that in relation to bankruptcy matters, the technical and administrative difficulties could be formidable, because they are dealt with chiefly in the so-called "inferior courts".

11. Article VIII We have no objections to the principles of this article, but draw attention to our recommendations concerning Article 29 of the Convention: the order for the re-direction of mail should be made by a court in the State from which re-direction is required and it should be limited, initially, to 3 months.

12. Article IX Add:

in England and Wales, to the Official Receiver and provisional liquidator, the liquidator, or the trustee, as appropriate;

in Scotland, to the trustee, judicial factor or liquidator, as appropriate;

in Northern Ireland, to the Official Assignee.

13. Articles X, XI and XII We do not think that the questions raised by these articles are suitable ones for us to advise on, and we suggest that they should be settled by the Department in consultation with the relevant court authorities in England, Scotland and Northern Ireland. We would expect Articles X and XI to be restricted to the High Court in England, the Court of Session in Scotland and the High Court in Northern Ireland. As regards Article XII we understand it to be contrary to accepted policy to provide for direct appeal from a judge of first instance to the House of Lords and especially when that appeal is restricted to questions of law.

14. Article XIII Add:

in the United Kingdom, to creditors' voluntary winding-up.

15. Articles XIV and XV Acceptable.

16. We draw attention to our recommendation concerning Article 74, that non-European territories should be listed in the Protocol and not in the main body of the Convention.

17. We stress the necessity for a comprehensive list of definitions.

18. [A paragraph on receivership protection?]

Preliminary Draft - The Protocol

Proposed amendments

Paragraph 5: Article IV. In general, those matters which are normally gazetted in England and Wales, Scotland and Northern Ireland should be listed. Compared with the notices already listed by the original six Member States, the number of notices gazetted in the UK is extensive. We think that, with a view to reducing costs, notices which are required to be advertised in the Official Journal should be kept to a minimum, while retaining the existing provisions for advertising in the U.K. gazettes.

Notices which are presently advertised in U.K. gazettes are scheduled in Appendices ..... For completeness, we have including notices of judgments or orders opening bankruptcy proceedings, which are covered by Article 25(1) and Article III of the Protocol. We have also indicated the notices which might be omitted from the Official Journal, or whose advertisement might be left to the discretion of the liquidator.

Paragraph 8: amend second sentence to read:

> "It envisages, however, that, unless the State in which service is to take place submits a declaration of objection to the Secretary-General of the Council of the European Communities, documents may pass from the 'proper public officers of the State in which the instrument has been drawn up directly to the proper public officers of the State in which the addressee is to be found'."

List of provisions for gazetting and advertising under English law

1. Bankruptcy

(a) Receiving order
(b) Administration order (deceased insolvent)
(c) First meeting of creditors
(d) Appointment of trustee
(e) Public examination
(f) Notice of proceeding after adjournment sine die
(g) Adjudication order
(h) Anullment of adjudication order
(i) Notice of intended dividend
(j) Notice of dividend
(k) Release of trustee
(l) Order to approve a scheme or composition
(m) Order anulling, revoking ot rescinding an order

2. Companies winding-up (compulsory)

(a) Petition
(b) Winding-up order
(c) First meetings of creditors and contributories
(d) Appointment of liquidator
(e) Death, resignation or removal of liquidator
(f) Release of liquidator
(g) Intended dividend
(h) Dividend
(i) Petition under s.206, and orders made thereon
(j) Petition under s.210, and orders made thereon

3. Creditors' voluntary winding-up

(a) Notice of resolution to wind-up voluntarily
(b) Notice of meeting of creditors
(c) Appointment of liquidator
(d) Annual meetings of creditors and contributories
(e) Final meetings of creditors and contributories

1. In respect of bankruptcies under Scots Law:

   (a) Petition for Sequestration
   (b) Award of Sequestration
   (c) Appointment of Trustee and Commissioners: Second Statutory Meeting
   (d) Payment of Dividend
   (e) Postponement of Dividend
   (f) Election of New Trustee
   (g) Appointment of New Commissioner
   (h) Meeting of Creditors: Discharge of Trustee
   (i) Petition for Discharge of Bankrupt
   (j) Award of Sequestration (Summary)
   (k) Discharge of Trustee (Summary)

2. In respect of company liquidations under Scots Law:

   (a) Creditors Voluntary Winding Up
   - Appointment of Liquidator
   - Notice of Appointment of Liquidator
   - Meeting of Creditors
   - Anniversary Meetings
   - Final Meeting
   - Any other matters which the Court directs should be publicly advertised

   (b) Winding Up by the Court
   - Petition for Winding Up
   - Appointment of Official Liquidator
   - First Meeting of Creditors
   - Adjourned First Meeting of Creditors
   - Last Date for Lodging Claims
   - Anniversary Meeting
   - Petition for Discharge

1. Bankruptcy (Northern Ireland)

[(a) Notice of adjudication order and appointment of public sittings for examination of bankru

[(b) Notice of administration order - deceased insolvent .]

(c)* Notice of appointment of day for proceeding with final examination of bankrupt adjourned sine die.

(d) Notice of sitting for proof of debts.

(e)* Notice of audit and intended dividend.

(f) Notice of meeting of creditors (held in court) to consider offer of composition.

(g) Notice of special sitting of court to consider amended offer of composition.

(h) Notice of resolution of creditors at meeting to consider offer of composition.

(i) Notice of resolution of creditors at special sitting of court to consider amended offer of composition.

(j) Notice of annulment of adjudication.

Notes

(1) Items in square brackets , being judgments opening the bankruptcy within Article 25(1) should not, in my opinion, be included in the Protocol.

(2) Items marked with asterisk I have included for completeness , but would prefer to see them omitted, unless corresponding notices for England are to be included.

(3) Items (h) and (i) are not Gazetted at present but logically ought to be and I foresee no difficulty in amending our Rules to provide for this at the same time as the necessary amendments re arrangements mentioned below.

2. Arrangements under the control of the court (Northern Ireland)

[(a) Protection order (i.e. order protecting the debtor's person and property from ~~xxx~~ process of enforcement by his creditors).]

(b) Notice of private sitting of the court to consider debtor's proposal for arrangement.

(c) Notice of special sitting of the court to consider debtor's proposal for an amended arrangement.

(d) ~~&~~ Notice of order confirming arrangement or amended arrangement.

Notes

(1) Note (1) re bankruptcy applies also to item (a) above.

(2) At present there is no Gazetting or other publication of arrangement proceedings, but~~x~~, having regard to Article 1(2) , I take the view that we will have to amend our Rules to provide for such publication in future. This is one of the matters on which I hope we will be able to ensure uniformity of approach to the Convention between N. Ireland and the Republic of Ireland, who operate the same system.

3. Companies winding-up (compulsory) (Northern Ireland)

~~(a)~~ (a) Petition.

[(b) Notice of winding-up order.]

(c) First meeting~~x~~ of creditors and contributories.

(d) Notice of appointment of liquidator.

(e) Advertisement for creditors (i.e. notice fixing time for creditors to send names and addresses and particulars of debts or claims to liquidator).

(f) ~~Notice of petition~~ Petition under section 197 of the 1960 Act and orders made thereunder, if directed by the court.

4. Companies winding-up (creditors' voluntary) (Northern Ireland)

(a) Notice of meeting of creditors (following meeting of company at which resolution for voluntary winding-up is to be proposed).

[(b) Notice of resolution to wind up voluntarily.]

(c) Notice of appointment of liquidator.

(d) Notice of annual meeting of creditors.

(e) Notice of final meeting of creditors.

e items in square brackets in 3 and 4, see note (1) to Bankruptcy above.

9(2.9)

XI/453/73-E

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Directorate-General
for the
Internal Market

"Bankruptcy law"

COVERING NOTE

to the preliminary draft of the Convention on bankruptcy, compositions and analogous forms of proceeding (Doc. 3327/1/XIV/70), drawn up by Mr L. Gadebois, Member of the French Delegation (submitted to the Delegations of the three new Member States at the meeting of the group of experts 18 to 22 June 1973.

XI/453/73-E

JUNE 1[illegible]

PRELIMINARY DRAFT OF THE CONVENTION ON BANKRUPTCY, COMPOSITIONS AND ANALOGOUS FORMS OF PROCEEDING

COVERING NOTE[1]

Article 220 of the Treaty establishing the European Economic Community provides that "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

.....

the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."

It soon became clear during the negotiations, which were begun in Brussels by experts from the six founder Member States in 1960, that there was a need, alongside the general Convention[2], for a special Convention on the recognition and enforcement of judgments in the field of bankruptcy.

These discussions have been lengthy and difficult. A plenary committee met until January 1965 under the chairmanship of Professor Bulow, the German Secretary of State for Justice. However, a special working party on the bankruptcy convention met on numerous occasions between 1963 and 1970 under the Chairmanship of Mr Nöel of the French Delegation. Finally, a preliminary draft Convention was drawn up and adopted unanimously by the experts of the six countries at their final meeting which took place from 16 to 20 February 1970. This preliminary draft (document No 3327/1/XIV/70 contains 82 articles, a draft uniform law of 6 articles (annex 1), the reservations introduced by the Member States regarding certain provisions (annex 2), a protocol comprising 15 articles and a joint declaration. The preliminary draft convention is accompanied by a 160 page report prepared by Mr Noël and Mr Lemontey (doc. No 16 775/XIV/70-F).

These documents have been officially submitted to the Member Governments for their opinions.

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[1] Prepared by L. Gadebois, Member of the French Delegation

[2] The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968.

I. RATIONALE OF THE PRELIMINARY DRAFT CONVENTION

A. The present arrangements do not allow of solution of the problems connected with bankruptcy within the European Economic Community

At the present time, unless a convention exists between the two countries concerned, the same debtor may be declared bankrupt in both of them and creditors may prove in each bankruptcy for the full amount due to them.

This position, known as the system of multiple bankruptcies or of the territoriality of bankruptcy, allows a debtor to arrange his insolvency from one country to another to his own best advantage. It is true that this system is partly compensated for both by the existence of exequatur procedures (whereby a judgment in bankruptcy can be enforced in a country other than that in which it was given) and by bilateral conventions under which the territoriality principle is replaced by that of unity (a single bankruptcy procedure being followed in both countries) and of universality (the judgment in bankruptcy has legal effect in both countries wherever the debtor has assets or creditors).

But, firstly, the exequatur procedure is not always available, (as for example in the Netherlands) or else is difficult to apply and, secondly, bilateral conventions are not in force between all the Member States of the EEC (France has concluded conventions with Belgium and Italy, but not with the other Member States) and even where they are in force they are mostly not of recent date (the Franco-Belgian Treaty is dated 8 July 1899; the Franco-Italian Treaty, 3 June 1930).

Attempts to draw up multilateral conventions of a very wide-ranging effect have not been successful (as at the fifth and sixth Conferences on Private International Law held at The Hague in 1925 and 1928).

B. It was necessary to solve the problems connected with bankruptcy within the European Economic Community

It might be asked whether the task at hand, which is long and difficult to achieve because of the differences in the national laws relating to bankruptcy and because of national variations in private international law, was justified from a purely practical point of view.

Indeed, very few bankruptcies have hitherto had extra-territorial effects. Firstly, large international undertakings rarely become insolvent. Secondly, they carry on their overseas activities in most instances through subsidiary companies which are legally independent of the parent company.

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Yet the creation of the Common Market should result in considerable change in this situation, in that the Common Market is to become one large internal market governed by free competition. The achievement of freedom of establishment, of freedom to supply services and of free circulation of persons, goods and capital inevitably leads to mobility of undertakings. The proposed creation of a European Company, and the possibility of mergers between companies governed by different national laws (as provided for in Article 220 of the Treaty) also encourage national undertakings to establish branch offices or secondary establishments in other Community countries.

From then onwards adjudications in bankruptcy in the Member States will often have effects which transcend the boundaries of any one Member State. The difference between the systems of private international law, if nothing is done about them, will give rise to insuperable difficulties. The few existing conventions (apart from the Franco-Belgian Treaty and the Franco-Italian convention already mentioned, the only conventions in existence amongst the six original Member States are those between Belgium and the Netherlands of 28 March 1925, the Netherlands and the Federal Republic of Germany of 30 August 1962 and a treaty between the three Benelux countries of 24 November 1961 which has not yet entered into force) differ widely from one another and do not provide any satisfactory solutions in the context of the Common Market.

It was therefore essential to try and draw up a multilateral convention between the Member States of the EEC laying down common rules: rules as to jurisdiction, as to which law is to be applied, as to the effects of bankruptcy and rules relating to recognition and enforcement of judgments.

C. The preliminary draft convention seeks so far as possible to solve the problems connected with bankruptcy within the European Economic Community

It was impossible to harmonize the various national laws relating to bankruptcy, not only because of the profound differences between them but because bankruptcy is an incident in the law which affects the law of persons, companies and firms goods, the rules of procedure and of the means of enforcement, and even criminal law. Harmonization in this field would require first that the law of obligations be harmonized, which would be very much a long term process if it were ever attempted.

The only way open was therefore to try and solve the conflicts of law and of jurisdiction i.e. conflicts as to jurisdictional competence and as to which law should apply. However, on certain points it was found that the conflicts rules did not produce satisfactory results and it was considered necessary, in order to ensure certainty in the law affecting transactions and equality as between third parties having similar rights, to draw up uniform provisions of/Law (Annex 1) which to a a limited extent may be subject to reservations on secondary points (Annex 2)

II. GENERAL SCHEME OF THE PRELIMINARY DRAFT CONVENTION

A. The convention is essentially a private international law convention based on the principle of the unity and universality of bankruptcy in the contracting states.

The principle of unity and universality has distinctly more adherents than that of territoriality [1] [2]. It is true that the latter (involving a bankruptcy in each state in which the bankrupt has assets or where there are creditors having a claim upon him) does give greater security to those creditors whose national law is given effect, but it creates greater injustice in that the various assets and liabilities in each country may differ very widely in proportion to each other, and involve higher costs because creditors may prove in all the bankruptcies. Lastly, because the adjudications are obviously not all pronounced on the same date, the debtor has time in which to arrange his insolvency in those countries in which he has not yet been dispossessed of his assets.

The principle of universality could not, however, be given free rein in such a way as to ensure that privileges and securities granted were satisfied, and for a long time this difficulty appeared to be insuperable and likely to lead to failure of the negotiations. It being clearly impossible at that moment to unify the law on privileges and securities, the working party concentrated on finding the least unsatisfactory and least inequitable solution. The proportionality between the various groups of assets and liabilities in each country which arises as the result of the territoriality principle has been mitigated by dividing up the balances remaining outstanding pro rata to the available surpluses. It has proved an extremely onerous task to draft in sufficiently comprehensible form the rules adopted in this connection.

It has not been possible moreover to adopt the universality principle as regards incapacity, forfeiture and disability resulting from bankruptcies pronounced in each state. But in this case the territoriality principle did not appear to make for too much difficulty. [3]

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[1] Those countries which have regard especially to the incapacity of the debtor (Belgium and Luxembourg) prefer universality. Those which look upon bankruptcy first and foremost as a procedure for executing judgment on and of liquidating assets (France and the Netherlands) adopt territoriality. German and Italian laws include features of both systems.

[2] Numerous European and national professional and trade organizations have declared themselves to be in favour of the princple of unity and universality, in particular the Standing Conference of Chambers of Commerce of the EEC, the Standing Conference of the Chambers of Commerce and Industry of Belgium, France,

and Italy, the Union of the Industries of the European Community (UNICE), and the Savings Banks Group of the EEC. The EEC Bankers' Federation, on the other hand, has raised objections to the unity principle.

3 The group of experts nevertheless hoped that coordination of the national criminal laws relating to bankruptcy would be undertaken as soon as possible.

B. The convention lays down binding rules concerning jurisdiction

1. The principle of the unity of bankruptcy was inconsistent with the rules of indirect jurisdiction, which come into effect only upon recognition and would not have avoided multiple bankruptcies.

On the other hand the jurisdiction of the courts within the States could not be interfered with. The experts therefore excluded the possibility of having rules of special direct jurisdiction (particular jurisdictions within a particular State) and adopted rules of general direct jurisdiction (courts of a particular State having jurisdiction under the law of that State).

2. The principal criterion for jurisdiction adopted was that of the debtor's principal place of business (of which there can be only one) which has been defined as "the place where the main interests of the debtor are usually administered" (for companies, and in the absence of proof to the contrary, this is presumed to be the place where the registered office is situated).[1]

3. An order of criteria for determining jurisdiction has been introduced (centre of management, - debtor's place of business - national jurisdiction).

4. Rules have been suggested for the purpose of resolving as far as possible both positive and negative conflicts of jurisdiction.

C. The convention abolishes the normal exequatur procedure for judgments in bankruptcy and substitutes a voidability procedure.

The principle of universality, in order not to allow time for the debtor to misapply his assets and for certain creditors to act more swiftly than others, logically involved, first, that judgments in bankruptcy pronounced in one of the Member States be recognized automatically by the other States, and, secondly, the adoption of a simplified exequatur procedure[2] or even outright abolition of any such procedure.

It was this last which was finally preferred, but in order to ensure that a bankruptcy would be fully effective while retaining such control as may be necessary, it has been tempered by permitting proceedings for a declaration of voidability to be brought against the administrator by any persons who wishes to challenge the recognition and enforcement of the judgment in bankruptcy, but at his own risk and cost. A form of enforcement order was also recognized as being necessary in certain cases.

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[1] The experts rejected the words "managed" and "business", in favour of "administered" and "interests", the latter expressions appearing to be more neutral.

[2] Such procedure is provided for in Article 31 of the General Convention of 27 September 1968.

D. The scope of the convention is as follows:

1. Territorially: the convention applies to the territory of the contracting States and to the French overseas departments and territories. Special provisions apply in respect of Surinam and the Netherlands Antilles.

2. Substantively: insurance, savings, capitalization, and deferred credit undertakings, for which a separate convention will be negotiated later, are exempted from the scope of this convention.

3. The convention applies to all proceedings:

- based on cessation of payments, insolvency or shakiness of the debtors' credit,
- in which a judicial authority is involved, and
- which result in the suspension of individual proceedings, compulsory collective liquidation of assets or mere control of a debtor's business.

4. No distinction is made between bankruptcies pronounced in one and the same country, for it is often impossible to know at the time of adjudication whether it will have effects in other countries.

5. As regards actions arising out of the bankruptcy which in certain countries fall to be dealt with by the court which has pronounced the judgment in bankruptcy, and in others to other courts: a list has been drawn up of actions which are compulsorily to be dealt with by the court which pronounced the judgment in bankruptcy.

6. With reference to the general convention of 27 September 1968: this continues to apply as regards those matters which are not covered by the convention on bankruptcy (e.g. insolvency of non-commercial persons or undertakings under French law, amicable arrangements).

E. For those cases in which it has not been possible satisfactorily to resolve the conflicts of law the convention includes uniform provisions of law

These uniform provisions were discussed at great length by the experts in view of the differences between the national systems and it proved very difficult to reach agreement. The uniform provisions (see Annex 1) relate to the following:

1. extension of the bankruptcy of companies or firms so as to include the persons directing or managing them;
2. bankruptcy of persons responsible for conducting the affairs of companies or firms;
3. proof of the spouse's claim to recover property;
4. acts invalid as against the general body of creditors during the suspect period;
5. set-off of debts payable and debts receivable in one hand;
6. contracts of sale where the passing of the property is deferred.

10(3-9)

Choice of law 1-5
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DRAFT E.E.C. BANKRUPTCY CONVENTION

DRAFT FINAL REPORT: COMMENTS

"CHOICE OF LAW" SECTION

~~Page 1. "undermining credit"~~ Page 1, "Centre of administration"

Page 2, para.3.

There are "events" in the laws of the Six comparable with acts of bankruptcy, e.g. making a declaration of suspension of payments, suffering an execution, absconding, etc.

Pages 2/3, para.5.

I am, rather belatedly, concerned with the absence from the draft Convention of any provision about "discharges" within the English bankruptcy sense, while the N.L. Report refers to "clôtures", which do not represent any U.K. event except "annulment". I wonder if we should somewhere (if we have not already done so) deal with the termination of "divestissement"?

Discharges

Page 7. "Deprivation of capacity"?

Page 8, para. 20

Should a distinction be here made between the effect of the receiving order and of the adjudication; it will be recalled, I think, that the "divestissement" is to be at receiving order stage.

Para. 21, line 8

I do not understand the text "about the time that the liquidator is appointed". In compulsory winding up, the O.R. is appointed liquidator at one instant of time, viz. the winding-up order; in voluntary winding up, there is a notional interregnum between the Members' meeting appointing a liquidator and the creditors' meeting confirming him or appointing another Liquidator.

Page

Page 9, para.23, l.3.

For "company", read "compulsory"?

The sanction to carry on the business can be given

also by the Committee of Inspection: see para. 24.

Para. 24, l.2.

~~Should "the debtor" read "the creditor"?~~

Page 10, para. 26

Cross ref. to para.31, re after-acquired property in Germany?

Page 11, para.30

I do not agree with the hypothesis here advanced about the presumption re matrimonial property acquisitions. I do not think that Art. 3 of the U.L. could extend that far.

Page 12, para.32, l.7

Insert reference to S.51(2), B.A.?

Page 13, para.34

I do not understand the quotation from the Bar Council Comments! The main disqualifications attaching to bankruptcy are enacted by the 1883 Bankruptcy Act, still unrepealed (see Williams). Can this proposition be clarified? The other disqualifications "arise from bankruptcy", for they specifically attach to "bankrupts" (e.g. C.A. S.187).

Para. 35

I thought we had contemplated extending the 8 days to 15 days?

Note: I am not aware of any provision protecting purchasers from the bankrupt as such, other than s.s.45 and 46 (dependent on absence of notice) and s.47, B.A. (after acquired property acquired for valuable consideration, even with notice of the bankruptcy, not recoverable, so long as the trustee has not "intervened").

Page 16, para.41

I am not sure that I agree with the last sentence, but I may have misunderstood the point.

Page 17, para.44. unexceptionable

There are already provisions for invalidating executions, incomplete as at various stages, as against the trustee or liquidator: see B.A. s.s.40 and 41 (and proviso introduced by the 1947 C.A. (see Williams), and C.A. s.s.325, 326. para.45. creditors execution costs a preferred debt? ss.40/41?

Page 18, para 46 (top)

"The substance of a debtor's duty"? Should this not read "creditor"? Prescription || limitation? not parallel?

Paras. 47, 48 (page 19)

See Uniform Law

Cross ref. to Uniform Law section on "actio Pauliana""

Page 19, para.50, l.5.

Before "protected" insert "in general", and then add "unless the marriage be itself a fraud upon creditors, present or future" (see Williams, and Kerr on Fraud).

Page 20, para.5[illegible]

After "Social order" insert the French ("ordre social") - it has no real equivalent in English jurisprudence.

Page 21, para.55, Note.

Disclaimer & Jurisdiction Section, para.R

The subject of disclaimer is extremely complex, and differs markedly between bankruptcy and winding up. Since in bankruptcy the property of the bankrupt vests in the trustee personally, he becomes personally liable in respect of onerous property; I think (writing without the relevant authorities) that he must become personally so liable in respect of property anywhere. In winding-up, however, unless the liquidator causes the property to be vested in himself (see para.21), it remains vested in the company, and the necessity - and the incentive - for disclaimer is greatly reduced. In fact, in recent years, I believe, disclaimers in company winding up have become pretty rare; the court in relation to onerous leases used to seek to persuade the

the landlord to accept a surrender. Check with David Graham and the I.-G. there?

If this is to be a universal "vesting" in the trustee or liquidator of all property, including onerous property, situated in the E.E.C., then provision must be made either for requiring the national laws of Member States to permit local disclaimers, or for allowing the trustee or liquidator to disclaim in his own court, i.e. of the State of the bankruptcy. In the latter case, the proceeding would properly fall under Article 17, which must provide for it, and will require the amendment of clause (9).

No disclaimer in Statute laws in Scotland

Page 23, para.60, l.16

"Written" or printed Memorandum?

Page 24, para.61.

Is it indeed the case that other E.E.C. States (except Eire?) do not have hire purchase agreements? They certainly have some system for instalment purchase of consumer durables (called, in Italian, "pagamento a rete"). Does the Finance Houses Association deal with this in their evidence? If not, could you ring them (Mr.Humphrey Oliver, of U.D.T., their chairman, is an old friend of mine) to check? The problem must surely arise frequently, now that cars, caravans, and yachts on U.K. h.p., go abroad continuously. Do the French, for example, levy execution on a caravan on h.p. whose owner has been ordered to pay damages or a fine?

Page 25, para.64

I find the references in the Convention (Art.31), and in the N.L. Report, to "the continuance of the debtor's business" very obscure. If the trustee or liquidator is in possession and vested, why should he not continue (indeed, must he not continue?) to run the debtor's business wherever it is carried on at the date of the bankruptcy, at least for

the purposes of its beneficial winding up? This should be clarified with Brussels.

Para.65, l.5.

Insert order "of ranking".

Para.66.

Public policy should be in inverted commas, I think.

Page 27, para.71.

I favour the majority view re redirection of mail.

Para.72

I think we should insert a parenthesis at the end of line 1 "(assuming that that is an adequate translation of 'sans aucune formalité')". Cross ref. to other passages thereon.

"INTRODUCTORY" SECTION

Page 2, para. 8: The N-L Report. Policy

1. I suggest we should refer to the intimations we have received of the ultimate preparation of a "Revised Report". This would presumably explain or justify the final "Revised Draft" of the Convention now in preparation.

2. Three points arise here: firstly, "The Panel of Experts" of the 9 now preparing these things at Brussels should now include (in fact, I assume it does include) U.K. experts, both from the D. of E., and the Lord Chancellor's Office, and quaere the F.C.O. Is it intended to update the Report, and its citation of authorities, to include appropriate references to the U.K., Eire and Denmark? If not, what reference will be made to their laws as the sources of the final draft?

3. The second point is juridically more far-reaching. It will be recalled that we have sporadically discussed the use as authority for the construction by the courts of the Convention, of "travaux préparatoires", which in other Member States are accepted as a guide to construction, at least in cases of difficulty or obscurity. Normally, I understand, the Report on which the Convention was based would be regarded in those States as a "travail préparatoire". Is it intended by H.M. Government either (a) to amend the U.K. law to introduce the recognition of "travaux préparatoires" as a guide to the construction of E.E.C. Conventions (and quaere also of Directives), or (b) specifically to confirm the exclusion of such material. It will be recalled that there have been recent controversies in the Court of Appeal and in the House of Lords on this point (see a recent speech by Lord Diplock in the H.L.). I do not think it adviseable to leave the matter in doubt.

4. Thirdly, on the assumption under (a) above, that "travaux préparatoires" are to be recognised in the U.K., the question arises as to which "travaux préparatoires" will become so applicable to the final version of the Convention. The N-L Report has now plainly been rendered obsolete in places, either by later amendments to the draft Convention (see e.g. the February 1975 document), or by second or third thoughts by the authors or their colleagues (see e.g. the papers delivered by M. Noel and M.Lemontey at the colloquium in December 1974). If there is, however, to be a "Revised Report", will not that become the definitive "travail préparatoire"? Having regard to the fact that the Commission has circulated summaries of our Consultative Paper to all parties concerned, will the Consultative Paper itself constitute a "travail préparatoire"?

5. I feel strongly that these points should be made at some appropriate place in our Report, possibly in a separate Section; although they are made, I fear, very late in the day, I should like them to be circulated to members of the Committee.

? in Summary

Page 5, para.15, lines 3/4.

Should not "compulsory character" read "statutory character", unless "compulsory" is explained as not referring to "compulsory liquidation"? Or possibly "collective character" would be more appropriate?

Scope

"SCOPE" SECTION

Page 1 "undermining credit" Language in paras 1 & 2
Page 2 "when" 1 & 2
Page 4, para.9 et seq.: "Compositions and analogous proceedings"

Please refer to my draft Report written for the sub-committee on Floating Charges and Receiverships: see also paras. 33 and 34. In my view, protective provisions for these will be required under Article 4(C)(1) of the U.L. and otherwise as indicated therein. The same applies to deeds of arrangement: see paragraph 30, and my memoranda already delivered.

Floating Charges

para 10. implication misconceived re surplus = solvency.
Page 6, para.14

It should, I think, be emphasised that deeds of arrangement and receiverships for debenture holders are not at present within the bankruptcy and winding-up codes of the U.K. ~~at present.~~ To include them under the Convention might seem to involve a fundamental enlargement of the scope of those codes.

except marginally

Page 7, para 15 : Kelbrandon D of T. Receiverships (except of court) are not judgments.
Page 10, para.24

Identical provisions for compositions to those prescribed by S.21, B.A., (after adjudication) are contained in s.16, B.A., (after receiving order). Having regard to the Department's contention that the receiving order should be regarded as "the opening of the bankruptcy", this point should be made clear.

Language re adjudication bankrupt".
para. 25. Time for composition extensible
Page 11, para.26 et seq: Deeds of arrangement.

It should be emphasised that (comparably with the continental systems earlier described), a deed is attended with considerable formality and publicity. It is void (i) if not duly registered within a short period after execution, and (ii) if not assented ~~by~~ to by a majority of creditors in number and value, and those assents must be themselves registered. It is an offence for the trustee not to pay debts which would be preferential in bankruptcy, or to pay

unsecured creditors other than rateably. See my Memoranda. para. 30.

Page 13, para.32

May I perhaps draw attention to my recent paper, "The Rehabilitation of Insolvent Companies", published in the journal "Credit Management" for May, 1975, of which the I-C has a copy, as to more extensive forms of "liabilities adjustment" for insolvent companies which might be introduced.

Paras. 33, 34. Receiverships.

See my comment on page 4, para.9, ante, and my Draft Sub-committee Report. and latest "amendment exercise" not "final". para. 34

Page 14, paras. 35 et seq. Voluntary Winding Up.

I have received an interesting letter dated 12 June, from Dr. Schmidt of the International Law Institute of Cologne, a close student of the Convention and of the C.P. (photocopy attached) regarding Protocol, Art.1(a), and the categories of voluntary winding up. He makes the points made in paras. 37 to 40 about those members' voluntary winding-ups which become creditors' winding up, either by virtue of the directors' failure or inability to make a declaration of solvency, or by virtue of the liquidator subsequently finding that the company is going to be insolvent and not solvent; on the basis of our approach to this problem, some form of court order would be needed to be made in these cases also, in order to obtain "recognition".

Page 16, para.43: Administration orders.

Has not the pecuniary limit for administration orders recently been increased to £1000? See Administration of Justice Acts 1970 et seq. and Halsbury, Vol.3: "Bankruptcy".

Page 17, para.48. "Sociétés ou personnes morales".

Could (and should) reference be made to the differing

translations of these terms into English in several H.M.G. translations, e.g. of the Treaty of Rome, of the Judgments Convention, etc.? I agree that Sandy's Charts should be included with an explanatory note.

page 21, para 58 : for "attainment", read "sophistication"?

Dutch Antilles — of course esp.

"JURISDICTION" SECTION

Para.48, et seq. Comments.

1. General. The whole of this draft will, I think, require reconsideration in the light of the imminent, if not already achieved, fundamental rethinking and redrafting of Articles 10, 11 and 12, and Articles 1 and 2 of the Uniform Law at Brussels. I know that our policy has been not to anticipate the effect of changes in the draft; but this seems to me to be such an important, and contentious, area that we should apply ourselves to the real situation with which our negotiators will be dealing. I would refer again to the E.E.C. paper of February 1975 and the Noel-Lemontey discourses of December 1974. See e.g. your para.53. Do we need to combat dragons which are obsolescent, if not already obsolete?

2. "Exorbitant jurisdiction" (page 3 et seq.)

Having regard to our criticisms of other States "exorbitant jurisdictions", I think that reference must be made (and in the context critically made) to that form of exorbitant jurisdiction exercised by the English bankruptcy court, by virtue of the legal fiction of a debtor being deemed to be continuing to "carry on business", long after he has in fact ceased to do so and has left the U.K., by virtue of his having left debts of his business unpaid: see Theophile v. S-G (1950) A.C. and Re. Bird. I hope incidentally that this fiction will either be eliminated by the projected insolvency Bill, or given precise statutory sanction.

Paras 3 - 11 Check law as stated

3. Para.8 et seq.

With regard to the exorbitant jurisdiction over foreign-based companies, see The Merabello (1973) Ch. 75, to which David Graham drew attention, where jurisdiction to

wind up the company was held to be conferred merely by the presence of assets, or the probability of assets, within the jurisdiction.

4. Para. 11. The lacunae in relation to deceased insolvent debtors must be filled up, not only as to remedies available to the trustee but, more importantly, on the denial of jurisdiction to entertain a creditor's petition until probate or administration has been taken out. This reform is needed as much internally as externally.

5. Para. 21 et seq. Reference should be made, in any discussion of the alterations needing to be made to our national bankruptcy laws, in order to comply with E.E.C. requirements, to the probability that we may need to keep the existing laws in force to deal with non-E.E.C. bankruptcies, whether foreign-based, or having a Commonwealth character.

6. Para. 27. Reference should perhaps be made to English limited partnerships (under the Limited Partnerships Act, 1907) being required to have a "registered office", the location of which prima facie established bankruptcy jurisdiction: see Bankruptcy Rules 282-284. Could Sandy Anton usefully relate a limited partnership "to one or more of the Continental "sociétés en commandite", etc?

7. Para. 31 I was unaware of the proposed Convention referred to; is this a different one from that already concluded (with a Protocol) on the Recognition of Companies? If it is in fact the same, particulars and E.E.C. document numbers should be stated.

8. Para.39. "Freedom of establishment": does this not generally refer to the right to carry on a profession, and is not "freedom of movement" more appropriate?

9. Para.40. Reference should be made to the obscurity, or ambiguity, of the term "seized of the matter", which we discussed, as to what stage in the bankruptcy court's procedure is referred to. See your paragraph 59.

10. Para.42 et seq. I think that greater clarity is needed as to the French law concerning "commerçants". "Civil and not commercial" is not easily intelligible in the context. The French law will seize on "actes de commerce" committed by a person not amenable to their bankruptcy law, in order to bring them within it; e.g. a notary buying and selling land, and (I imagine) a farmer selling his land for building plots. The position of a non-amenable person who guarantees a commercial transaction may also be potentially hazardous in this respect.

11. Should we say something more here about "territorial bankruptcies" under Article 60?

12. Para. 48 et seq. See Comment at my paragraph 1 above.

13. Para. 49. See my paragraph 9 above.

14. Para.51, l.5: For "foreign" law, I suggest "the law other than that of the delinquent director's State".

15. Para.52: "The solvency of the contributories": is it not "the contributories' liability to be made bankrupt", that is intended?

16. Para.56. What is the source of the observations attributed to the French, German and Dutch delegations, and what is its authority?

17. Para.57, line 4. For "extension" is not "attenuation" or "modification" intended?

18. Para. 58. (Insofar as still a runner, in the light of my paragraph 1), In line 9, is it intended to be conveyed

that the "person" subject to Article 1 may not be confined to a natural person, but can extend to legal persons or corporations? I doubt if the text and the Report, can support such a construction.

19. Para. 61, l.3. What sort of "jurisdiction" is to be conferred? Only an exception to the "centre of administration" test, I assume, not a substantive jurisdiction to adjudge him bankrupt under his own State's national bankruptcy law?

20. Para. 69. "The court which is seized": see my paragraph 9 above.

21. Para.72: As to Article 17 and immoveable property, see my comments on "Choice of Law" section, re disclaimers of leases: see also your paragraph 80 re Article 17(9).

See para 55, p.21.

Amended translations of Articles 55 to 82

55 : Action to challenge the bankruptcy

In any Contracting State other than that in which the bankruptcy proceedings have been opened , an action to challenge the judgement opening the bankruptcy may be brought in the cases specified in Article 56.

56 : Cases in which an action to challenge the bankruptcy may be brought

An action to challenge the bankruptcy may be brought only in the following cases:

1 if, as a result of circumstances for which he cannot be held responsible, the debtor did not receive knowledge of the proceedings in sufficient time either to prepare his defence, or to avail himself of any legal remedy against the judgement opening the bankruptcy;

2 if the judgment opening the bankruptcy is contrary to the public policy of the State in which the action to challenge the bankruptcy is brought; provided always that such an action may not be brought on the basis that the judgment was contrary to public policy on any of the following grounds:

(a) that the proceeding in question is unknown in the law of that State, if such proceeding is listed in Article I of the Protocol to this Convention;

(b) that the court which opened the bankruptcy had no jurisdiction;

(c) that the judgment could not have been given in the State where the action to challenge the bankruptcy is brought, by reason of its own law governing the requirements for the opening of a bankruptcy;

(d) that the judgment has been given against a natural person or a grouping of persons under private law, whether or not having legal personality, who or which could not have been declared bankrupt in the State where the action to challenge the bankruptcy has been brought, so long as such person or grouping or persons has not or no longer had his or its centre of administration in that State;

(e) that the judgment has been given on the court's own motion or ex parte.

57 : Courts with jurisdiction to entertain actions to challenge the bankruptcy

An action to challenge the bankruptcy shall be brought in each Contracting State before the court designated in Article X of the Protocol to this Convention.

58 : Parties to such actions and time limits

1 The action to challenge the bankruptcy shall be brought against the liquidator. It may be brought by the public prosecutor, the debtor or any other interested party, with the exception of the person who brought the bankruptcy proceedings.

2 The action may be brought only within a period of three months from the date of the advertisement of the bankruptcy judgment in the Official Journal of the European Communities or, in the absence of such advertisement, from the date when the person bringing the action had knowledge of the judgment. Such an action may on no account be brought after the closure of the bankruptcy.

59 : Effects of an action to challenge the bankruptcy and legal remedies

1 The bringing of an action to challenge the bankruptcy shall not operate to stay enforcement of the judgment opening the bankruptcy.

2 The court seised of such an action may nevertheless decide to stay enforcement in whole or in part until it has decided the action. Courts with jurisdiction to decide matters of urgency shall also have power to stay enforcement in whole or in part if they lay down a time limit within which an application is to be made to the court having substantive jurisdiction to entertain an action challenging the bankruptcy. Judgments ordering such a stay may also order measures to protect the estate.

3 A judgment in an action to challenge the bankruptcy shall in the State in which it is given, take effect against all persons and shall be advertised in that State, in the same manner as a bankruptcy judgment. The same legal remedies shall be available against it.

4 A judgment which has been successfully challenged shall cease to be recognised or to have effect in the State where the action to challenge the bankruptcy has been brought. The same shall apply accordingly to judgments given in any of the proceedings set out in Article 17, as well as to any other judgments given in the course of the bankruptcy proceedings. Acts performed prior thereto by the liquidator shall not however on that ground cease to be valid.

60 : Possibility of territorial bankruptcy in the case of a successful challenge.

Where the judgment opening the bankruptcy in one Contracting State has been successfully challenged in an action brought in another Contracting State, a bankruptcy may be opened in that first State. A bankruptcy so opened shall have no effect in the other Contracting States.

SECTION IV - ENFORCEMENT OF JUDGMENTS IN BANKRUPTCY MATTERS

61 : Orders for enforcement

1 Judgments in bankruptcy matters given in one Contracting State, and in particular those given in the proceedings set out in Article 17, may be enforced in another Contracting State pursuant to a writ of execution granted there, upon an application to the court or authority designated in Article XI of the Protocol to this Convention.

2 This shall also apply to instruments for the purpose of levying execution delivered to creditors in accordance with the law of the State in which the bankruptcy has been opened.

3 Paragraph 1 shall not apply to judgments concerning the freedom of the individual.

62 : Grant of orders for enforcement

1 The sole requirements for the issue of an order for enforcement shall be the production of:

(a) an official copy of the judgment or of the executory instrument for the purpose of levying execution satisfying the requirements necessary to establish its authenticity, accompanied by a translation thereof, certified by a person authorised to do so, in the language of the court or authority to which application for the order for enforcement is made;

(b) any document which establishes that the judgment is enforceable according to the law of the State in which it was given.

2 The competent authority shall do no more than satisfy itself that the formal requirements of the documents referred to in paragraph 1 have been complied with. The issue of the order for enforcement shall not be subject to the levy of any tax, duty or fee.

3 No legal remedy shall be available against the granting of an order for enforcement, except as provided in Article 63.

4 The judgment, together with the order for its enforcement, shall before enforcement be served upon the party against whom the enforcement is sought. The judgment must be accompanied by its translation.

63 : Challenging enforcement

1 The party against whom the enforcement is sought may, in the cases listed in Article 56 and to the extent that these may be applicable, appeal against the judgment or challenge the instrument in respect of which an order for enforcement has been issued.

2 Proceedings under Paragraph 1 shall be commenced within 14 days from the date of personal service, or, where personal service has not been effected, 28 days from the date of the first measure of enforcement. If that party has his habitual residence in a State other than that in which the order for enforcement has been issued, the time shall be 28 days either from the date of service, or, where personal service has not been effected, from the date of the first measure of enforcement. This period cannot be extended on account of distance.

3 The proceedings shall be against the party seeking enforcement.

64 : Competent jurisdiction in challenging enforcement

1 An appeal under Article 63 shall in each Contracting State be lodged with the court designated in Article XII of the Protocol to this Convention.

2 The jurisdiction of local courts shall be determined by the place of the habitual residence of the party against whom the enforcement is sought. If he has not his habitual residence in the State in which the enforcement is sought, the court for the place where the order for enforcement has been granted shall have jurisdiction.

65 : Effects of challenging enforcement

If the appeal is allowed, the judgment shall cease to be recognised or to have effect in the State where the appeal was lodged.

66 : Further appeal

The judgment given on the appeal under Article 63 may be further contested only by an appeal in cassation or, in the Federal Republic of Germany, by a Rechtsbeschwerde.

67 : Safeguarding measures

1 During the time for appealing in accordance with Article 63, and until any such appeal has been determined, the only measures that may be taken are those to safeguard the assets of the party against whom the enforcement is sought.

2 The grant of the order for enforcement shall carry with it the power to proceed to any such measures.

SECTION V - COMMON PROVISIONS

68 : Dispensing with security

No security or deposit, however described, may be required from a party bringing an action under Article 55 or lodging an appeal under Article 63, either on the ground that he is a foreign national, or on the ground that he is not residing in the territory of the State in which the enforcement is sought.

69 : Dispensing with legalisation

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 62(1), nor in respect of those produced for the purposes of an action under Article 55 or an appeal under Article 63.

TITLE VI

TRANSITIONAL PROVISIONS

70 : Time for Commencement

The provisions of this Convention shall apply only to proceedings opened after its entry into force.

TITLE VII

RELATIONSHIP TO OTHER CONVENTIONS

71 : Substitution for existing Conventions between the Contracting States

This convention shall, in respect of the matters to which it applies, supersede as between the States which are party to it the following Conventions concluded between two or more of those States:

(i) The Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Probative Instruments, signed in Paris on 8 July 1899;

(ii) The Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Probative Instruments, signed in Brussels on 28 March 1925;

(iii) The Convention between France and Italy on the Enforcement

of Judgments in Civil and Commercial Matters, signed in Rome on 3 June 1930;

(iv) The Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed in The Hague on 30 August 1962;

and, in so far as it is in force

(v) The Treaty between Belgium, the Netherlands and Luxembourg on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Probative Instruments, signed in Brussels on 24 November 1961.

72 : Continuance in force of existing Conventions between the Contracting States

The Treaty and Conventions referred to in Article 71 shall continue to have effect in respect of matters to which this Convention applies, so far as concerns proceedings opened before its entry into force.

73 : Conventions concluded with non-Member States

This Convention shall not apply in a Contracting State to the extent that it is irreconcilable with the obligations resulting from another convention concluded by that State with a non-Member State before the entry into force of this Convention.

TITLE VIII

FINAL PROVISIONS

74 : Territorial application

1 This Convention shall apply to the European territories of the Contracting States, to the French overseas departments and to the French overseas territories.

2 The Kingdom of the Netherlands may declare at the time of signing or ratifying this Convention or at any later time, by notifying the Secretary-General of the Council of the European Communities, that this Convention shall be applicable to Surinam and the Netherlands Antilles. In the absence of such declaration with respect to the Netherlands Antilles, proceedings taking place in the European territory of the Kingdom as a result of an appeal in cassation from the judgment of a court in the Netherlands Antilles shall be deemed to be proceedings taking place in the latter court.

75 : Ratification and entry into force

1 This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

2 This Convention shall enter into force on the first day of the sixth month following the deposit of the instrument of ratification by the last signatory State to take this step.

76 : Incorporation of the uniform law into national legislation

1 Each Contracting State shall, not later than the date on which this Convention enters into force, incorporate into its own legislation relating to the forms of bankruptcy proceeding listed in Article I(a) of the Protocol to this Convention provisions in conformity with the uniform law laid down in Annex I, and also if need be provisions in conformity with Article 39(1).

2 Those Contracting States whose laws do not include the presumption referred to in Article 34(1) shall not be required to incorporate therein the provisions of Article 3 of Annex I.

3 Paragraph 1 shall also apply to the proceedings listed in Article XIII of the Protocol, as stated in that Article.

4 The provisions of the uniform laws prescribed by Article 39(1) and by Articles 3 to 6 of Annex I shall apply to the proceedings listed in Article I(b) of the Protocol to the extent that these provisions are capable of applying thereto.

5 At the time of signing or ratifying this Convention, the Contracting States named in Annex II may, by a declaration addressed to the Secretary General of the Council of the European Communities, make the reservations therein provided for. Such reservations may be withdrawn at any time.

77 : Accession to the Convention

1 The Contracting States recognise that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations necessary to ensure the implementation of the last subparagraph of Article 220 of the Treaty establishing the European Economic Community in the relations between the Contracting States and the State.

2 The necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member State of the other part.

78 : Notification by the Council of the European Communities

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the date of the entry into force of this Convention;

(c) any declaration received pursuant to Article 74(2);

(d) any declaration received pursuant to Article 76(5), or pursuant to Article VII(2) of the Protocol to this Convention;

(e) any communication made pursuant to Article XIV or XV of the Protocol to this Convention.

79 : Protocol to the Convention

The Protocol annexed to this Convention by mutual agreement of the Contracting States shall form an integral part thereof.

80 : Duration of the Convention

This Convention is concluded for an unlimited period.

81 : Revision of the Convention

Any Contracting State may request the revision of this Convention. In this event, a revision conference shall be convened by the President of the Council of the European Communities.

82 : Deposit of the Convention

This Convention, drawn up in a single original in the Dutch, French, German and Italian languages, all four texts being equally authentic, shall be deposited in the archieves of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.

IN WITNESS WHEREOFF, the undersigned Plenipotentiaries have signed this Convention.

DONE at Brussels this