EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the Twenty-second Meeting, held at Gavrelle House on 8 July 1975.

Present:	K R Cork (Chairman) A E Anton P H Armour P G H Avis C L Dodd M V S Hunter T H Traylor (Secretary)
In attendance:	D Graham C J Jenkins G A Weiss

REPORT OF THE TWENTY-FIRST MEETING AND MATTERS ARISING

1. The report of the meeting was accepted.

2. Mr Avis said that the sub-committee on receiverships and floating charges hoped to meet shortly.

24th July at 11 Agenda aide memoire

SECRETARY'S REPORT

1. The Secretary said that a memorandum of comments had been received from the Committee of the Scottish Clearing Bankers; copies were issued to members.

2. The Secretary reported on the state of the Final Report as follows: preliminary drafts on "Scope", "Recognition and Enforcement of Judgments" and "Choice of Law" had been prepared and issued and the comments of members were awaited. "Jurisdiction" had been re-drafted in the light of comments received to date and the re-draft had been sent to members. The Introduction to the Final Report was now being prepared, and he hoped to start on the section dealing with Uniform Law shortly. This would be followed by "Preferences" and "General Principles". The Secretary suggested that some thought should be given to the time required for the co-ordination of the Final Report and its agreement by the Committee.

3. The Chairman said that the Committee should complete its consideration of the draft Convention including "General Principles" in two more meetings (21 July and 12 August). There would then remain only the agreement of the Final Report. Mr Muir Hunter said that he might be able to attend the meeting on 12 August. Mr Anton said that agreement of the final text would probably require about a day on each subject if all controversial points were to be adequately discussed and a worthwhile Final Report produced. These discussions could only take place after members had given the Secretary their individual views on each section of the preliminary draft so that he was in a position to put points of dispute before the Committee. In his view the October date was unrealistic.

4. Mr Muir Hunter drew attention to the document dated February 1975 from Brussels which gave proposed amendments to the draft Convention. It seemed that many of the points to which we objected were already being amended. The Chairman said that this did not alter the requirement for the Committee to report in accordance with its terms of reference. If in the meantime the Brussels Panel had moved closer to our way of thinking this would assist our negotiators, but we should still set out our views in our Report. Mr Anton agreed but suggested that we could compromise; where long and detailed argument might be necessary to put over a particular point, this could be omitted if we knew that the amendment we were proposing had already been agreed to. He added that the Secretary was already putting this into effect in the preliminary drafts of the Final Report. It was agreed to leave this to the Secretary's discretion.

5. Returning to the question of discussion of the Final Report, the Chairman said that the matter should be left open for the time being. He wanted to be certain that points proposed for discussion were of sufficient importance to warrant additional time being spent on them, or to justify altering the Final Report. He thought the Committee should complete its re-appraisal of the Convention, concentrating on the principles involved, and then review the time required for agreement of the Final Report.

UNIFORM LAW ARTICLE 4 C(1)

6. The Secretary recalled that the Committee's preliminary view was that the clause was generally acceptable, third party protection being covered by the court having discretion; however in the Consultative Paper we had contrasted it with the protection afforded by section 46 of the Bankruptcy Act, 1914. Comments received from consultees after the preparation of Memorandum No 7 were as follows: the Certified Accountants thought the clause was reasonable as it was clearly intended to apply only where (a) cessation of payments was known and (b) where the transaction was prejudicial to the general body of creditors; the Scottish Chartered Accountants thought the clause was similar to the present position in Scotland and they saw no reason for the reference to "cessation of payments"; the Law Society of Scotland thought the practical application might be difficult.

intended to apply

7. Mr Muir Hunter pointed out that the clause gave a wide discretion to the court but prescribed no guidelines; this should be contrasted with the position in England where the definition was much more precise. He noted that the Brussels Panel had agreed that redrafting of the clause was necessary. Mr Anton agreed that there was a danger of the present draft being interpreted differently by different courts. He also drew attention to the word "other" which implied other than payments or acts already dealt with under U.L.4 A and U.L. 4 B; this meant that the transaction did not have to be a fraudulent preference, but simply prejudicial to the creditors.

8. The Secretary drew attention to page 95 of the Noel Lemontey Report which set out the three conditions to be met for an act to be declared void, and that the onus of proof was on the liquidator. Mr Anton suggested that a transaction might be perfectly good at the time but in the event turn out to be gravely prejudicial to creditors. The Committee thought this was covered by giving the court discretion. During further discussion the possibility of an intention to prejudice creditors was considered but rejected. Mr Muir Hunter said that the first limb of the clause seemed acceptable but he thought some protection was required for genuine transactions in the second limb and he undertook to prepare an alternative draft clause. It was agreed that this should be discussed at the next meeting.

9. Mr Muir Hunter's redraft of clause C(1) is as follows:-

"All other payments made by the debtor in respect of debts which have become due by the date of the opening of the bankruptcy, and all other acts done or deemed to be done for valuable consideration by the debtor where such payments are made or such acts are done after the date of cessation of payments and less than one year before the bankruptcy may be declared void as against the general body of creditors, if they have unreasonably prejudiced the interests of the general body of creditors and if the persons who have received the payments from the debtor or were parties to the transactions with him knew of the cessation of payments and of the likelihood that these payments or these transactions would prejudice the interests of the general body of creditors."

UNIFORM LAW ARTICLE 4 C(2)

10. Mr Anton said that this clause raised points of principle; the Law Society of Scotland had commented that they saw no logic or equity in the idea that a claim should be competent against a third party payee of a bill. The third party would be a creditor of the drawer who had chosen to settle his indebtedness by utilising his claim against his debtor. It seemed logical that the drawer should be liable to account to the trustee, if he had knowledge of the suspension of payments.

11. Mr Avis noted that the Scottish Clearing Bankers had not commented on this clause. Speaking as a banker, the provisions of this clause seemed too good to be true and he was concerned that the protection given to banks may not have been intended; he would like reassurance that it was intended. The Chairman did not think that a bank should be protected after a cessation of payments of which it had knowledge. Mr Dodd agreed and Mr Anton suggested it was necessary to limit the protection to banks. The Secretary drew attention to page 96 of the N-L Report which indicated that the object of this clause was to catch a person who had derived profit from putting a bill into circulation after the cessation of payments, and with knowledge of the state of affairs of the person against whom it was drawn. Any protection thus afforded to a bank appeared to be incidental and Mr Avis's fears might be justified.

12. Mr Anton proposed that in its Final Report the Committee should say that it "accepts that it is desirable to afford special protection to banks to enable debtors or debtor companies to continue to operate banking accounts after the date of cessation of payments. They are concerned, however, that Article 4C (2) as drafted may protect persons other than bankers. In its Consultative Paper the Committee pointed out that this Article raises technical questions on which the advice of bankers and others was sought. Little comment however, was received and the Committee consider that the Department should seek further and specific advice as to the impact of this provision".

Bankers deputation

UNIFORM LAW ARTICLE 4D

13. The Secretary recalled that the Committee's preliminary view was that the principles of this clause could be accepted, but the period should be 21 days and not 15 days. The Law Society of Scotland had commented that the clause was an improvement on present Scots Law but they also wanted 21 days as did the Scottish Chartered Accountants. Neither of these bodies could see any reason for including the date of cessation of payments in the clause.

14. Mr Muir Hunter referred to the existing requirements under our Companies Acts and said that no such comparable position existed in bankruptcy; acceptance of this clause would require its introduction into U.K. bankruptcy law. The Committee also noted that this clause would replace such as s.95 C.A. 1948 in its present form which makes such security interests invalid against the liquidator no matter when they were entered into, if they were not registered.

15. It was decided to recommend that the period of grace for registration should be 21 days, that the period of relation-back should be unlimited and that there should be no discretion of voidability in the event of a failure to register a security. That is, that all charges should be void as against the general body of creditors if application for registration was not made within 21 days.

application to register at a time (5.10.)

UNIFORM LAW 4 E

16. The Secretary said that the Committee were undecided about this clause when it was looked at previously. He thought its intention was that where a bankruptcy superseded one of the analogous proceedings listed in Article 1(b) of the Protocol, the periods of time quoted in clauses A, B, C and D of Article 4 would date back from the commencement of the analogous proceeding. The Committee found this principle acceptable, but agreed with Mr Anton that the clause could be more clearly phrased.

UNIFORM LAW ARTICLE 4 F

17. Mr Muir Hunter noted that Denmark proposed to join Holland in reserving the right to introduce into its own legislation provisions whereby creditors could act under this clause. Mr Anton said that although we might accept this clause, it was necessary to appreciate - as explained in the N-L Report - that it was drafted against a background of law which we do not have, particularly in England. It was the duty of the Committee to recommend that the second sentence of the clause should be more explicit and that there might be a requirement to introduce into our legislations analogues to Article 1167 of the French Civil Code (Paulian action). In reply to the Chairman he agreed that the requirement was a provision to strike down acts where there was an intention to prefer, which took place earlier than the periods specified in the uniform law.

Paulian action

18. Mr Muir Hunter suggested that it would be unthinkable to introduce Paulian actions into our law by this means. We had section 172 of the Law of Property Act 1925, but it was only exercisable by a liquidator following the commencement of a liquidation.

19. The Chairman proposed that the Final Report should contain a note at the end of its discussion on Article 4 to the effect that the Article should not restrict the rights of a liquidator to take proceedings authorised under the law of the State of the Bankruptcy. Mr Jenkins suggested that an alternative note might be that Article 4F should not restrict the rights reserved to the liquidator under Article 28 of the Convention. The Chairman agreed.

20. Mr Anton suggested that clause F could with advantage be amended to ".....the liquidator alone, unless with the leave of the court ..." The Committee agreed. Mr Anton continued that the Committee must point out that, for example, U.L. 4 E will delete s.42 B.A. 1914 and indeed, that clauses A to E were intended to supplant existing laws of Member States; therefore the existing laws in England and Scotland would need a careful review. This was accepted.

ARTICLE 5

Cross set off.

21. Mr Graham asked if it should be made plain that claims to be set off arose primarily out of contract. Tort claims were not set off under English insolvency law. He wondered if tort claims were intended to come within this article or not. Mr Dodd said that the possible recognition of foreign tort claims was an important matter which the Committee should bring to the attention of the Minister. Mr Muir Hunter said the introduction of tort claims would introduce a major change in English

Responsibilities enhance dette.

because it refers to Scots

bankruptcy procedure; in his view set-off of tort claims was not included in the Convention and 5(1) was in line with English law. It would be wrong to introduce tort claims into this article and not into the Bankruptcy Acts as a whole. The Committee agreed that clause 1 was acceptable in its present form, as was clause 2.

22. It was noted that Germany had reserved the right to recognise set-off in respect of contingent debts. Mr Avis said clause 3 could produce problems for banks in respect of performance bonds. Mr Armour said that the set-off of contingent debts was allowable under Scots law; in his experience they were difficult to administer, often involved appeals to the court and he would welcome the provisions of clause 3. Mr Anton, Mr Dodd and Mr Muir Hunter supported Mr Armour; Mr Avis and Mr Jenkins were against clause 3. Mr Weiss said he would like to see the set off of contingent debts stopped but he did not think there were good enough grounds. Mr Anton proposed that both arguments should be expressed in the Final Report and that the Committee should say that on balance, it favoured acceptance of clause 3.

23. With regard to clause 4, the Committee were of the opinion that the provisions appeared to be intended to be mandatory. The Committee thought the provisions should not be mandatory and that the clause should be amended to make this clear.

UNIFORM LAW ARTICLE 6

24. Mr Anton said that this article seemed to import into the Convention not the rule relating to the passing of property in the Sale of Goods Act, but the old rule of Scots law and of most Continental countries, that property does not pass until the act of handing over of the article. The concept of delivery in Continental systems meant the passing of the property in the goods, whereas under the Sale of Goods Act, the property passed when the parties intended it to pass.

25. The Chairman said it would be most unjust if a liquidator could demand the return of goods in a situation where the date for payment had not fallen due and the purchaser was willing to pay. This article prevented that possibility. The Committee agreed that the article was acceptable and that its provision should be a uniform law.

FISCAL AND QUASI-FISCAL DEBTS (ARTICLE 42)

26. The Secretary said that the problems previously noted by the Committee were the question of "self-help" by the fiscal authorities of certain States, and whether the provisions of Article 42 were acceptable.

27. Mr Muir Hunter drew attention to his memorandum on the subject and said that by "self-help" one meant the right to proceed against assets notwithstanding the opening of bankruptcy proceedings: measures which were no longer available in this Country. The Chairman said that seemingly, this would be impossible to change. The Committee agreed with the views of the College of Justice that direct rights of recovery by a State were not consistent with the basic philosophy of the Convention, but that the question was probably academic, particularly if the Revenue had a prior ranking to other preferential claims in its own State.

28. Referring to 42(1), Mr Anton said it was totally contrary to principle, that a State should be able to extend its fiscal preferences in other States. Fiscal preferences were sufficiently objectionable already and it was quite wrong that the Convention should allow such an extension, albeit as an unsecured creditor. Mr Anton proposed that the Committee should come down firmly against this provision. The Committee fully supported his views.

29. The Chairman said he was not so certain that the same view should be taken of 42(2), but Mr Dodd suggested that Social Security matters were a form of fiscal liability. Mr Anton said that it principally related to redundancy payments and the like which enjoyed preferential rights in certain States. There was an assimilation of Social Security with income tax; it was difficult to differentiate between the two, and there would probably be a movement in all EEC States towards a unified impost which included Social Security. Therefore the Committee should not agree to 42(2). This proposal was approved.

CIVIL AND COMMERCIAL GENERAL PREFERENCES

30. Mr Graham noted that the Bar Council disliked the phrase "civil and commercial matters". They assumed that it referred to debts other than debts in respect of fiscal and social security matters, and they urged that both classes of debts should be clearly defined in the Convention. Mr Anton said that the Kilbrandon Report on the Judgments Convention dealt with the phrase in some detail and gave a definition. "Civil and commercial matters" excluded revenue and customs matters, and administrative matters such as those involving relations between private individuals on the one hand and the State or a public entity on the other. To this extent, the scope of Article 42 was wider than fiscal and social security debts, but Mr Anton suggested that the Committee's decisions about its provisions still held good. The Committee agreed.

31. The Secretary recalled that in regard to Article 40, the Committee's preliminary view had been that it was wrong in principle for preferential creditors to enjoy the most favourable rights conferred by the laws of the States in which assets were situated. (See recommendation (a)(i) in Memorandum No 9). The Committee were unanimous in maintaining this view.

32. The Chairman said that before putting forward the alternative scheme it was necessary to consider any problems to which it might give rise. Mr Anton quoted the "Cork" method from the first draft of the Consultative Paper, viz:-

> "(1) A preferential creditor should be entitled to the preference allowed to him by the law of his own State, out of the assets available to him in that State as a member of that class of preferential creditors (ie that class may rank against such assets lower than other classes, such as fiscal debts);

(2) If (a) those assets are insufficient to satisfy his claim, or (b) the pecuniary limit on his claim as such preferential creditor in his own State is lower than the limit prescribed by the lawsof the State of the bankruptcy, then he may claim preferentially in the bankruptcy for any shortfall under (a) to the extent that his total recoveries will not exceed the maximum sum recoverable in the bankruptcy, or under (b) up to an amount equal to the limit imposed by the lawsof the State of the bankruptcy."

33. Mr Anton suggested that the scheme presupposed that all preferences ranked equally as they did in the U.K. but this was not the case. In his view there was no longer justification for any preferences against the background of modern social security arrangements. The Chairman agreed but said the present trend was to increase the preferential rights for wages and salaries and this was what the Convention had to deal with. Taking it step by step, the proposed scheme would work if the preferential rights for wages and salaries were the same in all States. Taking it a stage further, if the assets in one State were insufficient to pay the preferential debts, then the balance could be paid out of the main pool of realisations, but only to the extent allowed by the law of the State of the bankruptcy.

34. Mr Muir Hunter said the scheme had the merit of being in accord with public policy, in that you looked to the rules of the country in which you worked. There was no public policy which said you could look to the rules in other States. Mr Anton said he differed on this point and thought that the law applicable to the contract of employment should apply. He preferred the proposed scheme to that in the Convention but felt that it contained an incentive to States to increase their preferences. He suggested that a person should only have a preferential claim against assets in 'own' State and an unsecured claim in the bankruptcy for any balance. He agreed that this was against present practice, but any other method would be an incentive to proliferate preferences and the aim should be to reduce them. He agreed that such a scheme would not be accepted but considered the view should be expressed in the Final Report.

35. Mr Muir Hunter saw it as an advantage of the "Cork" scheme that it obviated the requirement for determining what was the proper law of the contract of employment. The Committee agreed that the term "Own State" meant the State where a person was employed. Mr Graham suggested that a disadvantage of the scheme was that it was detrimental to unsecured creditors. The Chairman replied that the scheme in the Convention was even more detrimental. He agreed that there were difficulties where preferences were of different rankings but this wouldbe so of any scheme.

36. The wording of the "Cork" scheme was discussed and it was agreed to amend it to read as follows:-

"(1) A preferential creditor should be entitled to the preference allowed to him by the law of his own State, out of the assets available to him in that State.

(2) If (a) those assets are insufficient to satisfy his claim he may claim preferentially in the bankruptcy for any shortfall to the extent that his total recoveries will not exceed the maximum sum recoverable under the laws of the State of the bankruptcy; or (b) the pecuniary limit on his claim as such preferential creditor in his own State is lower than the limit prescribed by the laws of the State of the bankruptcy, he may claim in addition such further sum as would be allowable to him under the laws of the State of the bankruptcy."

37. The Committee considered the rights of subrogated creditors. The general view was that such rights should be recognised by all Member States and should be specifically referred to in the Convention. However, Mr Anton said he could not accept this recommendation and added that his view was supported by the Blagden Report (paragraph 96) who found the scheme in company liquidation far from satisfactory and open to abuse. He agreed with the views of the Blagden Committee.

38. Mr Avis recalled that the British Bankers Association were not unduly worried at the prospect of loss of subrogatory rights. However, the Scottish Clearing Bankers had made a strong representation for the retention of such rights.

DATES OF FUTURE MEETINGS

39. The next meeting was fixed for Monday 21 July and the following meeting for Tuesday 12 August.

T H Traylor
Secretary

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EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the Twenty-third Meeting, held at Gavrelle House on 21 July 1975

Present: M V S Hunter (Chairman)
A E Anton
P G H Avis
C L Dodd
G A Weiss (for K R Cork)
T H Traylor (Secretary)

In attendance: D Graham

REPORT OF THE TWENTY-SECOND MEETING AND MATTERS ARISING

1. Paragraph 2: the Chairman said arrangements had been made for the sub-committee on Receiverships to meet on Thursday, 24 July.

2. Paragraph 38: Mr Avis emphasised that the view of the British Bankers Association was that a loss of subrogatory rights would be to the disadvantage of client companies rather than of the banks. The Chairman observed that the concept of subrogation on wages was apparently acceptable to Belgium and Germany. It was regarded as public policy in the U.K. because without it, banks would not be inclined to advance money for payment of wages. Mr Avis agreed that workers would also suffer, because a company which was unable to pay wages could not operate.

3. Paragraph 12: the Chairman enquired whether the banks were likely to make any further comments on Article 4C(2) of the Uniform Law and Mr Avis replied that he understood they had nothing further to say, subject to getting an agreed definition of cessation of payments.

4. Paragraph 21: the Chairman asked Mr Graham if he thought his statement'that claims to be set-off arose primarily out of contract" was not rather narrow. Mr Graham replied that he had wondered whether tort claims were included in the Convention; he noted that Germany was concerned that unsubstantial claims should not be subject to set-off; he now wondered if claims arising from quasi-contracts, or arising on a statutory basis - such as Crown debts in different departments - could be subject to set-off under Article 5 of the Uniform Law. The Chairman wondered if there was a translation problem between the texts and Mr Graham thought it might turn on the definition of "Civil and commercial matters." Mr Anton recalled that these matters had been discussed previously and the difficulties of Article 5 had been referred to in the Consultative Paper in order to obtain consultees' views. He thought there might be differences as between England and Scotland and that Article 5 was deficient in not dealing with special aspects. In his view it was not possible to make special rules for set-off without having regard to the main body of the law. The Chairman suggested that the point should be put back for discussion later, or if that was not possible, the existence of the problem should be referred to in the Final Report.

5. Paragraph 34: the Chairman enquired of Mr Anton as to the point on which he differed. Mr Anton said he was satisfied that the reference to the law applicable to the contract of employed was an adequate summary of his comments at the last meeting.

6. No other point being raised, the report of the last meeting was accepted.

SECRETARY'S REPORT

7. The Secretary said that a further memorandum of comments had been received from the Law Society; this dealt with Choice of Law and in addition the Society had drawn attention to Article 52 of the proposed new Insolvency Code of the States of Jersey, regarding the powers and functions of a liquidator; copies of the memorandum and of Article 52 were issued to Members.

8. The Secretary drew attention to the assumption by the Law Society that the law of the State of the bankruptcy included its rules of Private International Law. Mr Graham said this view was also expressed by M. Noel in his lecture to the Brussels symposium last December. Mr Anton said that this did not agree with the scheme of the Convention or with the N-L Report, though the latter was confusing about the matter. The Secretary said the point had been brought out in the draft of the Final Report.

9. The Chairman enquired if a new N-L Report was to be expected. The Secretary said he thought the intention was to revise the N-L Report later, possibly with the final draft of the Convention. The Chairman observed that the N-L Report was replete with the jurisprudence of the original six Member States and he hoped that this would be supplemented to embrace the three new Member States.

10. Concluding his Report, the Secretary said the drafts of two more sections of the Final Report had been issued in the last ten days - the Introduction and the Final Observations.

PROPOSED RE-DRAFT OF U. L. 4C(1)

10. The Chairman noted that his re-draft was in paragraph 9 of the report of the last meeting. He said that "deemed to be done for valuable consideration" was a kind of shorthand for the unsatisfactory expression in the French text, which did not in general mean a transfer for valuable consideration in our sense. The seven indicia of the transaction were:

1. It must be after the date of cessation of payments.

2. It must be less than one year before the bankruptcy.

3. The hypothesis that it can be shown to have had certain effects.

4. It must have unreasonably prejudiced the interests of the creditors.

5. Knowledge by the recipients; firstly, of the cessation of payments.

6. Knowledge by the recipients of the likelihood that payment would be prejudicial to the general body of creditors.

7. The extent to which the transaction can be set aside in the circumstances.

11. Mr Dodd was concerned about the meaning of the words "knew of": did it mean "knew as a fact" or "ought to have known"? The Chairman suggested that this was another problem of translation. He thought the French text meant "knew" in any way, as distinct from constructive notice such as in Section 137, B.A. 1914. Mr Anton said the French text meant, literally, that the recipient had knowledge of the cessation of payments. This sort of phrase required proof of the mental state of the person and we normally used the expression "when he knew, or ought reasonably to have known". Then knowledge meant appropriate circumstance to be imputed by the court. Mr Anton added that in his view "ought to" should come in both French and English texts.

12. The Chairman observed that the Convention did recognise the difference because at Article 26(2) the phrase proposed by Mr Anton was used. In his view an English judge would construe Article 4C(1) strictly as meaning that the recipient was proved actually to have known of the circumstances. Mr Graham observed that different expressions were used in Articles4C(1), 4C(2) and 5(4) for what was apparently the same idea. He suggested that they should all contain the same phrase if they were intended to have the same meaning. He also supported Mr Dodd because there was a difference in English law between "having knowledge of" and "having notice of"; the latter was more formal. He suggested that the recipient might close his eyes to knowledge imputed to him. He thought the draft was unnecessarily severe on a liquidator in requiring him not only to show that the recipient had knowledge of the cessation of payments, but also of the likelihood that the effect of the transaction would be prejudicial to the general body of creditors; he thought this latter fact could be inferred provided it was shown that the effect was prejudicial to creditors.

13. Mr Weiss agreed that the onus being put upon a liquidator was conside able. This was different from our practice which was to take pressure for payment as fair evidence of knowledge. The Secretary drew attention to page 95 of the N-L Report which set out three conditions to be met for a transaction to be void under the present provisions of Article 4C.

14. The Chairman justified his draft by referring to the discussion of the International Bar Association in Brussels when great anxiety was felt about the invalidation of a transaction which was perfectly all right on the face of it, because the recipient had been told something which might cause it to be invalidated. His re-draft crystallised their resolutions which, in relation to Article 4C(1), required that the condition of cessation of payments must comprise sufficiently recognisable events in the mind of a businessman, knowledge of which can fairly be attributed to persons whose transactions with the bankrupt may be invalidated by such knowledge; also greater precision was required. Mr Graham said that in his view if a payment was made after the cessation of payments and the liquidator could satisfy the court that it prejudiced creditors then the fact that the recipient had knowledge of such a likelihood should be inferred. The Chairman commented that all payments could be regarded as prejudicial to the unpaid creditors.

15. After further discussion it was decided that the problems surrounding the present provisions of Article 4C(1) should be pointed out in the Final Report but it should not include a proposed re-draft of the clause. Mr Anton said it would be essential to spell out exactly what we meant by "notice" as it would be necessary to amend the French text as well as our own. The Chairman agreed saying our view should be that the notice should be comparable to that expressed in Article 22. Mr Graham undertook to look at the wording in connection with notour bankruptcy to see if it was of assistance.

CIVIL AND COMMERCIAL GENERAL PREFERENCES

16. Mr Avis said he had prepared a re-draft of the principles of the "Cork" system which the Committee might like to consider, viz:-

> "(1) A preferential creditor should be entitled to the preference allowed to him by the law of his own State, out of the assets available to him in that State.
>
> (2) If those assets are insufficient to satisfy his claim, or the pecuniary limit on his claim as such preferential creditor in his own State is lower than the limit prescribed by the laws of the State of the bankruptcy, he may claim in addition such further sums as he would be able to claim under the law of the State of the bankruptcy."

17. The Secretary suggested that it was necessary to distinguish between the State of the bankruptcy's sub unit of realisations, upon which its own preferential creditors would have first call, and the residue of the assets, which would be available for topping up in accordance with clause two. It would also be necessary to amend the last sentence of Article 41(1) which said that realisations in non-Contracting States should be aggregated with those of the State of the bankruptcy; instead they should form a part of the "residue". These points were agreed to.

18. The discussion became general on the problem of dealing with preferences and Mr Anton suggested it might help to set out a table of options:-

(1) Allow all preferential creditors to claim preferentially for the balance of their claims, to the extent and ranking allowed by the laws of their own States.

(2) Allow the balance of a preferential claim but only to the extent allowed by the law of the State of the bankruptcy ('Cork' system).

(3) Only allow a preferential creditor to claim as an ordinary unsecured creditor in the main pool for any unsatisfied portion of his claim.

(4) Lay down a uniform law of preferences for dealing with the main pool (i.e. residue).

19. Mr Anton said in his view option three was the correct one as it was the most equitable and was the least detrimental to unsecured creditors. It also emphasised that preferences were strictly territorial. He accepted that the second option would receive most support from the Committee.

20. Returning to Mr Avis's draft, Mr Dodd suggested that the following words should be added to the last sentence of clause 2:"with such preferences as may be accorded to him by that law but otherwise as an ordinary unsecured creditor."

21. Mr Graham suggested that it might have to be made clear that this did not refer to fiscal claims and the like, but the Committee decided that this was covered by its objections to the provisions of Article 42(1).

22. The Committee decided that it could not support the suggestion by the U.K. Insurance Brokers European Committee that unpaid insurance premiums should rank preferentially.

23. Referring to the proposal by the Chartered Accountants of England and Wales that a liquidator should be able to call for the notification of claims within a specified period, and disregard any subsequent claims, the Chairman said that all liquidation systems had a terminal date for the submission of claims but this was rarely absolute. In his view the matter need not be pursued.

24. The Committee noted the Bar Council's dislike of the term "Civil and Commercial". Mr Anton said the term was crucial to Article 220 of the Treaty of Rome and to the Judgments Convention. He suggested that the Secretary should write to the Secretary of the Kilbrandon Committee for a copy of the agreed definition of the term which could then be put in the Final Report.

25. The Committee discussed the provisions of Article 41(2) and decided that they would be unnecessary provided the Cork system was adopted but otherwise, they were logical and acceptable.

SECURED RIGHTS AND POSSESSORY LIENS

26. Referring to Article 43(1) the Committee were satisfied that in so far as it related to both immoveable, and moveable property other than that listed in clause 2, the applicable law should be that of the place where the property was situated. Mr Anton suggested that a provision similar to Article 41(2) was also necessary and this was agreed.

27. Regarding Article 43(2) Mr Anton said that in relation to ships, etc., the Committee had not received the sort of advice which would enable it to come to any satisfactory conclusions. Therefore, in the Report, the Committee should simply say that in relation to ships, boats, aircraft, the provisions presented difficulties - and we should allude to them briefly - and we should recommend that the Department engaged in further consultations. In relation to motor vehicles, the Committee should point out that difficulties could arise, particularly for a liquidator, where a vehicle is registered in more than one country.

28. The Committee raised no objections to clause 3 of Article 43.

GENERAL PRINCIPLES OF THE CONVENTION

29. The Secretary referred to the discussion at the eighteenth meeting when it was agreed that the Committee would discuss the general principles of the Convention when re-appraisal of its articles was completed; in particular it would consider the comments received from consultees who had raised objections to the Convention and that these matters would be included in the concluding section of the Final Report. Therefore, as a basis for discussion, he had prepared and circulated a preliminary draft which included views expressed by dissenting consultees.

30. Mr Anton said that the draft did not deal with problems which he wished to raised such as whether or not the Convention as it exists should be accepted. He had started to prepare his views in a Note of Reservation about the basic principles and would like Members to consider it at the same time as the Secretary's draft. He proposed that the item should be dealt with at the next meeting and the Committee should now take the next item, which was consideration of the re-draft of 'Jurisdiction'. Mr Avis said that he had been unable to consider the draft 'General Observations' as he had only recently returned from leave and Mr Dodd agreed it would be preferable to see Mr Anton's paper first. Mr Graham referred to the time factor and said that if Mr Anton had trenchant views about the principles of the Convention, the sooner the Committee got to grips with them the better. He suggested that all of the Committee's time should now be devoted to the drafts of the Final Report. Mr Weiss said that in his view it would be preferable if the standing Chairman (Mr Cork) and all Members were present when the general principles were discussed.

31. The Chairman said he wished to make three observations. Firstly, the Committee were engaged in preparing a brief by which the Government could re-negotiate the provisions of the draft Convention. It was not required to draw up principles, but it should draw up conclusions as to what the Government should or should not do in regard to the provisions of the Convention. Secondly, he could not see how the Committee could deal with either principles or conclusions until it had dealt with each substantive section; for example, the Committee had altered its views on some matters raised earlier in the day; therefore it was much too premature to deal with the general principles. Thirdly, he thought the Committee should complete its task of informing the Government how the individual provisions of the Convention would work; then, if need be, the Committee could debate the general principles and, if necessary, say that the Convention was not practical. He agreed that the Committee should deal next with the re-draft on Jurisdiction.

32. Mr Anton replied that from the earliest meetings of the Committee, he had expressed reservations about the basic principles of the Convention. He was preparing a paper in which firstly, he would be accepting the detailed comments of the Committee, but then secondly, he would be examining the principles of unity and universality and whether a document based on those principles should be accepted. He considered that it was the duty of the Committee, if necessary, to advise on alternative options; the Convention was extremely important as it was to be for an unlimited period. In his view it would put restraints on the development of international bankruptcy law and of U.K. internal bankruptcy laws. In the circumstances he thought the Committee should have an opportunity of reading a paper on his views before dealing with the last section of the Final Report. He thought it would be a mistake if the Committee did not advise the Minister of the difficulties which could arise from accepting the terms of this Convention. He reminded the Committee that they were proposing alterations and amendments to virtually every article in the document and he queried whether, on balance it was worth making all the alterations which would be necessary to our national laws.

33. The Chairman said that during the early days he had had many reservations about the Convention; but he had come to realise that the Convention would be implemented whether we liked it or not and it was surely preferable to try to have some influence on its provisions. If necessary, the Committee could comment on the statutory, political and economic difficulties of implementing the Convention, but we had to accept the fact that there would be a Bankruptcy Convention and that it was too late to think of an alternative system. Mr Anton agreed, but added that the Committee must advise on the practical implications. He wanted to accept as much of the Convention as he could, but in courtesy to other Members, thought they should see his remarks about its principles.

PRIORITY OF CHARGES

34. Mr Anton drew attention to an article in the New Law Journal dated 19 June on the "Priority of Charges and the European Communities." He suggested that it might assist the sub-committee in their consideration of floating charges and the full committee when dealing with the sub-committee's proposals.

JURISDICTION AND GENERAL DISCUSSION

35. The Chairman said he thought it would be difficult to deal with the draft line by line; he disagreed with various parts, but on a more general question, wondered if it was necessary to repeat groundwork already covered in the Consultative Paper. He wondered if the draft could be compressed. The Secretary said that the content was a matter for the Committee; he had drafted in the manner adopted for other reports by Government committees; a report had to stand on its own feet and not depend on other references. Regarding the length of the Report, each preliminary draft contained all possible information, and the intention was to reduce and amend this in the re-drafts, in accordance with comments received from Members. He had hoped this had been achieved in the re-draft under discussion, which was based on the criticisms and comments sent in to him. Mr Anton said it was essential that the Report be self-contained; it would be read by senior civil servants responsible for advising Ministers and they would not necessarily be specialists in this field nor would they expect to have to read other references. It must be accepted that the Report would be long and, as he had said at a previous meeting, Members should assist the Secretary by sending him their comments and suggested alterations. He had already done this as regards several sections of the Report and intended to deal with the remaining sections in the same way.

36. Mr Graham said that apart from slight inaccuracies in the law, he was concerned that the style adopted by the Secretary tended to obscure the thrust of the agreement; he thought a general tightening up was required. He then drew attention to the time limit and observed that it would not be possible for the Committee to deal with the whole Report in detail in, say, two more meetings. Either there would have to be more meetings, or a sub-committee should be appointed, or the Committee should do the best it can with what there is, in the available time. Mr Dodd said that he had not had time to read the draft sections of the final report in detail, neither did he anticipate having time in the near future. He did not think a sub-committee was the answer because they would be faced with the same problem of time. In his view the Committee should make only a cursory examination of the Report, with the minimum of comments.

37. The Chairman said he had understood that the Final Report would be a report by the Secretary rather than by the Committee. Mr Anton said this was not so; the Secretary was drafting the Report on behalf of the Committee; that was his function. It was up to Members to specify the alterations which they thought should be made. Mr Dodd agreed adding that no matter who wrote the Report, the Committee were responsible for it. Mr Weiss said he felt that the standing Chairman would accept that Members could not go through the Report, in committee, line by line.

38. The Chairman asked the Secretary why four weeks were required for production. The Secretary said this was for any final editing which might be required, complete retyping of the Report in readiness for reproduction, proof reading and correction of typographical errors, reproduction and binding. He was not allowing for printing which would take longer, but was assuming that the finished document would be similar to the Consultative Paper. Printing would be undertaken later on, by H M Stationery Office, if a decision was taken to publish the Report. The Chairman thought that it should be possible to produce an acceptable document in about three days if really necessary, but Mr Anton said that the Secretary's estimate was optimistic and in his experience, production could take 6 weeks. He could not agree with the Chairman's suggestion that the Report could be submitted, if necessary, in a sort of draft form. Although classified, the Report would receive fairly wide distribution through a number of government departments. The Minister might even decide to publish it at a later date, in order to support any action taken by the Government. The Chairman remarked that in that case the Report had to be correct and Mr Dodd agreed, saying it would be wrong to rush things at this stage and lower the quality of the Report.

39. Mr Graham suggested that if it was accepted that the Committee could do no more than give the draft Report a cursory examination during the next two meetings, it was necessary to decide on alternative action. Mr Anton said that in his view, to expect submission of the Report by early October was unrealistic. Members individually should deal with the drafts prepared by the Secretary as quickly as possible to enable him to prepare re-drafts; these should then be studied by the Committee. He thought there might be a case for having no meetings during September to allow for holidays. In his view it would be more realistic to expect the Report to be ready for submission just before Christmas. This extension could be defended by the requirement to take full notice of the views expressed by consultees, many of which were lengthy and detailed, and some of which were highly critical of the Convention; there were also the external burdens of Members and the difficulties of the holiday season. Mr Avis said he thought that the standing Chairman should be made aware of the problem. Mr Dodd and Mr Anton agreed and the Chairman undertook to deal with this.

40. The Chairman enquired about the present work of the Inter Departmental Working Party. The Secretary said they had been keeping in touch with the proceedings of the Brussels Panel. They would be required to examine the Advisory Committee's Report as soon as it was ready.

DATE OF NEXT MEETING

41. The date of the next meeting was confirmed (Thursday, 12 August).

T H Traylor
Secretary

1063

Working

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Agenda for the Twenty-Third Meeting on Monday, 21 July 1975 at 10.00 am at Gavrelle House, 2-14 Bunhill Row, London EC1.

1. Consider the Report of the Twenty-second meeting and matters arising.

2. Secretary's Report. Redraft of References.

3. Consider re-draft of Uniform Law 4(C)1 prepared by Mr Muir Hunter. para. 9.

4. Complete civil and commercial general preferences (Memorandum No 9 (c) - miscellaneous matters).

5. Secured rights and possessory liens (Memorandum No 10).

6. General principles of the Convention. Too early

7. Consider the re-draft of "Jurisdiction" (Final Report).

8. Confirm date of next meeting (12 August) and agree date of subsequent meeting (22 August).

9. Agenda for next meeting.

Jersey.

T. H. Traylor

T H Traylor
Secretary

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Agenda for the Twenty-fourth Meeting on Tuesday, 12 August 1975 at 10.00 am at Gavrelle House, 2-14 Bunhill Row, London EC1.

1. Consider the Report of the Twenty-third meeting and matters arising.

2. Secretary's Report.

3. Report from sub-committee on Receiverships.

4. General principles of the Convention ("Concluding Observations" of Final Report).

5. Consider the re-draft of "Jurisdiction" (Final Report).

(Time permitting)

6. Consider the draft of "Recognition and Enforcement of Judgments" (Final Report).

7. Confirm date of next meeting (22 August) and arrange subsequent meetings.

NOTE Would members who intend to propose major amendments to the subject matter of items 4, 5 or 6, kindly let the Secretary have copies as soon as possible, for circulation to the Chairman and other members.

T H Traylor
Secretary

6(1.2)

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the Twenty-Fourth Meeting, held at Gavrelle House on 12 August 1975

Present:
K R Cork (Chairman)
A E Arton
P G H Avis
P H Armour
C L Dodd
D Graham (for M V S Hunter)
T H Traylor (Secretary)

In attendance:
C J Jenkins
G A Weiss

REPORT OF THE TWENTY-THIRD MEETING AND MATTERS ARISING

1 It was noted that the third line of paragraph 36 should refer to "the thrust of the argument". The report was then accepted.

SECRETARY'S REPORT

2 The Secretary said that a further and final memorandum of comments had been received from the Law Society, concerning Preferential and Secured Creditors and the Recognition and Enforcement of Judgments. He added that no further submissions were in the course of preparation insofar as he was aware and a full list of consultees would be annexed to the Final Report.

PROGRAMME

3 The Chairman referred to the proposals made in the Secretary's letter of 8 August and said that from his discussions with the Inspector-General, it was clear that much of the value of the Committee's work over the past two years would be lost, unless it was able to produce final views for the benefit of the UK negotiating team by 6 October. We were unable to stop the Brussels programme, he continued; as it was, the Brussels panel were only expected to meet on two more occasions, primarily to deal with the views of the three new Member States. Afterwards, the Convention would be re-drafted and passed via the Commission to the Council of Ministers. The Chairman added that in his view, the Committee had done far more in the way of examination of the details of the Convention than had been expected. This was both necessary and a good thing and there seemed every likelyhood that the Final Report would be published. It seemed that the only practical answer was to get a final draft of the Report and any reservations, to the Department by 6 October, and to take a little more time to ensure that the signed copy was to everyone's satisfaction. The Committee agreed unanimously with these proposals, subject to it being made clear on the draft of the Final Report that it had not been signed by all members.

4 The Chairman said that the period following 6 October should be used to polish the Report, in case it should be published, the aim being to submit the signed document in January 1976. In his view, the Report should not be

completely re-drafted by any particular members of the Committee and he asked for views on how the work might be implemented and whether a sub-committee should be set up. Mr Graham said that if the Report was to be published, the lawyers on the committee would want to be extra careful of the way in which statements of law were expressed. Mr Anton said that it should be open to all Members to comment on the final drafts and in his view, this could best be achieved in the same manner as had been adopted by the Secretary for dealing with preliminary drafts; Members should submit comments to the Secretary. This was agreed and the Chairman asked the Secretary to bring to the notice of the full committee any proposals which were likely to change views expressed in the Report.

REPORT OF THE SUB-COMMITTEE ON RECEIVERSHIPS AND FLOATING CHARGES

5 Mr Avis said that a full discussion had taken place which was attended by Mr Frank Ryder. He understood that Mr Muir Hunter had prepared additional paragraphs for inclusion in the Final Report as a result of these discussions, and had passed them to the Secretary. The Secretary said these were additions to the Uniform Law section of the Report at paragraphs 62 and 62A. Copies were issued to members and Mr Muir Hunter's proposals were accepted. The Secretary said he had received detailed comments from Mr Muir Hunter on the whole Uniform Law section and he undertook to provide Mr Avis and Mr Jenkins with copies.

CONCLUDING OBSERVATIONS

6 The Secretary said consideration of this section had been referred back at the last meeting, to enable members to read a draft of Mr Anton's Note of Dissention, which had since been issued. In a short discussion on Notes of Dissention in general, the Chairman said that it would be open to any member to submit Notes of Dissention where he was in disagreement with a recommendation put forward by the Committee. Referring to Mr Anton's paper, the Chairman said he thought this went further, in that many of the conclusions reached about the draft Convention led Mr Anton to the view that an entirely different approach was required. The Chairman added that, on the supposition that we had to make the best of this Convention, he thought Mr Anton supported the views taken by the Committee, and he hoped that Mr Anton would make this clear when re-drafting his reservations. Mr Anton said that he had tried to weaken the main Report as little as possible when drafting his "Note", and he asked members to kindly let him have their views and comments on it. He wondered whether the Secretary could re-draft the Concluding Observations in the light of what he had said in his Note of Reservations, though he thought it might not be practical, because the orientation was different. The Secretary undertook to look at it again. The Chairman said this should be borne in mind but meantime the Committee should deal with the present draft of Concluding Observations.

7 Following discussions, the Committee aproved the draft of the Concluding Observations, subject to various amendments and additions which were noted noted by the Secretary, and which will be reflected in the final draft of the section. Mr Graham undertook to prepare an additional paragraph 8A explaining, for the benefit of consultees whose views were not referred to, that this section of the Report only dealt with dissenting views. Mr Anton agreed to prepare a re-draft of paragraph 12

JURISDICTION

8 The Committee discussed the re-draft of the Jurisdiction section of the Final Report and agreed a number of amendments and additions. Mr Graham said that he thought the paragraphs dealing with English Law required to be checked. Mr Anton said that the section on Scots Law was acceptable and the

Secretary said that Mr Registrar Hunter had kindly checked the section on Northern Irish Law. The Committee hoped Mr Muir Hunter would kindly undertake to check paragraphs 3 to 11.

9 Mr Graham noted the absense of any paragraphs dealing with "Establishment" following paragraph 33 and the Secretary undertook to look into the matter. [Note by Secretary: This was covered originally by paragraphs 38 and 39 in the preliminary draft, but these paragraphs were deleted as a result of suggestions received from individual members, and amalgamated into the present paragraph 20 which, it is suggested, adequately deals with the matter.]

10 The Committee noted that paragraph 69 dealt with the problem of the Court having to decide matters, if necessary, of its own motion. This was a point on which Mr Anton had reservations; it was agreed to leave it to Mr Anton and the Secretary to see if a compromise could be reached as regards the wording of the paragraph. However, the Chairman pointed out that the Committee's recommendation should not be changed.

11 Subject to the amendments and additions, which were noted by the Secretary, and agreement of paragraphs 3 to 11 with Mr Muir Hunter, the Committee aproved the re-draft.

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

12 It was agreed that the final sentence of paragraph 1 should be deleted. There was some discussion over the necessity for paragraphs 2 to 5, or whether they could be compressed. The Secretary agreed to look into it. Referring to paragraph 6, Mr Anton said there were difficulties over the meaning of "recognition" and whether it extended to the dismissal of an action. Problems also arose as a result of the decision in the Black-Clawson case. Mr Anton undertook to draft proposed amendments to the paragraphs concerned. It was then decided to leave discussion of this Section for the next meeting.

FUTURE MEETINGS

13 The next meeting was fixed for Friday, 22 August when the Agenda would include:

(a) Introductory Section

(b) Recognition and Enforcement of Judgments

(c) Preferential and Secured Creditors

(d) The Protocol

Subsequent meetings were agreed for Friday 12 September and Monday 22 September. It was hoped to complete "Scope" and "Choice of Law" at the first of these meetings, leaving the Uniform Law for 22 September.

T H TRAYLOR
SECRETARY

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Agenda for the Twenty-fifth Meeting on Friday, 22 August 1975 at 10.00 am at Gavrelle House, 2-14 Bunhill Row, London EC1.

1. Consider the Report of the Twenty-fourth meeting and matters arising.

2. Secretary's Report.

3. Introductory section of the Final Report.

4. Recognition and Enforcement of Judgments

5. Preferential and Secured Creditors.

6. The Protocol.

7. Confirm date of the next meeting (12 September) and the agenda.

T H Traylor
Secretary

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the Twenty-fifth Meeting, held at Gavrelle House on 22 August, 1985

Present:

K R Cork (Chairman)
A E Anton
P G H Avis
C L Dodd
D Graham (For M V S Hunter)
T H Traylor (Secretary)
Miss G H Goodwin (Assistant Secretary)

REPORT OF THE TWENTY-FOURTH MEETING AND MATTERS ARISING

1. The report of the meeting was accepted.

2 Mr Avis drew attention to a paper on Floating Charges and Receiverships, prepared by Mr Muir Hunter, copies of which had been circulated. Mr Anton suggested that the matter was adequately dealt with in the Final Report, by paragraphs 62 and 62A in the chapter on Uniform Law, and an amended paragraph 5 in the chapter on Preferential and Secured Creditors. The Committee agreed, but at Mr Avis's suggestion, decided to refer the said paragraph 5 to the sub-committee on Floating Charges for their views. Mr Avis undertook to deal with this.

3 The Secretary said that he had received some helpful comments from Mr Muir Hunter on the draft of the Concluding Observations, which would assist preparation of the final draft. Mr Muir Hunter had also proposed additional paragraphs 15A and 17. The Committee considered the relevant parts of the N-L Report, to which paragraph 15A referred. It was agreed that a short reference could usefully be included in the existing paragraph 15. The Committee were not in favour of the proposed paragraph 17.

SECRETARY'S REPORT

4 The Secretary said no further memoranda of comments had been received from consultees. He drew attention to the report of the decision in Aluminium Industrie Vaasen BV which appeared in the July 24 issue of The Accountant. This case concerned the sale of goods with reservation of title and the decision appeared to support the Committee's views on Article 39. Mr Graham observed that the case was notable in that the goods involved were raw material

INTRODUCTION TO THE FINAL REPORT

5 Following discussion, the Committee approved the re-draft of the Introductory section of the Final Report, subject to a number of small amendments which were noted by the Secretary. Referring to paragraph 19, the Secretary suggested that a short summary of major points at issue should be included in the Final Report. This was agreed, it being decided that the summary should include:

(a) Jurisdiction to declare directors and managers bankrupt;

(b) Preferential creditors;

(c) Fiscal debts;

(d) Cessation of payments;

(e) Voluntary winding-up;

(f) Territorial scope.

6 Members were asked to let the Secretary have details of any other matters which should be included in the Summary.

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

7 The Secretary said this section was referred back at the last meeting and had since been re-drafted in the light of comments received from Members. The re-draft, dated 19 August, was approved, subject to a number of amendments and additions which were noted by the Secretary and which will be reflected in the Final Draft.

8 NOTE BY SECRETARY: Paragraph 9 of the re-draft is not intended to deal with the extension of Article 53 to protect third parties. It points to the requirement, in the Convention, of a ready means of setting aside judgments rendered invalid by the operation of the rules in Articles 51 and 52, while preserving their validity until they have been set aside. "Efficacy" seemed to be "le mot juste".

PREFERENTIAL AND SECURED CREDITORS

9 The draft of this section of the Final Report was approved subject to a number of amendments and additions.

THE PROTOCOL

10 It was decided to leave discussion of this section for the next meeting. The Chairman asked members to let the Secretary have any proposed amendments in time for the section to be re-drafted.

GENERAL REMARKS

11 The Chairman said that sections of the Final Report whose drafts had been approved, should not require further examination in committee. Final drafts should be prepared, taking into consideration agreed amendments, and issued. The final draft should be subject only to editing and suggestions thereon should be submitted to the Secretary.

DATE OF NEXT MEETING

12 The date of the next meeting was confirmed as Friday 12 September. The agenda would include:

a) The Protocol

b) The Scope of the Convention

c) Choice of Law

T.H TRAYLOR
SECRETARY

EEC BANKRUPTCY CONVENTION

INTER-DEPARTMENTAL WORKING PARTY

Report of the Eighteenth Meeting held at Gavrelle House on 8 August 1975

Present:

C A Taylor (Chairman)
W Armstrong (D of T)
J A Sell (D of T)
D Graham (Solicitor, DTI)
J S Doig (Scottish Courts Administration)
E Scott Robertson (Solicitor, Scottish Office)
J M Hunter (Bankruptcy Registrar, N Ireland)
R B Rowe (Lord Chancellor's Office)
D R Titchener (DHSS)
D J Lawday (Inland Revenue)
D E Keefe (Customs & Excise)
T H Traylor (Secretary)

REPORT OF THE SEVENTEENTH MEETING AND MATTERS ARISING

1 The report of the seventeenth meeting was accepted.

2 The Chairman said it seemed likely that the Insolvency Bill would start in the House of Lords during the next parliamentary session. A paper had been circulated to departments concerned, setting out the reasons for restoring the value of monetary limits "across the board"; the Chairman hoped that these problems would be resolved shortly. Points raised by the Lord Chancellor's Office were being dealt with separately. Mr Titchener thought the question of monetary limits would have to go to the Ministers in his department because of the sharp increase in values.

3 Referring to the Brussels timetable for the draft Bankruptcy Convention, the Chairman said the next meeting started on 20 October, when the delegations from the three new Member States would be expected to give firm views on behalf of their governments on the major points at issue. A final meeting was planned for January 1976, after which the Commission would draw up its paper to go to the Council of Ministers.

4 In answer to an enquiry from Mr Rowe, the Chairman said it was hoped, that a draft of the Advisory Committee's Final report would be made available by 6 October. The other members of the Brussels Panel were aware of the work being done by the Advisory Committee and that the position taken up by the UK government would depend on that Committee's advice. At the same time, every effort should be made to keep to the target dates and the Chairman observed that the Inter Departmental Committee would have a very short time in which to absorb the final views of the Advisory Committee. Therefore, discussions would be restricted to major points at issue, but he hoped individual members would submit papers on any points which they considered should be discussed.

JULY MEETING OF THE BRUSSELS PANEL

5 Mr Armstrong said that the whole question of the calculation of general preferences was re-opened. It was clear that no-one liked the method of calculation proposed in the Convention. No new proposals were put forward however and it was decided to adopt the method of calculation based on legal preferences provisionally and to await the report of the U.K. Advisory

[illegible] Armstrong said that (b) raised a problem as regards

creditors' voluntary liquidations and an amendment would be required. The Secretary said the Advisory Committee thought the Advertisement should distinguish between an Order having universal application and an Order under Article 9 or Article 56. The Chairman suggested that this was not a matter for the liquidator to prejudge and Mr Registrar Hunter suggested that the matter should be distinguished in the actual Order.

Article IV

12 Mr Armstrong said that the Department would prepare a list of advertisements applicable to England and Wales. Mr Registrar Hunter undertook to prepare a list for Northern Ireland and Mr Scott Robertson, a list for Scotland.

13 It was decided that Articles V and VI presented no difficulties, and that the procedures required under Article VII were already available in the U.K. However, the Secretary drew attention to the remarks made by the Kilbrandon Committee about a similar Article in the Judgments Convention; Mr Rowe undertook to look at the matter again.

14 Regarding Article VIII, the Chairman asked Mr Sell to look into the procedures available in the U.K., and to see if there were any problems. The Secretary said the Advisory Committee had some problems regarding Article 29 or the Convention, and it was decided to look at these articles again before October 20. Mr Rowe suggested that in the meantime, the views of the GPO should be obtained.

DATES OF FUTURE MEETINGS

15 The next meeting was fixed for Friday, 19 September and the subsequent meeting for Friday, 10 October.

T H TRAYLOR
SECRETARY

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the Twenty-fifth Meeting, held at Gavrelle House on 22 August, 1975

Present:

K R Cork (Chairman)
A E Anton
P G H Avis
C L Dodd
D Graham (For M V S Hunter)
T H Traylor (Secretary)
Miss G H Goodwin (Assistant Secretary)

REPORT OF THE TWENTY-FOURTH MEETING AND MATTERS ARISING

1. The report of the meeting was accepted.

2 Mr Avis drew attention to a paper on Floating Charges and Receiverships, prepared by Mr Muir Hunter, copies of which had been circulated. Mr Anton suggested that the matter was adequately dealt with in the Final Report, by paragraphs 62 and 62A in the chapter on Uniform Law, and an amended paragraph 5 in the chapter on Preferential and Secured Creditors. The Committee agreed, but at Mr Avis's suggestion, decided to refer the said paragraph 5 to the sub-committee on Floating Charges for their views. Mr Avis undertook to deal with this.

3 The Secretary said that he had received some helpful comments from Mr Muir Hunter on the draft of the Concluding Observations, which would assist preparation of the final draft. Mr Muir Hunter had also proposed additional paragraphs 15A and 17. The Committee considered the relevant parts of the N-L Report, to which paragraph 15A referred. It was agreed that a short reference could usefully be included in the existing paragraph 15. The Committee were not in favour of the proposed paragraph 17.

SECRETARY'S REPORT

4 The Secretary said no further memoranda of comments had been received from consultees. He drew attention to the report of the decision in Aluminium Industrie Vaasen BV which appeared in the July 24 issue of The Accountant. This case concerned the sale of goods with reservation of title and the decision appeared to support the Committee's views on Article 39. Mr Graham observed that the case was notable in that the goods involved were raw materials

INTRODUCTION TO THE FINAL REPORT

5 Following discussion, the Committee approved the re-draft of the Introductory section of the Final Report, subject to a number of small amendments which were noted by the Secretary. Referring to paragraph 19, the Secretary suggested that a short summary of major points at issue should be included in the Final Report. This was agreed, it being decided that the summary should include:

(a) Jurisdiction to declare directors and managers bankrupt;

(b) Preferential creditors;

(c) Fiscal debts;

(d) Cessation of payments;

(e) Voluntary winding-up;

(f) Territorial scope.

6 Members were asked to let the Secretary have details of any other matters which should be included in the Summary.

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

7 The Secretary said this section was referred back at the last meeting and had since been re-drafted in the light of comments received from Members. The re-draft, dated 19 August, was approved, subject to a number of amendments and additions which were noted by the Secretary and which will be reflected in the Final Draft.

8 NOTE BY SECRETARY: Paragraph 9 of the re-draft is not intended to deal with the extension of Article 53 to protect third parties. It points to the requirement, in the Convention, of a ready means of setting aside judgments rendered invalid by the operation of the rules in Articles 51 and 52, while preserving their validity until they have been set aside. "Efficacy" seemed to be "le mot juste".

PREFERENTIAL AND SECURED CREDITORS

9 The draft of this section of the Final Report was approved subject to a number of amendments and additions.

THE PROTOCOL

10 It was decided to leave discussion of this section for the next meeting. The Chairman asked members to let the Secretary have any proposed amendments in time for the section to be re-drafted.

GENERAL REMARKS

11 The Chairman said that sections of the Final Report whose drafts had been approved, should not require further examination in committee. Final drafts should be prepared, taking into consideration agreed amendments, and issued. The final draft should be subject only to editing and suggestions thereon should be submitted to the Secretary.

DATE OF NEXT MEETING

12 The date of the next meeting was confirmed as Friday 12 September. The agenda would include:

a) The Protocol

b) The Scope of the Convention

c) Choice of Law

T.H. Traylor

T.H TRAYLOR
SECRETARY

10(2.6)

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the Twenty-seventh Meeting, held at Gavrelle House on 22 September 1975

Present:	K R Cork (Chairman) A E Anton P H Armour P G H Avis C L Dodd M V S Hunter T H Traylor (Secretary) Miss G H Goodwin (Assistant Secretary)
In attendance:	D Graham C J Jenkins G A Weiss

REPORT OF THE TWENTY-SIXTH MEETING AND MATTERS ARISING

1. The report of the meeting was accepted.

2. Following a suggestion from Mr Muir Hunter, it was decided that the paragraphs relating to U.K. law, removed from the chapter on Scope, should appear in the edited version of the Final Report and that there should be additional paragraphs giving the applicable Scots law.

THE UNIFORM LAW

3. The Committee examined the redraft of the chapter on the Uniform Law, which was accepted, subject to a number of minor amendments which were noted by the Secretary.

MAJOR POINTS AT ISSUE

4. Following discussion, the Committee accepted chapter VIII of the Final Report and decided that it should be entitled "Major Points at Issue". Additional paragraphs were agreed dealing with floating charges, the use of the Official Report (N-L Report) and the fundamental changes which will be necessary to U.K. law in order to adhere to the Convention.

FLOATING CHARGES

5. The Committee discussed alternative methods of dealing with Mr Muir Hunter's paper on amendments which would be necessary to the Convention in order to ensure recognition of receiverships and floating charges. It was decided that, since an EEC draft directive on securities over moveables was now under consideration, Mr Muir Hunter should submit his paper directly to the Department.

FUTURE PROGRAMME

6. The Secretary said he hoped to issue copies of the final draft of the Committee's Report on 6 October. The Chairman said he hoped that all matters relating to editing could be dealt with by correspondence. It was agreed that suggestions for editing the Report should be passed to the Secretary by not later than 30 November. Arrangements would then be made regarding a meeting for the signing of the Final Report.

T H Traylor
Secretary

THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

Colloquium

on

THE EEC DRAFT BANKRUPTCY CONVENTION

Prince Consort Suite, De Vere Hotel, Hyde Park Gate,
Kensington, London, W.8.

Friday, March 14, 1975

PARTICIPANTS**

Mr. R.E. Adkins	Partner, Thornton Baker & Co., Birmingham
Mr. J. Bertin	Barrister, London
Mr. A.M.D. Bird	Partner, Edward Thomas Collins & Son and Thornton Baker & Co., Bristol
Mr. R. Churchill	Senior Research Officer in International Law, BIICL
Miss J. Clarke-Smith	Personal Assistant to the Director, BIICL
Mr. W.D. Conolly	Partner, Hedleys, London
Mr. T.H. Donaldson	Vice President, Morgan Guaranty Trust Company of New York, London
Mr. G.C. Ehlers	Partner, Edward Thomas Collins & Son and Thornton Baker & Co., Bristol
✓ Mr. G.T. Ehlers	Partner, Edward Thomas Collins & Son and Thornton Baker & Co., Bristol
Mr. L.J. Errington	Company Affairs Directorate, Confederation of British Industry, London
✓ Mr. J.H. Farrar	Senior Lecturer in Law, University of Bristol
✓ Mr. I.F. Fletcher	Lecturer in Law, University College of Wales, Aberystwyth
Mr. P.R.N. Fowler	Barclays Bank Group, EEC Legal Affairs Section, London
✓ Professor S.N. Frommel	Reader in Law, City of London Polytechnic
Mr. P.N. Gerrard	Partner, Lovell, White & King, London
Mr. J.S. Gillies	Chartered Accountant, Whinney Murray & Co., London
Mr. D. Graham	Barrister, London (Member of the Cork Advisory Committee)

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Mr. S. Guthrie-Brown	Solicitor, Lovell, White & King, London
Mr. P. Houyoux	Belgian Advocate; Research Student, Trinity College, Cambridge
Mr. Registrar J.M.Hunter	Bankruptcy Registrar, Northern Ireland (Member of the Cork Advisory Committee)
Mr. Muir Hunter, QC	Queen's Counsel, London (Member of the Cork Advisory Committee)
Professor F.G. Jacobs	Professor of European Law, King's College, University of London
Professor A.D. Lawton	Barrister; Professor of Civil Law, Queen's University, Belfast
Mr. J.D.M. Lew	Research Fellow, City of London Polytechnic
Mr. H.H. Marshall,CMG	Deputy Director, British Institute of International and Comparative Law
Mr. D.J. McNeil W.S.	Council Member, Law Society of Scotland
Mr. D.L. Morgan	Partner, Alfred Tooke & Co., London
Mr. D.St. C. Morgan	Commercial Relations Officer, States of Jersey, C.I.
Mr. C. Morris	Partner, Touche Ross & Co., London
Mr. W.A.R. Mutch	Law Secretary, Bank of Scotland, Edinburgh
Miss S. Nicholas	Legal Editor/European Community Law, Sweet & Maxwell Ltd., London
Lady Oliver	Lecturer in Company Law, City of London Polytechnic
Mr. A. Parry	Assistant Legal Adviser, Foreign and Commonwealth Office, London
Mr. J.H. Pollard	Secretary, Reed Group Ltd., London
Mr. F.R.Ryder	Group International Legal Adviser, Midland Bank Ltd., London
Mr. S.D. Samwell	Partner, Josolyne Layton-Bennett & Co., London
Mr. J.P. Schmidt	Attorney, University Assistant, Institut für Internationales und Ausländisches Privatrecht, Cologne

cont/

Professor K.R.Simmonds	Director, British Institute of International and Comparative Law; Visiting Professor in International Law and European Law, Queen Mary College, University of London
Mr. D. Sugarman	Lecturer in Law, City of London Polytechnic
Mr. J. Sutherland	Partner, McClure, Naismith, Brodie & Co., Glasgow
Dr. J. Thieme	Research Assistant, Max-Planck-Institut, Hamburg
Mr. J.H. Thompson	Head of Department of Law, City of London Polytechnic
Mr. D.E.F. Vickers	Principal, Bonavis, London (Japan)
Mr. G.A. Weiss	Partner, W.H. Cork, Gully & Co., London (Member of the Cork Advisory Committee)
Mrs. J. Welch	Legal Adviser, Inter-Bank Research Organisation, London
Mr. M.C. Withall	Partner, Thornton Baker & Co., London
Mr. R.Wilson	Chartered Accountant, Whinney Murray & Co., London

** Applications received after 12.3.75 are not included in this list

JCS
12.3.75

THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

Colloquium

on

THE EEC DRAFT BANKRUPTCY CONVENTION

Prince Consort Suite, De Vere Hotel, Hyde Park Gate,
Kensington, London, W.8.

Friday, March 14, 1975

PROGRAMME

09.45 REGISTRATION

10.00 1ST SESSION: OPENING PAPER - THE CONVENTION RE-EXAMINED

Speaker: MR. MUIR HUNTER, Q.C.*

Chairman: PROFESSOR K.R. SIMMONDS
(Director, British Institute of International and Comparative Law)

11.00 COFFEE

11.15 - 12.30 2ND SESSION: INFORMAL PRESENTATIONS ON:

1) THE POSITION IN SCOTS LAW

Speaker: Either MR. D.J. McNEIL, W.S.
(Council Member, Law Society of Scotland)

or MR. J. SUTHERLAND
(Partner, McClure, Naismith, Brodie & Company)

2) THE POSITION IN THE LAW OF NORTHERN IRELAND

Speaker: MR. REGISTRAR J.M. HUNTER *
(Bankruptcy Registrar, Northern Ireland)

Chairman: MR. MUIR HUNTER, Q.C.

13.00 LUNCH
(Cash bar facilities will be available before lunch)

14.30 3RD SESSION: PANEL DISCUSSION

Panellists: MR. F.R. RYDER
(Group International Legal Adviser, Midland Bank Limited)

MR. G.A. WEISS *
(Partner, W.H. Cork, Gully & Company)

Chairman: MR. MUIR HUNTER, Q.C.

16.30 TEA

17.00 CLOSE OF MEETING

* Members of the Cork Advisory Committee

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UNIVERSITÉ LIBRE DE BRUXELLES

Sous la présidence d'honneur de
Monsieur F. ORTOLI,
Président de la Commission des Communautés européennes

COLLOQUE SUR LES CONVENTIONS COMMUNAUTAIRES

13 et 14 décembre 1974

Sous les auspices de la Faculté de Droit et
de la Commission des Communautés européennes

Institut de Sociologie
44, avenue Jeanne - 1050 Bruxelles

THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

A COMPANY LIMITED BY GUARANTEE REGISTERED IN ENGLAND NO. 615025 A REGISTERED CHARITY

announces

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Colloquium

on

THE EEC DRAFT BANKRUPTCY CONVENTION

to be held in the Prince Consort Suite of the De Vere Hotel, Hyde Park Gate, London, W.8., on Friday, March 14, 1975, from 10 a.m. to 5 p.m.

This Colloquium has been arranged at short notice by the Institute in order to give participants an opportunity of considering and discussing the Consultative Paper issued in November, 1974, by the Department of Trade Advisory Committee ("The Cork Committee") which was set up to consider the terms of the EEC Bankruptcy Convention and to advise ... upon the effect of the implications of the Convention ... and to recommend such modifications as the Committee considered necessary and practicable.

The Colloquium will be introduced by MR. MUIR HUNTER, QC, a member of the Cork Committee, who will speak on the principal innovations contained in the Draft Convention and the consequent changes in English law that will be involved. There will be, in the other morning sessions, a contribution outlining the special problems for Scots law and a contribution illustrating how certain of the concepts (in particular that of the cessation of payment) underlying the Draft Convention operate in existing European law. The afternoon session will be devoted to a Panel Discussion in which specialists in related bankruptcy and accountancy problems will take part as well as the contributors of papers in the morning sessions.

Applications for places at this Colloquium should be made as soon as possible to the Institute on the attached form. All applications will be acknowledged and a detailed programme sent.

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KRS/JCS
18.2.75

THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW
32 FURNIVAL STREET
LONDON EC4A 1JN
Tel: 01-405 4051-2-3

THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

Colloquium

on

THE EEC DRAFT BANKRUPTCY CONVENTION

Prince Consort Suite, De Vere Hotel, Hyde Park Gate,
Kensington, London, W.8.

Friday, March 14, 1975

APPLICATION FORM

1. I wish to reserve ..... place(s) for the above meeting and enclose my cheque for £10:00 (per person including VAT) made out to the British Institute of International and Comparative Law, in the sum of £ .... in respect of the Colloquium fee (to include luncheon with wine at the Hotel, and coffee and tea during the working sessions).

BLOCK CAPITALS PLEASE

NAME OF PARTICIPANT ** .....

TITLE OR POSITION .....

(with details of Firm, Organisation or University represented)

ADDRESS .....

.....

TEL. NO ..... (Office) ..... (Home)

(** Please list names and details of other participants on a separate sheet)

2. APPLICATIONS SHOULD BE RETURNED TO:

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Under the Honorary Chairmanship of

Mr. F. ORTOLI

President of the Commission of the European Communities

SYMPOSIUM ON THE COMMUNITY CONVENTIONS

13 and 14 December 1974

Under the auspices of the Faculty of Law and the

Commission of the European Communities

Institute of Sociology

44 Avenue Jeanne - 1050 Brussels

[List of those giving lectures at the Colloquium on Community Conventions, on the second page of the original, not translated]

Rue 10, 11, 12

BROAD LINES OF THE EEC DRAFT CONVENTION ON BANKRUPTCY

by Mr. Jean NOEL

Judge at the French Supreme Court of Appeal,

Chairman of the Committee of Experts.

Ladies and Gentlemen

Allow me first of all to thank Professor WESER, who so competently organised and arranged the chairing of this symposium, for being so kind as to invite the Chairman of the Group of Experts which has completed the draft convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings, but whose work, alas, is far from being completed.

As extensive as this draft is, I would not wish to subject you, at least by way of its length, to too harsh an ordeal. I think in fact that the most fruitful part of this meeting will come in the exchange of views which is to follow and that in the presence of so many well-informed persons I, in particular, will have much to learn.

I shall not burden my subject with remarks on the progress of our work undertaken with in the framework of Article 220 of the Treaty of Rome. I must point out however that the Group of Experts which, under the direction of the Secretary of State Mr. BULOW, to whom I could not pay too great a tribute, has drawn up the convention on the jurisdiction and enforcement of decisions in civil and commercial matters, referred to as the "general convention", felt that it had to deal in a separate text with the subject of bankruptcy and similar proceedings. This decision was not dictated solely by the desire not to delay the conclusion of the general convention. Essentially a collective procedure, bankruptcy presented many specific problems requiring particular examination and possibly the involvement

of specialists. That the task thus given us has not been entirely a simple one, the time which we have had to devote to it would bear sufficient witness.

As the general convention came into force some months ago, I, for my part, have only to place before you a simple draft.

This draft has admittedly gone through what was a long initial stage. The States then members of the Community, the Six, to whom it was sent, submitted their comments. These were many and interesting but they do not necessarily appear to call into question the basic provisions on which it had been possible to reach an agreement at expert level. Except on one question, nevertheless very important, and this concerns the persons managing a firm or company. We cannot hide the fact that this, with the reservation of title, is one of the stumbling blocks of our convention.

X now being amended?

The Group of Experts, however, would, it seems to me, have been able to arrive fairly quickly at a definitive edition of the draft, if in the meantime we had not had to record the entry of three new partners into the Community, an eminently fortunate event for Europe.

It goes without saying that these new members may quite legitimately have different views on the principle which we have adopted without them. In any event, the characteristics of their laws which we shall have to take into account, will require fresh thought.

So our draft, as you know it, is not so much an established fact in the discussions now in progress, as a working instrument.

I would only hope that the solutions at which we had arrived will seem sufficiently satisfactory to receive to a very large extent the approval of all.

* * *

Scope

What are the broad lines of this draft? First of all what is its scope?

When we speak of "bankruptcy", except where there is indication to the contrary, this is a generic term which covers the collective legal procedures of liquidation and distribution: "faillite" in Belgium, "liquidation des biens" in France, for example, the institution existing in each of the Member States with, of course, varying rules. Our draft naturally applies to those procedures, whether they relate to traders or non-traders, natural persons or legal persons.

But in each of our countries, we have under various forms equally collective procedures which, on the basis of the cessation of payments or a related concept and involving intervention by the legal authority, have the effect of staying process by individual creditors and result either in supervision of the debtor, or in the reduction of his liabilities so as to safeguard the undertaking, or even, in the final analysis, in the realisation of the assets.

It was not a question of isolating bankruptcy in the strict sense, which is the extreme solution, from the range of more flexible measures intended to avoid this. Consequently we have had to include the latter. But owing to their variety of forms in the different States we thought it unwise to limit ourselves to giving a general definition of them. We have drawn up a list of them in a protocol, and this will have to be brought up to date as simply and swiftly as possible.

All the procedures not referred to are excluded and will fall within the scope of the General Convention.

Certain undertakings are, in the majority of our countries or only in some, subject to systems which tend to avoid their liquidation and involve the administrative authority. This is the case in insurance

which, it has been affirmed, is to form the subject of special directives.

Our draft excludes them from the scope of the convention. In the case of other undertakings specified, the exclusion would only be partial since it is limited to the territory of the States where they form the subject of a separate, largely administrative procedure.

Finally, and this concerns more especially the "liquidazione coatta administrativa" in Italian law which involves an administrative phase and a legal phase, the convention would only come into play at the legal phase.

These restrictions which weaken the scope of the draft and which will only serve to create difficulties, are they really justified? This is a question which may continue to be asked.

Unity of the Bankruptcy

The Committee of Experts with, I say again, the Secretary of State, Mr. BULOW, in the chair, made a basic choice from the outset. Sensitive to the criticism advanced by the general body of doctrine of the system of multiple bankruptcies occurring in different countries, the disadvantages of which are known all too well, it adopted the principle of a single bankruptcy having its effects in all the Member States.

This was an ambitious choice. I admit that the size and difficulties of the task would have made me, personally, hesitate in spite of all the advantages of the solution adopted. But when I began to take part in this work, the decision had already been taken. There was nothing to do but to implement it. Admittedly, there were in existence, important studies and known drafts on the subject. In practise however

the case law pertaining to bankruptcies having international implications and to existing bilateral conventions was of little help to us and we quickly became convinced that although the single bankruptcy represented a desirable aim and the proper solution for the future, the disparities in our national laws, traditions and reactions would be difficult obstacles to surmount. I say that, not by way of introductory remarks, but in order to justify the length of a text whose development has been surprising.

* * *

To speak of the single bankruptcy is to raise three problems at once: the jurisdiction, the proceedings to be followed, the law applicable.

Jurisdiction

A single bankruptcy may only be opened and pursued by a single court. This led us to lay down regulations for direct jurisdiction that is, to designate the State in which the bankruptcy should be declared. Without going further however; without having to choose from among the courts of the country responsible. Therefore direct but general jurisdiction. In fact we took every care insofar as possible, and this was a constant concern which you will find throughout our draft, not to tamper needlessly with the legal organisation and rules of procedure of each State.

You will note however, that in order to determine the elements in that direct jurisdiction we could not refer to the national laws which showed dissimilarities. We had to find a common criterion, all the more since we could not distinguish in this respect between traders and non-traders, a distinction now unknown to Netherlands law. It is in this way that we were led to adopt the centre of administration,

defined as being the place where the debtor usually manages his main activities. It does not appear that this concept, which synthesises the main points of the national laws, which for all that are not greatly at variance, will tend to give rise to great difficulties in practise. In the case of companies, except where there is proof to the contrary, this will be the registered office. The centre of administration must be a single one if we leave out the possible birth of multi-headed monsters which would constitute companies with multiple offices. The single centre therefore is easy to identify in the vast majority of cases. But this centre may be outside the Community. For fear of creating what would have appeared in several States as an unacceptable legal void, we had, in this case, to refer to other points of contact in order to determine the jurisdiction. The courts of the country where an establishment exists, will be able to give judgement and by that we mean signs of permanent activity. You will find these terms somewhat vague. This is because we wanted a broad concept capable of carrying a wide meaning. Also, and this reason would be sufficient, we did not manage to define the establishment which for my part, I in no way regret. But our draft is capable, of improvement and this symposium may bring that improvement about. Defined or not, establishments may be multiple. Hence the possibility of competing jurisdictions.

In the absence of an establishment, it will still be possible for the bankruptcy to be declared in accordance with the national law of each of the Member States. Then, the internal provisions, often criticised particularly by the supporters of the universality of the bankruptcy, will again take effect: existence of assets, article 14 of our French Civil Code, or even the existence of debts. Our States or some of them at least, did not wish to be disarmed in the face of certain

(Article 5)

situations, without doubt exceptional, but which fully justify recourse to collective proceedings. It might perhaps be thought that our ideas express a European nationalism. Why not? And we know full well that the truly universal bankruptcy is only a dream.

The residual applications of the national law may also give rise, however rare they should be, to conflicts of jurisdiction.

I will pass over the difficulties arising from a transfer of centre or establishment and substitutions or changes of proceedings, a "liquidation des biens" replacing a "règlement judiciaire" in France for example. I shall only point out that a risk of conflicts exists there again.

More notable it seems to me is the derogation introduced to our rules of jurisdiction in respect of members having joint and several liability for the debts of the firm and the persons directing or managing a bankrupt firm or company.

Article 10

We considered that the courts in the country where the bankruptcy of the firm or company was declared must have jurisdiction in the consecutive bankruptcy of members of firms having joint and several liability, at least if the law of that country permits. We shall thus manage by way of the rules of general indirect jurisdiction to maintain, in fact, the jurisdiction already given in some laws to the company bankruptcy court. According to the French concept everything calls for such a solution and, personally, I cannot bring myself to admit that the laws having a different concept are satisfactory. But we are touching on questions on which our legal systems most conflict.

You are aware that the French law has tended in practice not to let pass without financial sanction the actions of persons directing or managing a firm or company who have led their company to ruin, often

without becoming any poorer themselves. The fear of scandal is sometimes the legislator's great inspiration. Without going into more detail since the subject will be dealt with by Mr. Lemontey, I shall merely note that the Convention based on French law, Belgian and to a certain extent Italian case law has set up what is currently although improperly called the extension of bankruptcy. There again, it seemed to us that jurisdiction to declare the bankruptcy of persons directing or managing a company must fall to the company bankruptcy court, disregarding the place in which they have their personal centre of administration. I did not expect our draft to be uncontested. The volume of criticism raised in some economic circles would lead me to believe that we were not mistaken regarding its effectiveness.

In the case of bankruptcy it is not permitted to choose one's judge. The court to which application is made will have to review its jurisdiction. This is all the more necessary since the convention makes the legal power dependent upon the jurisdiction.

It can therefore be reckoned that the courts which will declare bankruptcies will have full jurisdiction in accordance with the proposed regulations.

This will reduce the number of conflicts. They will still be possible however.

It is at the stage of recognition of decisions that we have mainly tried to resolve them.

In the case of conflicting claims, by laying down two rules: first of all that on the hierarchy of jurisdictions. A judgement based on the existence of the centre of administration must take precedence over a judgement based on the existence of an establishment. And in its turn the latter takes precedence over the opening of a bankruptcy pursuant to the national law, but what if the jurisdictions rank equally? Then, and this is our second rule, the judgement given first will alone be recognised and will, alone, take effect. Doubtless an arbitrary and simplistic solution, but effective. The delaying tactics on jurisdiction are one of the weak spots of the proceedings. In the case of bankruptcy, it is important, more than elsewhere, to avoid the means of causing delay. A single judgement will therefore become operative, even in a country of the Community where any other judgement, which will be null and void, would have intervened.

Conflicting disclaimers should be very rare. We reckoned that it might suffice to prohibit a court from disclaiming its jurisdiction on the grounds that there exist bases of jursidiction which the Court of another State refuses to recognise.

Of course the edifice which we have created is not perfect. It could not be since at present there exists no international court to refer cases. We might therefore contemplate giving jurisdiction for this

purpose to a high international court, the Court of Luxembourg, not to mention names.

But just let us consider. If it is a question of speaking in terms of law, that is of imposing a uniform interpretation of our convention, most certainly (however) on condition that the cases referred to that Court are strictly limited, so as not to create for the parties a fresh interlocutory plea which would delight mala fide litigants.

Procedure of the bankruptcy

I will not enlarge on the actual procedure. The Court must apply its own law and we could not contemplate grafting on to the national laws a common special procedure which would have been difficult to integrate. That would not have been realistic.

I shall go so far as to say this is not desirable at present. I shall explain. The slowness of the procedure involves considerable losses of assets. The creditors are deprived for too long of what might finally be restored to them. When we get on to distributions which will be, in actual value, the sums recovered by the liquidator, it is perhaps not going too far to suggest that in a general way, the creditors are no less deprived by the length of the procedure than by the actions of their debtor. One would have to be absolutely convinced of that however. Yes, in economic affairs and particularly so in the case of bankruptcies, one must opt for swift proceedings. One might fear errors, that is injustices, but the present system in various States, from which I cannot exclude France, in fact creates general injustice, that is confusion which is to everybody's disadvantage. Between this confusion and the specific risks of unsatisfactory decisions, let everyone, like Goethe, take his choice. All that one can say is that the time has not yet come for exacting solutions which would disturb the quietude of the legal experts.

Applicable law

Determining the applicable law presented us with problems of a different magnitude.

One ambiguity, which is not in your minds, must here be dispelled. When in qualifying our draft we speak of "European bankruptcy" this is only an approximation. If our bankruptcy is going to have its effects in the territories of the Member States, and it is in this respect that it is European, it nevertheless remains that we have in no way drawn up a common law on the cases for opening and the effects of the bankruptcy.

The task would have been far too great. Our work, you will have noted, has not moved quickly. But how long would it have taken, how many generations of experts would have worn themselves out in order to get a single collective procedure fitting into the national laws, adopted by all the States of the Community concerning the whole body of the law and particularly that on obligations and on companies. Furthermore we would not have been able to restrict ourselves to bankruptcy in the strict sense, we should still have had to establish one or more procedures intended, like the "reglement judiciaire" and the arrangement or composition, to ensure, under legal supervision, that the claims of creditors are met, whilst at the same time facilitating the survival of the undertaking.

Now, from all sides, we are urged to succeed.

However, this task, from which we retreated, must be viewed parallel to an approximation if not a unification of patrimonial law. This will be work for the future. Let us only hope that the necessary work, benefiting from developments already made, will finally quicken as is said of the course of history.

For the moment, it is the measures laid down in each State which will continue to be taken by the national courts. It is the local law

which will continue, barring derogation, to define the cases for opening and the effects of the bankruptcy just as it determines the procedure to be followed. As a basic rule therefore the law on bankruptcy is applied with its own system of conflicts.

But this simple and, from a theoretical point of view, normal solution would be bound to cause many serious difficulties.

We had to guarantee the security of transactions and to make it so that "foreign" bankruptcies fit smoothly into each national system. We also had to avoid alarming disparities. The law on bankruptcy will depend on the court which has jurisdiction. Now the rules of jurisdiction cannot preclude a degree of uncertainty. Let us imagine the case where an undertaking has its centre of administration outside the Community and establishments in more than one country of the Community. Let us also consider the transfer of the centre. Steps had to be taken to avoid the rights of creditors and third parties being subject to these risks. Two solutions were open to us.

To lay down rules of conflict in order to arrive at comparable solutions. Where the basic law differed too much, to unify the legislation by means of uniform laws. Mr. LEMONTEY will present these to you. I will only say that these form a vital part of our draft and that if, in the end, they were not to be accepted at least in their essential form by all the Member States, the concluding of a convention would seem to me to be greatly jeopardised.

In order to assess the effect of these new provisions, whether in regard to jurisdiction and rules of conflict and not only to common laws, one must not fail to appreciate the real scope of the draft. Our text is in no way restricted to bankruptcies having possible international implications. It will apply to all bankruptcies. At the outset, it is not always

possible, far from it, to know whether an international aspect will arise: assets, creditors, persons having entered into a contract with the debtor. There was no question of creating two types of bankruptcy, the bankruptcy for domestic use and the exportable bankruptcy. It would, indeed, have been unreasonable to alter the applicable law because of the appearance of originally unknown elements and to submit the same bankruptcy to two successive sets of regulations.

Opening of the bankruptcy

With regard to the circumstances necessary for opening a bankruptcy, our respective laws are fairly close and the case law solutions sufficiently similar for the application of the local law to be acceptable. Nevertheless we had to concern ourselves with non-traders and "piccoli imprenditori" who in some countries are not subject to collective proceedings and remain dependent upon the unorganised system of insolvency.

Effects of the bankruptcy

The cessation of the debtor's power to deal with his property, the staying of process by individual creditors which are the essential part of the bankruptcy did not present any difficulties worthy of note other than to mention the problem posed by the German law under which future assets do not form part of the assets of the bankruptcy.

I shall say no more about the powers of the authorities administering the bankruptcy nor of the forms of realisation and (shall limit) on this chapter my remarks to the effects of the bankruptcy as against creditors and third parties.

Advertisement

In our various countries, bankruptcy immediately produces an erga omnes effect - as soon as it is declared it is reckoned to be known. Could

this presumption, which is not everywhere absolute, be extended without safeguards to the territories of Member States other than that of the place where the bankruptcy was opened? The Committee of Experts decided that it was necessary to protect bona fide third parties. An advertisement, still optional, in the Official Journal of the Communities will inform them. Acts done by them before the expiry of a period running from the date of publication will remain valid as against the general body of creditors. Unless the third parties knew or ought reasonably to have known of the bankruptcy.

This is obviously a complication and may prejudice the effectiveness of bankruptcies. But it was not thought acceptable to expose third parties to undue shocks.

A single bankruptcy - realisation of the assets - distribution among all the recognised creditors: fine aims and much progress.

Only, things are not so simple and our Committee found itself confronted by the formidable, some said insoluble problem of preferential rights. General preferences, secured rights and special preferences, which includes the legal mortgage of the married woman or of the married couple, qualification, subject-matter, extent, ranking.

It quickly became apparent that on these various points the law on bankruptcy could not be applied.

We started from three observations:

- In the case of secured rights and special preferences - and we could take the existing doctrine and case law as our base, it seemed impossible not to apply the law of the place where the property is situated.

- Some general preferences - such as those of the Revenue authorities are not exportable as our laws stand. They are only imposed on assets located in the national territory.

- A ranking could not be established from several laws.

From this we therefore arrived logically at a general application of the law of the place where the property is situated. This was, after all, to retain the present solutions, but by an appreciable infringement of the principle of applying the lex fori and also, to a certian extent, of the unity of the bankruptcy. A very limited infringement admittedly, only affecting the distribution of the assets but an undeniable complication. We have created (I was going to say quite simply) fictitious local assets-pools for calculation purposes. After determination of the assets in each of the national territories, we propose to bring the national laws into play to determine the preferences to be adopted, and whether they are special or general preferences, to fix the subject-matter and the extent and to undertake their ranking. We then considered methods of distribution in those cases, which will be normal, where the same preference exists in various countries for differing amounts. I do not wish to dwell on these methods of distribution which we are to review.

To get back to the principles - which will no doubt be of greatest interest to you - it is worth pointing out that the dreditors benefiting from a general preference will be able, where that preference is not strictly territorial in nature, to invoke in each local assets-pool the preference laid down by the national law without that leading however to their being granted more than the maximum guaranteed by the most generous law. This will apply for paid workers who, in each local assets-pool will benefit from the general preference established by the local law. This

is one result worthy of note.

Of course, these provisions on preferences which I have drawn attention to have not awakened the enthusiasms of our Committee and I may say that we have none of the love befitting authors. There as elsewhere, we remain open to any suggestion. But so far, if I leave out the field of methods of distrubution with regard to preferences which apply under several local assets-pools, we have received no constructive criticism. We are still askers.

Current Contracts

Escaping now from the bleak field of preferences, and in order not to miss out too much, I shall examine, very briefly, some aspects of the effects of the bankruptcy on current contracts.

With regard to the contract of employment, we agreed, mainly for social reasons, not to apply the local bankruptcy law, but the law governing the contract. It is the latter, in its provisions relating to bankruptcy, if they exist or failing which in its common law provisions, which will state whether and how the liquidator may terminate the contract and the wages and allowances which he is to pay out. The law on bankruptcy will again become applicable, as such, only where the law governing the contract of employment is not that of a Contracting State.

IMMOVEABLE PROPERTY

In the case of leases of immovable property and leases of hiring of moveable property which is required to be registered, we bring into play, at any rate in order to determine the effects of the bankruptcy, the law of the place where the property is situated.

Although this solution may have seemed questionable in the case of property which is required to be registered, for immovable property, the regulations on leases of rural property and those relating to premises for professional use of habitation are too closely connected with public policy and too tightly bound up with the real status to be rules other than in accordance with the provisions of the local law.

It seems to be the same with the effects of the bankruptcy on sales of immoveable property although this point is not explicitly stated in the draft.

With regard to sales of moveable property we adopted an original solution by making a distinction between whether the sales was concluded with the centre of administration or with a branch. In the first case the law of the place where the centre is located, in effect the bankruptcy law, will apply.. In the second case, the law relating to the establishment will apply, even if the bankruptcy has been opened in another country. This solution for which some delegations showed a particular preference is indicative of the desire to guarantee the security of transactions, it being possible for the contracting parties to envisage the consequences of any bankruptcy.

If the sale was concluded with a centre of administration or a branch situated outside the Community, the law on bankruptcy again takes effect.

I would add that Mr Lemontey will also have something to say to you about the effects of bankruptcy on contracts of sale.

Recognition and Enforcement of Judgements

Ladies and Gentleman, in the last part of this expose I shall quickly go over the proposed solutions for the recognition and enforcement of bankruptcy judgements without touching on the recognition of judgements given in bankruptcy cases - by way, for example, of the vis attractiva concursus -. judgements for which the proposed regulations were very seriously brought into question and which it was proposed should be submitted to the general convention.

According to our draft, bankruptcy judgements, and by this we mean those opening proceedings whether it is an actual bankruptcy or a comparable process, together with those given in the course of the proceedings - an approval of an arrangement for example, all these

judgements are recognised and take full legal effect - without any formality and therefore without "exequatur."

This is, at least in its substance, an innovation with seemed to us desirable.

We had at all costs to avoid idle time. The debtor, whose bankruptcy is opened in one Member State, must not be given freedom to exercise his ingenuity in the other countries, to conceal his assets there or to create fresh liabilities. Many third parties, too among those who happen to be informed, would be sorely tempted.

Besides against whom should the judgement be enforced? The debtor may be indifferent or may contest systematically. The third parties concerned? A series of costly and time-consuming actions would be necessary. Infringement of the unity of the bankruptcy might be flagrant.

What else is there to be examined?

- Observance of the rules of jurisdiction? We attempted to lay down detailed regulations allowing this supervision, also excluded by the general convention, to be set aside. Their eventual repudiation would give rise to the proceedings laid down by the local law . Which is sufficient.

- That the decision is well founded? Basic rehearing is also rejected by the general convention which in this follows the modern doctrine. In a convention which advocates full mutual confidence in the laws and courts of other signatory States, the solution is forced upon us. The only remaining alternative was the violation of the rights of defence and the infringement of the public policy of the country where the bankruptcy is being challenged We thought that the possibility of bringing an action to challenge the bankruptcy would constitute a perhaps necessary but in any event sufficient safeguard.