Preliminary Meeting of the EEC Bankruptcy Convention Advisory Committee

Held on Monday 13th August, 1973 at 2.30 pm at Gavrelle House - 2-14 Bunhill Row, London EC1.

Present: K R Cork (Chairman)
P H Armour
C L Dodd
M Hunter
T H Traylor (Secretary)

In attendance:
C A Taylor (Inspector General, Bankruptcy and Companies Liquidation)
E G Harper (Deputy Inspector General)
W Armstrong (Principal Bankruptcy Clerk)

Mr Taylor gave a summary of events leading to the setting up of the Advisory Committee and explained its terms of reference. He indicated that there was already a big measure of agreement, albeit with certain reservations, between the original six EEC members and we were faced, therefore, with some degree of unanimity. Mr Taylor also explained that in addition to advising the DTI, the Committee's task would be in the nature of a public relations exercise, bringing material parts of the Convention to the attention of various interested organisations and obtaining their views. In this connection he was setting up a working party within the Civil Service in parallel with the Advisory Committee, to discuss the Convention with such departments as the Board of Inland Revenue.

2. There followed a general discussion, from which the following points of agreement emerged:-

(1) The Committee would aim to meet once a month initially and it was hoped that a regular day each month could be agreed (such as "the last Thursday of each month"). Hours would be from 1000 to 1300 and from 1415 to 1600.

(2) A member unable to attend a particular meeting should consider sending a substitute with any papers which might be required at that meeting.

(3) The Conference Room in Gavrelle House was considered suitable for the Committee's meetings, including those at which representatives of interested organisations were being interviewed.

(4) There was no objection to the electronic recording of the Committee's proceedings for the purposes of the compilation of records and of the subsequent Report, supplemented when necessary by a verbatim writer, such as when evidence was being taken from representatives of interested organisations.

(5) A draft programme for the following meeting would be agreed before the close of each meeting.

(6) No time scale had been set but it was anticipated that the task confronting the Committee would take about a year to complete.

(7) It was left to the Chairman and Secretary to write to a small number of organisations who will be particularly interested in the Convention and who may wish to set up their own internal working parties to consider it, before giving evidence to the Committee. A full list of other organisations to be approached and method(s) of approach will be considered at the next meeting.

(8) Any changes in the Convention or in its interpretation by other EEC States which came to the attention of the Inspector General would be passed on to the Committee.

(9) The Chairman asked that members read through the Convention, Mr Muir Hunter's Opinion and associated papers, and prepare schedules of important items requiring discussion; schedules to include any items thought to have been omitted from the Convention. The Schedules should be sent to the

Secretary by not later than 14th September 1973 so that a consolidated schedule could be prepared for the next meeting.

(10) It was envisaged that the following matters would be considered at the next meeting:-

(a) The scope of the Convention and the principle of 'Unity and Universality' (Convention, Articles 1 and 2).

(b) Any major difficulties with regard to Scottish law affecting (a) above.

(c) The consolidated schedule of important points, referred to in (9) above.

(d) A list of organisations to be approached and the method of approach.

3. The next meeting, being the first formal meeting of the Committee, will be held in the Conference Room, 2nd Floor, Gavrelle House, 2-14 Bunhill Row, London EC1, at 1000 on Thursday, 27th September 1973.

T H TRAYLOR

Secretary

10(45) 186

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the First Meeting held at Gavrelle House on 27th September, 1973

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

1. The Chairman opened the meeting by referring to the Committee's terms of reference and stressing the public relations aspect of the task; it was essential that various interested associations and other bodies should feel that they had been given a fair hearing even if the Committee did not agree with their views or adopt their ideas. The Committee would have to see a lot of people, some of whom might have little useful to say and this might be time-wasting, but it would be best to give them the opportunity of saying what they wanted to say. Northern Ireland was not represented on the Committee but the Chairman said that he went to Belfast once a month, he had already talked with Mr. Registrar Hunter and agreed to keep him informed, obtain his views, etc.; further, it had been agreed that Mr. Registrar Hunter would attend any meeting at which matters on which he had strong views were being discussed.

2. The Secretary reported that the Inspector General and members of his staff had been to Brussels last week to discuss, inter alia, the English translation of the draft Convention; secondly, that an inter-departmental Working Party had been set up under the chairmanship of the Inspector General, of officials from departments interested in the Bankruptcy Convention.

3. The Chairman questioned whether the setting up of the Working Party meant that the Committee would be unable to deal direct with such as the Inland Revenue, DHSS, etc. to seek their views and to invite their representatives to attend before the Committee. Both he and other members indicated they considered it essential that the Committee receive such views at first hand and be able to question departmental representatives. The Secretary was asked to confirm that the Committee had a free hand in this matter.

ACTION SECRETARY X

4. The Committee considered a draft list of organisations to be approached for their views on the Convention, which had been prepared by the Secretary. The Chairman asked whether the British Bankers Association included merchant bankers and Mr Muir Hunter said that those parts of the draft Convention which dealt with such as Bills of Exchange regulations were quite complex and it was likely that the merchant banks would have strong views and be able to help the Committee; he thought there was an association called Inter Bank Research. The Secretary was asked to make enquiries about this and also to enquire of the B B A as to whether they covered other than the clearing banks.

ACTION SECRETARY

5. Mr Anton suggested that the following be approached for their views:-

British Insurers European Committee
Finance Houses Association
H.P.Trade Association
Issuing Houses Association
London Discount Market Association
Committee of London Clearing Bankers
Committee of Scottish Clearing Bankers
National Association of Moneylenders
Accountant of the Court
? Scottish Courts Administration
? Lord President of the Court of Session (Courtesy letter only)
Faculty of Advocates
Royal Faculty of Procurators in Glasgow
Society of Writers to the Signet
Sheriffs' Association

6. The Chairman thought that since the Sheriffs were akin to the Cour Court Registrars, approaching their association might be unnecessary. He also felt that we might approach a number of the bodies along the lines..."should you have any suggestions..." whereas those from whom we wanted views on speci points would be asked to "please submit...".

7. Mr Dodd suggested inclusion of the Retail Consortium, and Mr Arm referred to the Group of Accountants set up under Mr R W Hellyer to consider insolvency matters. Mr Armour also pointed out that the Stock Exchanges were now merged under the Combined Committee of Stock Exchanges of Great Britain, address London Stock Exchange.

8. The question of approaching individual banks was considered; the Chairman said that some banks, notably the Midland Bank, had legal departme in which insolvency matters were under active consideration. Mr Avis felt t the B B A would certainly approach such as Mr F.Ryder of the Midland Bank f

appropriate system to govern this matter is the proper law of the trust, rather than bankruptcy law. This reasoning might be extended to the special case of alimentary provision: in Scotland only the excess over a reasonable aliment falls into the bankrupt estate - 1913 Act, s. 98. It is arguable that the validity of this provision is for the law of the trust rather than the law of the bankruptcy. The Convention attempts, though with a number of exceptions, to secure that the effect of bankruptcy upon a variety of contracts is governed by the law of bankruptcy. This is true, for example, of the contract of sale where the relevant law, if the contract was not concluded with a business establishment of the bankrupt, is the law of the bankruptcy. Clearly this could operate hardship in relation to a party who has contracted with a view to another system of law. It has been held in England that a foreign composition contract does not discharge a contract unless it operates as a discharge under the proper law of the contract (See New Zealand Loan and Mercantile Agency Co. v. Morrison (1898) A.C.349; Re Nelson (1918) 1 K.B.459; Cf. Gibb & Son v. Société Industrielle et Commerciale des Metaux (1890) 25 Q.B.D.399). Article 39 (2) which provides for clauses deferring of the passing of property in contracts of sale to be governed by the law of the State of the bankruptcy is tolerable only because a provision immediately follows for a uniform substantive rule permitting such clauses.

(c) Per article 17 - claims as to the invalidity of certain transactions carried out by the debtor during the period of relation back - even where such transactions relate to immoveables - shall be adjudicated upon only by the courts of the State of bankruptcy. This provision becomes workable only because and to the extent that article 35 and articles 4 and 5 of Annex I provide a species of uniform law relating to the effect of what we would call gratuitous alienations and fraudulent preferences. In at least one respect, however, no uniform law is created. Article 34(2) provides that the law of the state of the bankruptcy proceedings shall determine to what extent benefits conferred by matrimonial status and gifts between spouses are valid as against the general body of creditors. I suspect that this provision might cut right through the new and growing body of matrimonial property law in England.

(d) Creditors in this country could not effectively participate in the administration of a foreign administration. The rules relating to the meetings of creditors in England and Scotland pre-suppose that creditors who are really interested can attend in person or by proxy. In relation to a foreign administration with similar rules such participation would be so expensive as to be impracticable. Though the business domicile of a debtor may be abroad the majority in number and value of his creditors may be in this country, and decisions in the foreign proceedings might not effectively reflect the views of the majority.

(e) Although it may not be insuperably difficult for creditors in this country to submit claims to a foreign liquidator, it may be very difficult for him to

adjudicate upon them adequately.The creditor may write an ordinary letter in his own language to the authorities of the state of liquidation, who are to provide a translation; but the supporting documents would also require to be translated, and experience shows that translations are not always happy. The liquidator, moreover, may not be able to understand adequately the legal basis of the claim, and to appreciate, for example, that it may have prescribed or otherwise be unmaintainable under its proper law. As if in recognition of this difficulty and in an effort to simplify the liquidator's task, the Convention in several cases provides that the law to be applied to the proof of certain debts is not their proper law, but the law of the state of the liquidation. This may be a natural consequence of the application of the principles of unity and universality but clearly may lead to hardship in individual cases.

(f) Still more serious, it would appear that questions relating to the admission of preferred debts and secured debts are to be determined by the liquidator, or, if his views are disputed, by the courts of the state of the bankruptcy under article 17(5). An exception is made for taxes, social security debts, and contracts of employment. Even with this necessary exception the provision seems unrealistic. How is a liquidator or court unaccustomed to English or Scottish legal concepts adequately to determine in complicated cases the relative priority of secured rights in English or Scots law? The proposal is even more questionable when it is remembered that in European systems foreign law is treated as a question of law and not of fact to be proved by evidence. Experience shows that such determinations are often misguided.

(g) Again in perfect harmony with the principle of unity and universality the liquidator is empowered by article 28(1) to exercise within the territories of all contracting States the powers conferred upon him by the law of the state of bankruptcy. This seems unrealistic. Article 32(1) for example, empowers the liquidator to take without further authority those protective measures and disposals authorised by that law. An important protective measure in France is the 'saisie provisoire' under which assets in dispute may be frozen to prevent the holder divesting himself of them. We have analogous remedies in Scotland including inhibitions and arrestment on the dependence, but I understand there is no real analogue in England. For this reason, the European Judgments Convention admits the extension only of such orders for protective measures as are competent under the law of the country where it is sought to enforce them (Art. 24). In the negotiations on that Convention we are to attempt to make it clear that our courts would exercise a discretion whether or not to enforce foreign orders for protective measures. It is surely unrealistic to seek to go further in the context of the bankruptcy Convention.

(h) In general, however, the Committee must consider whether they accept that

a liquidator should exercise in England or in Scotland under article 28 all the powers he possesses under the law of the state of bankruptcy. Supposing that the foreign system authorised - as the Working Party on Bankruptcy appointed by the Scottish Law Commission suggested a trustee in bankruptcy should be authorised - the liquidator to cite and examine without court order the wife and employees of the bankrupt. Would this be acceptable in England? I doubt it - as, I understand, does the Insolvency Service of the D.T.I.

13. Mr Anton went on to say that although the Convention professes to be based upon the principles of unity and universality, it constantly derogates from them at points where their application would lead to unmacceptable results or glaring anomalies. Illustrations were as follows:-

(a) Art. 9(1) and (2) in relation to persons who may not be rendered bankrupt either because th y are small traders or not traders at all.

(b) Arts. 13 and 14 in cases where the law of the bankruptcy does not admit the bankruptcy of partners or directors or managers.

(c) Art. 17 (8) in relation to the admission of taxes, social security debts and debts arising from contracts of employment.

(d) Art. 16 (9) re: the termination of contracts of employment and leases of immoveables.

(e) Art. 21 (2) re: the suspension of actions where a judgment has already been given on the merits.

(f) Art. 27 re: the effect of bankruptcy on property subject to registration.

(g) Art. 33 (3) re: certain property which by the lex situs is excluded from the assets taken over.

(h) Art. 36 re: the effect of bankruptcy on contracts of employment.

(i) Art. 37 (1) (2) re: leases of immoveables, moveables subject to registration and franchises or licenses relating to industrial property rights.

(j) Arts. 40 and 48 re: general rights of preference.

(k) Art. 42 re: debts other than civil and commercial debts.

(l) Arts. 43 and 48 re: secured rights, possessory liens,etc.

(m) Art. 47 re: disqualifications and prefectures.

(n) Art. 56 re: the application of rules of natural justice, public policy,etc.

(o) Art.56(c) re: the conditions for institution of bankruptcy proceedings. Arts. 8,9 and 56 (c) raise a number of problems which require careful consideration.

(p) Art. 60 which provides for territorial bankruptcies after impeachment under art. 56.

Mr Anton thought that these derogations and exceptions from the principles of unity and universality did not succeed in making the Convention a workable one; rather they pointed unmistakably to the need to consider the appropriateness of the principles.

NOTE BY SECRETARY.... Mr Anton has since informed me that he was working from a 1970 translation of the Convention, and that some of the above remarks may no longer be applicable in the light of the 1973 translation.

14. Mr Dodd said that he had a certain amount of sympathy with the principle of unity of bankruptcy but he could see difficulties in operating under the draft Convention. He objected strongly to the position where, because the principal place of business was outside this country, but irrespective of everything else, the bankruptcy would be under the law of some other state. He felt that uniformity should be designed as far as possible to bring together the laws of, say, France and this country.

15. Mr Avis could see many problems for practical bankers re: creditors in a foreign bankruptcy. But having entered the Common Market, could we now opt out of a bankruptcy convention? If not, then somehow we have to become a part of i

Mr Armour said that he had little to add after Mr Anton, but personally, he saw it as a question of size and by far the majority of bankruptcies were medium or small.

16. Mr Muir Hunter pointed out that the new translation altered the sense of some of the clauses in the Convention, but he wished to make three points:-

(i) This is a political consequence of joining the Common Market and it is up to the Minister to decide on whether there is to be a bankruptcy convention.

(ii) Must there not be common rules for business failures? (reference the note to Memo 9 of the 'Muir Hunter Opinion')

(iii) Ofcourse there are sacrifices to be made - all have something to give and something to gain. There are not many big international insolvencies, but many with foreign-based assets and claims, and we in this country had the most civilised approach; the present system in the Community is much worse than will be the case under the Convention. So really it is a case of comparing what is going to happen under the Convention with the existing jungle of liquidations in Europe.

17. The Chairman agreed that Mr Anton had made out a case against the Convention, but did not think he had made a case for anything in place of it. The present system is chaos and impossible. 99% bankruptcies have both the creditors and assets in situ, so the existing system goes on in so far as they are concerned, and 1% are multi-national. Of the latter about half are basically in this country and half are where the creditors and/or the assets are not in this country and in these, under the present system, our creditors often seem to have no rights. In the ½% where the assets are abroad, more often than not there is a debenture, and a foreign receiver pays out the preferentials - say under Dutch law - and creditors in England and probably also in Scotland, are always on a loser. But, said the Chairman, the Convention would help and therefore he would prefer the Convention, even in its present form if we could not amend it, to the existing position. Having entered the Common Market we want to encourage trading and this will be helped by re-assuring traders on their position re the recovery of foreign debts. The arguements against the Convention are in respect of the relatively small number of multi-national bankruptcies - the occasional ones.

18. Mr Anton replied that he agreed with the views of the Chairman and Mr Muir Hunter. He wanted to see a Bankruptcy Convention and could see the practical need for it. But the problem was not one of comparing the present Convention with the present position; we want the most efficient Convention as it will be with us for a long time. He thought we should develop a scheme from a different starting point as opposed to the principle of unity and universality - though this was not within the Committee's existing terms of reference. He pointed out that there was no legal requirement to enter this Convention and he felt, therefore, that we should re-negotiate with the original six for the convention we want - harmonisation of judicial law, harmonisation of classes and harmonisation of the definitive laws of practical bankruptcy plus the rules of relation back . He thought we should first deal with the question of a judicial administrator to determine if a person was in a state of overall bankruptcy. Then we should consider small trader problems. We should so design a Convention as to start from the concept of overall equality of creditors, no matter where they be.

19. Mr Avis agreed with the Chairman's remarks about 'the 99%', but wondered whether the ratios would change with the growth of companies across international barriers. Mr Dodd said that there should be no question of condemning the draft Convention willy nilly; he agreed with the principle of uniformity; he agreed that the Committee's job was to seek to improve the draft Convention. Mr Armour agreed with Mr Dodd. Mr Muir Hunter agreed that the two draughtsmen of the draft Convention were indeed French but pointed

out that all those concerned with the draft were bankruptcy experts. The doctrine of plurality presented great difficulties; also a judicial administrator could result in unacceptable delays in proceedings. Something was required which would strike immediately in all countries and so prevent the movement of assets, etc.

20. The Chairman said that he too, would like to start again drawing up a new draft Convention, but this was not practicable. The Six had been talking a long time and we would have to talk with them - they having reached some measure of agreement - say for another ten or twelve years, and in the meantime we would be left with the present law of the jungle. He would like to accept the basic principles of the draft and put in strong representations on those points we really wanted to change. Then at least a trustee would have a chance of getting at assets abroad, and creditors would get a fair hearing. At present foreign creditors have no difficulty in being represented in this country but British creditors often had much difficulty abroad. He therefore hoped that the Committee would agree to the draft Convention as a working basis, and he proposed to take a decision immediately after lunch.

21. Before adjourning for lunch, the question of deputies was considered and it was agreed that members might have a deputy to sit in at meetings of the Committee, to assist in continuity for example by producing documents on behalf of a principal member who was unavoidably absent.

22. Mr Muir Hunter raised the question of small traders and suggested we write to the National Association for the Protection of Trade to enquire if they represented foreign creditors and if they envisaged setting up a foreign section. He also gave details of the Conference of the Business Law Section of the International Bar Association to be held in London beginning 5th November, which is devoting two days to study of the draft Convention. He would arrange for an official invitation to be sent so that members of the Committee who wished to do so could attend.

Lunch.

23. The Chairman referred to the discussions during the forenoon on the overall principle of unity of bankruptcy and put to the Committee -do you consider that we should go through the draft Convention on the basis of not proposing too great an amendment but perhaps making strong recommendations about major items which need to be changed, or on the basis that the draft is not viable as a basis on which the law can be framed?

24. Mr Dodd said that he was convinced that we would be unable to alter the draft of the Convention drastically; he accepted the advantages put forward by the Chairman and Mr Muir Hunter and thought that we would have to accept the draft and then consider to what extent we must recommend its alteration. Mr Anton agreed that the Committee should examine the draft Convention on the basis of acceptance but without prejudice to a final decision. Mr Avis said the draft should be accepted as a basis for building up the Convention we wanted. Mr Armour agreed that the draft should be accepted as a basis. Mr Muir Hunter also agreed, but added that he was impressed by Mr Anton's criticisms and thought that at some stage we should look at them and try to find answers, as he anticipated we would be getting such criticisms from some of the consultees. The Chairman agreed and said that as we were all agreed on the basis on which to deal with the draft Convention, the Committee would now consider Article 1 and what bankruptcy proceedings should be specified in Articles 1 (a) and (b) of the protocol.

25. The Secretary said that it might help the Committee if he pointed out that there appear to be three basic requirements for proceedings to come within the scope of the Convention, namely, a proceeding -

must commence with a declaration by a court,
must relate only to insolvent debtors, partnerships or companies, and
must be subject to the provisions of the proposed Uniform Law.

26. The Chairman said that it was necessary to consider the question of Voluntary Liquidations; he could foresee difficulties in the protection of assets abroad if they were not included in the Convention, and it might become necessary to transfer such liquidations into compulsory liquidation. There might be some difficulty in differentiating between members and creditors liquidations, but it seemed inconceivable that creditors' voluntary liquidations should be excluded from the Convention. Mr Dodd tended to think that creditors' voluntary liquidations came within the scope of the Convention but members' liquidations were not really applicable. Mr Muir Hunter said it would be necessary to enrol the resolution for winding-up into an Order of Court; it should be the job of the liquidator to get an ex parte Order and this should not prove too difficult. It could be that our recommendation should be to the effect that a Court must enrol such a resolution - Article 62 (2) was an example of such a proceeding. There might be a problem where, for example, members of a company passed a resolution in this Country but the centre d'affaires was in France. He had discussed this problem in Memo 1 to his Opinion.

cf. winding up under supervision

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of Seventh Meeting, held at Gavrelle House on 18 March, 1974

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: C J Jenkins (Midland Bank)

REPORT OF THE SIXTH MEETING

1. Amendments to the text: paragraph 5, line 4: "but for" should read "apart from"
paragraph 9, line 2 should read "Sheriff's officer".
paragraph 21, line 4 should read "heritable property"

2. Mr Anton said he was not sure that the conclusion to paragraph 21 was accurate as he thought it premature to say that the article was acceptable generally, and he had a similar comment to make about Article 30. He recalled that at one of the Committee's earliest meetings he had pointed to the difficulties presented to creditors who resided in one State making claims in another, particularly in regard to the adequate translation of supporting documents. The Chairman said he thought the Committee had taken Mr Anton's points into account but had decided that they would not present too great a problem, and Mr Muir Hunter added that the article did not change the present practice. Mr Anton said that in the context of the system of the Convention, he found Article 30 entirely satisfactory; his point was that if there was a system of local bankruptcies, such as he had proposed at the first meeting, then translation problems would not arise.

3. There was a further discussion regarding amendments to the translation of th text of the draft Convention. (For previous discussion, see paragraph 3 of the

Fourth Meeting). The Chairman said that note would be taken of translation amendments as each article was considered, to see if the amendments suited the Committee's requirements; there would be a review of all amendments when the preliminary consideration of the Convention was completed.

SECRETARY'S REPORT

4. The Secretary reported that a memorandum of views on the draft Convention had been received from the Association of British Chambers of Commerce and a report had been received from the British Insurers' European Committee on the effects of Article 19(2). Copies would be sent to members.

ARTICLE 32

4. Mr Anton said that the key phrase in section 1 was the French expression "sans autre formalité" - 'without other formality', which meant without any approval other than that of the law or authorities of the State of the bankruptcy; this was contrary to normal international practice as it implied that the liquidator could take any protective measures which were open to him under the law of the State of the bankruptcy, without reference to the law of the State in which the protective measures were being taken. Mr Anton added that in every Convention for the execution of judgments of which he was aware, protective measures were always those of the Country in which they were being taken. Section (2) of the article did not help on this point as it was fundamental that an authority from another State could not be allowed to take measures which were unknown, or perhaps even prohibited in the State in which he was endeavouring to protect assets. Section (2) only related to a particular form of realisation.

5. In agreeing with Mr Anton, Mr Muir Hunter referred to page 99 of the N-L Report which indicated that the lex situs would determine the local procedure to which it would be necessary to have recourse, and he said that the Convention did not appear to carry out the intentions given in the Report. The Chairman said it seemed that the principle of the law of the State of the bankruptcy should apply, but that it could only be put into effect through the appropriate methods of the country in which the asset was to be found. There followed discussion on how best this might be made clear within Article 32,

and Mr Anton suggested it might be sufficient simply to state the principle which should apply and not to go into the re-draft of the article; this was agreed.

6. Referring to 32(3), Mr Anton said it would be appreciated that he had reservations about this section, which was in line with the basic principles of 32(1); other members had no comments to make on this section apart from disagreeing with the French proposal to include the words 'if there is urgency' in the first sentence of the section. Mr Dodd took the view, supported by Mr Anton, that such a phrase would place an unacceptable restriction upon an applicant and should be resisted.

ARTICLE 33

7. Mr Anton asked for it to be noted that he thought the basic principle of this article was unsatisfactory and he did not think that a Convention based on this principle was the best way of tackling the problems presented by European bankruptcies. He also thought it strange that the article was limited to assets situated in the contracting States; under Scots law the effect of the bankruptcy applied to assets wherever situated. The Chairman said the restriction was probably because the Convention only applied to contracting States, but he thought it might present difficulties to a liquidator who was trying to recover assets in a non contracting State. Both Mr Avis and Mr Dodd expressed misgivings about any amendment of 33(1) to refer to non-contracting States: in particular because a reference to non-contracting States in this article would necessitate a similar reference in every other article in the Convention which might involve a non-contracting State: the liquidator's rights of recovery in non-contracting States were dealt with by the internal laws of the States concerned. The Chairman said that at this stage we would only put down a note, for our own reference, to the effect that the article must not be allowed to diminish a liquidator's powers.

8. Referring to 33(2) Mr Muir Hunter remarked that under German law, a bankrupt was not dispossessed of after-acquired property, but it appeared from the N-L Report that the German delegation were in agreement that the law of the State of the bankruptcy would prevail; this would cause anomalies, depending upon whether the bankruptcy was opened in Germany or in one of the other States.

The Chairman said he was concerned about the effect of a second bankruptcy and Mr Anton said that so far as he could see the Convention did not deal with this problem, or adequately with the question of discharge from bankruptcy. The Chairman suggested a note be made that 33(2) should not be utilised to deprive a second lot of creditors of their assets.

9. Mr Anton raised the question of non vested contingent rights and said that the Committee reviewing Scots bankruptcy law was inclined to the view that such interests should not fall wit in the bankruptcy. Mr Muir Hunter said he was unable to express an opinion as to the present position on the Continent but it appeared from this article that such interests might be excluded on two counts - either by the law of the State of the bankruptcy (33(2)), or by the lex situs (33(3)). He suggested that the committee's note on 33(2) should respectfully deplore the exclusion in a certain State of the principle of after acquired property. The Chairman said he was worried about the possibility of a second lot of creditors losing the right to their assets; after further discussion it was agreed to note:-

(1) All States should comply with the principle of after-acquired property.

(2) The creditors in second bankruptcies should not be deprived of their assets.

(3) There should be provisions regarding discharge.

ARTICLE 34

10. Mr Muir Hunter said he was troubled by the expression "If the law presumes" in section (1): did it mean the law of the debtor, or of the State of the bankruptcy or of the matrimonial regime? Mr Anton said that there was a drafting inconsistency because section (2) specifically referred to the law of the State of the bankruptcy. The Chairman asked for it to be noted that the committee assumed 34(1) referred to the law of the State of the bankruptcy.

(Note by Secretary:- Is it possible that the phrase is deliberate because the proper law will depend upon the type of property involved?)

11. Mr Anton said that there appeared to be no reasons for objecting to 34(1) and Uniform Law Article 3, and this was agreed.

12. Mr Anton then continued that he did have reservations about 34(2) because "Les avantages matrimoniaux" was not the same as marriage property agreements in English law - it had a much wider meaning, referring to the benefit which a spouse might acquire either by a marriage property agreement, by a matrimonial regime implied by law or, more commonly in this context, simply a gift in the course of marriage. He agreed that it was difficult to decide whether it should be for the law governing the matrimonial regime or the law of the bankruptcy to determine the validity against creditors of liberalities between spouses but, where the gift was one of immovable property, the lex situs should determine its validity. Mr Dodd agreed that this was certainly essential from a conveyancing viewpoint.

13. Mr Muir Hunter said it appeared necessary to get a clear understanding of what was meant by "les avantages matrimoniaux" in the context of the Convention because the text of 34(2) also included the phrase "les libéralités entre époux" which he understood to refer to gifts between spouses. This latter part could be compared with s.42 of the B.A.1914, but property passing in consideration of marriage was protected under English law, unless the marriage was a conspiracy to defraud creditors. It therefore seemed that to strike down 'les avantages matrimoniaux' in the event of a bankruptcy within 2 years would be a considerable departure from English law.

14. Mr Anton also referred to the Married Woman's Policies of Assurance (Scotland) Act,1880, which enabled a man to effect a policy on his own life for the benefit of his wife and children - both the policy and its proceeds were excluded from the diligence of the man's creditors, subject to certain limitations; it seemed that 34(2) might enable the law of the State of the bankruptcy to ignore the terms of this Act. Mr Muir Hunter said similar conditions prevailed in England under the Married Woman's Property Act and he would not wish to see its provisions eroded by the Convention. After further discussion the Chairman asked for it to be noted that (1) the lex situs should apply as regards immovable property and (2) the proper law of the contract of insurance should apply in the case of life policies effected for the benefit of a spouse and/or children.

ARTICLE 35

15. Mr Anton asked for consideration of Uniform Law Articles 4 and 5 to be deferred; the committee reviewing Scots bankruptcy law had been considering these articles with regard to 'relation back' and had not finished their enquiries.

16. After reading both sections of the article, the committee agreed to accept Article 35 subject to examination of Uniform Law articles 4 and 5.

ARTICLE 36

17. Mr Anton said his only comment on this article related to the second section; he did not care for discrimination between contracting and non-contracting States as in his view, any discrimination in matters of Private International Law was likely to be counter productive; he considered that the proper law of the contract should apply in 36(2) as it did in 36(1). The Chairman thought that non national employees should be given the same protective rights as nationals but other members agreed with Mr Anton, and Mr Muir Hunter said he thought it would be quite wrong to interfere with express contractual rights; therefore if the law of a non-contracting State was expressed or implied then it should apply. The committee's view, therefore, was that Article 36 should simply relate to the proper law of the contract and not differentiate between contracting and non-contracting States.

ARTICLE 37

18. The Secretary said the article was now entitled 'Leases and Hiring' and the principle amendment resulting from meetings of the translation committee was in section (2) which now read, "The effects of the bankruptcy on contracts for the lease or hire of movable property which is required to be registered, inscribed or otherwise recorded shall be governed by the law of the contracting State in which the property is so recorded. The same shall apply to contracts for the granting of franchises or licences in respect of rights of industrial property".

19. Mr Muir Hunter drew attention to the English law of disclaimer of onerous property (s.54 B.A.1914 and s.323 C,A,1948). The Committee found 37(1) acceptable but asked for it to be noted that nothing should take away from the trustee or liquidator the right to disclaim onerous contracts. The Chairman said the whole question of onerous contracts would need to be looked at later in case other articles of the draft Convention were involved.

20. As regards 37(2) Mr Anton recalled that there was a huge movement of lorries across international frontiers in Europe and the view expressed in the Hague Traffic Accidents Convention was that the law of the registration of the motor vehicle should apply, rather than the law where the contract of leasing was made. He suggested that the Department's representatives should be asked to clarify the precise ambit of 37(2) and whether it was intended to include such as ships, aircraft and motor cars. Mr Dodd drew attention to the fact that the section referred to "Movable property required to be registered": what if someone had failed to carry out the registration? Mr Muir Hunter thought these might be caught by 37(3) but other members did not think this was the purpose of the latter section and indeed, after further discussion, the committee came to the conclusion that 37(2) should be governed by the law of the contract and that 37(3) was unnecessary and should be deleted. 37(4) was accepted.

ARTICLE 38

21. Mr Anton drew attention to a note he had prepared about the Common law choice of law rules on this subject and drawing attention to the extent to which this article differed from them. The article was applying a special rule to point to the law of the contract and he considered special choice of law rules in a matter of this kind were inappropriate in a Bankruptcy Convention. The EEC was presently negotiating a Convention on choice of law for contractual and non contractual obligations and there was no special rule in regard to contracts of sale in that Convention. Mr Muir Hunter did not feel that the article was too anomalous: it was simply saying that whichever party to the contract became bankrupt, then the law of his place of business would determine the effect of the bankruptcy upon the contract. Mr Anton agreed that it was not too anomalous, but added that the article was simplifying the task of the liquidator by establishing a special choice of

law rule limited to contracts of sale; this seemed wrong, particularly when different rules might point to a different system in relation to associated contracts of lease or hire. Mr Muir Hunter wondered if the authors of the Convention had considered the possibility of both vendor and purchaser being bankrupt; this signalled the time for lunch.

22. In reviewing 38(1) after lunch, the Chairman said that the majority of cases would relate to ordinary invoices for goods and the article was really saying that the applicable law would be that of the place where the business was conducted; it seemed simple and clearcut. The committee were generally in favour of accepting 38(1), but Mr Anton asked for a note to be made of his hesitation about possible difficulties presented by having specific rules for contract of sale and not having corresponding rules for associated contracts including service contracts connected with the contract of sale.

23. Mr Muir Hunter pointed out that, according to the N-L Report, 38(2) was in line with the Hague Convention; no objections were raised by the committee against this section.

ARTICLE 39

24. The Chairman cited an instance of a German firm exporting carpets to this Country whose invoices carried a notice that under its contract of sale, the carpets remained the property of the vendor until they were paid for; if such a system became widespread it would add to the difficulties of liquidators, as without stock they might be unable to continue businesses in order to effect better sales, and this could be detrimental to creditors generally. Mr Muir Hunter said that in addition to Germany, this form of contract was Italian law and also widely used in the French wine trade. He had drawn attention to the fact that it ran contrary to statutory provisions in this Country in his Opinion on the draft Convention; the effect of the Sale of Goods Act and the Factors Act in English law was that a vendor could not impose a restriction on the passing of property until he had been paid, in the absence of fraud or lack of bona fides; this would be changed if Article 39 - which was intended to be a Uniform Law - was accepted by the U.K.

25. Mr Anton thought the article would be unacceptable in its present form, and he questioned whether it would necessarily prevent goods being treated as the property of a bankrupt purchaser in this country having regard to s.38(c) of the B.A.1914, but the Chairman did not think s.38(c) referred to stock; normally, stock with a title had transferred to the debtor and therefore belonged to the trustee anyway. Mr Muir Hunter pointed out that reputed ownership did not apply to companies, was to some extent redundant and in any case was in no way equivalent to "Reserve de propriété". Mr Anton thought that the generality of Article 39 could enable the hirer of goods to avoid the whole effect of the protective provisions in our H.P. Acts; he considered the reference to the law of the bankruptcy as being applicable was objectionable and contrary to the general principles of Private International Law; further, the second sentence of 39(1) was stated in absolute terms of generalities, not said to be in the context of the law of bankruptcy. Mr Anton therefore thought that the views of the Department of Consumer Protection should be sought as to the suitability of the article.

26. Mr Muir Hunter said that he was strongly against acceptance of the article: firstly, in place of our complex protective system of H.P. law there would simply be a written memo made before delivery; such provisions as the 72 hour cooling off period would therefore be lost; secondly, this would mean the abolition of the Factors Act's protection of bona fide holders of goods which had not been paid for - there was complete incompatibility between the Continental credit system and our own; thirdly, there was the problem of a floating charge, and the further difficulty of identifying which particular stock had been paid for and was therefore the debtor's property. Mr Dodd disagreed with Mr Muir Hunter's first point as the article dealt only with validity against creditors in the event of a bankruptcy; our existing H. P. law as between vendor and purchaser and its protective measures would therefore be untouched.

27. The Chairman thought 39(1) might be acceptable if it contained the same provisions as 38(1) and referred to the law of the place of business of the bankrupt, but Mr Muir Hunter suggested that as Article 39 was intented to be a Uniform Law, it implied acceptance of the doctrine of reservation of property. He added that before coming to a decision it might be prudent to establish whether the Crowther Report covered the Factors Act and whether the Sales of Goods Act and Factors Act were intended to remain unchanged. Mr Anton also

urged caution and said there might well be arguments for accepting some uniformity in relation to the passing of property - if one accepted the Convention generally; it was not necessary for the Committee to reach a decision at this stage and the Consumer Credit Department should be invited to express views on the effects of the article. Mr Dodd observed that most of the Consumer Credit law dealt with the position between the retailer and the consumer.

28. The Chairman said that it seemed that the Committee had no objection to the retention of property rights where goods were the subject of H.P. or other credit sale agreements, but it was against such retention of property rights for normal invoice sales. He asked for it to be noted that the Committee, as at present advised, was thoroughly against this sort of deferring of title, and that the Secretary should seek the views of the Consumer Credit Department.

UNIFORM LAW, ARTICLE 6

29. Mr Muir Hunter said that this article dealt with the position arising from the bankruptcy of the vendor and that it was not a reason for setting aside the contract; it was in line with English law and he agreed with it entirely; the Committee acepted the article.

UNIFORM LAW, ARTICLE 5

30. Mr Muir Hunter said that set-off law in England was now extremely wide as a result of recent case law, and 5(1) was in line with English law. Mr Anton said that it was different from present Scots law but he saw nothing radically wrong with the article. The Committee accepted 5(1) and, after a short discussion, 5(2) and 5(3), Mr Muir Hunter commenting that there was now no bar to these provisions in English law.

31. Mr Muir Hunter said that he was against 5(4) because our own rules were in some respects more unfavourable to the person effecting the set-off and his understanding of the Uniform Law was that, unless otherwise provided, it displaced the national law. Article 5(4) only dealt with assignments - the Eros Films situation - where someone acquired a debt in order to set it off

against his own; but English law prevented one from acquiring a debt in order to answer something; 5(4) was therefore less favorable to creditors than English law. Mr Muir Hunter added that the article was founded on the "Cessation des paiements", which was a notional suspension of payments and the provisions would be unworkable unless English law was given an equivalent of this concept. Mr Anton suggested that there was a concept of the suspension of payments in the definition of bankruptcy, in s.62 of the Sale of Goods Act , 1893. He continued that the Scottish bankruptcy team had given much thought to U.L. 4 and 5 and their provisional views were that if one accepted the principles of the Convention, a concept of suspension of payments was essential: the Sale of Goods Act contained a perfectly sound definition

32. The Chairman said it seemed that the Committee would be prepared to accept 5(4) provided there was an acceptable definition of 'suspension of payments'. However Mr Anton pointed out that the present English text did not include the sense of the French phrase "à titre particulier", by which it was intended to exclude the case of general assignments. Mr Muir Hunter enquired what the banks' views might be of the last clause of 5(4) but Mr Avis said he would like to see the intended definition of 'suspension of payments' before giving an opinion.

UNIFORM LAW, ARTICLE 4A (1)

33. The Chairman pointed out that it was only intended to have a preliminary general discussion on the article at this stage. Mr Muir Hunter said that this created an entirely new form of relation back in the case of companies and, if it was intended to replace existing law, it was considerably less penal than the provisions of s.42 of the B.A. 1914.Mr Anton said the article differed from the common law challenge of gratuitous alienations under Scots law in that it was limited to a period of 1 year before bankruptcy, insolvency of the grantor at the date of the alienation need not be established, nor the fact that the alienation was prejudicial to creditors. Mr Muir Hunter referred to the reservation clause in Annex II (c) wherein Germany, France, Italy and Holland all reserved the right to preserve different periods of relation back, not less than 6 months nor more than 2 years.

34. Turning to the second paragraph of 4 A (1), Mr Anton suggested that there were analogous rules in Scots case law dealing with gifts and he did not think this would present formidable difficulties; referring to the French text, he

said this meant "To the extent that they are not unusual having regard to the circumstances". This enabled customary presents and gifts to the extent that they were not unusual to remain valid; after some discussion, the Committee agreed that, if this was the correct interpretation, then it was acceptable.

35. Mr Anton said that in his view proof of the insolvency of the grantor at the time of the alienation was essential: that it was not a requirement of present English law was harsh, in certain circumstances unjust and not acceptable. Mr Armour agreed. Mr Muir Hunter point to the difficulties in proving insolvency and the Chairman thought it might be acceptable to allow the donnee an opportunity of proving the solvency of the donor; he asked if the inclusion of such a clause would make 4A (1) acceptable. Mr Anton thought that it would and Mr Muir Hunter said he would accept some evidence of proof of solvency if the period was more than a year - say up to 2 years as contempleted in the reservation clause. Mr Anton disagreed with an extension of time. The Chairman said that if 4 A(1) was only intended to be the minimal requirement then present English law would apply to the majority of cases occurring in England, but what law would then be applicable when dealing with assets situated in other member States? Mr Anton suggested that the views of the I.G.'s staff be sought as to whether this Uniform Law was only intended to be a minimal requirement.

AGENDA FOR THE NEXT MEETING

36. Uniform Law 4, followed by Articles 40 to 46

DATES OF FUTURE MEETINGS

37. The next meeting was fixed for Monday 29th April 1974 and the following meeting was provisionally arranged for 21st May 1974.

T. H. Traylor

T H Traylor
Secretary

6(12)

EEC BANKRUPTCY CONVENTION

INTER-DEPARTMENTAL WORKING PARTY

Report of the Eleventh Meeting held at Gavrelle House on 19 November 1974

Present:

C A Taylor (Chairman)
E G Harper (D of T)
J B Clemetson (Dof T)
W Armstrong (D of T)
J S Doig (Scottish Courts Administration)
R A Forth (Inland Revenue)
D F Graham (DTI (Solicitors))
J M Hunter (Bankruptcy Registrar, N. Ireland)
R B Rowe (Lord Chancellor's Office)
E Scott Robertson (Solicitor, Scottish Office)
D R Titchener (DHSS)
T H Traylor (Secretary)
Miss G H Goodwin (Assistant Secretary)

1. The Chairman said that discussionswere going on with the Department of Employment which was promoting an Employment Protection Bill. The original proposals would have distorted the position between preferential and unsecured creditors. but it was now proposed that in a liquidation, employees' preferential claims would be met out of a redundancy fund, which would become a subrogated creditor in the liquidation. It had been agreed that, in compulsory liquidations, the Official Receiver would adjudicate on employees' claims as soon as possible and pay them as an agent for the Department of Employment. That Department was approaching accountancy bodies, seeking cooperation for similar early payment of employees in voluntary liquidations.

2. Mr Doig asked if the position in Scotland had been considered, there being no system of Official Receivers. The Chairman said this was a matter for the Department of Employment, who would need to make similar approaches to those being made in respect of voluntary liquidations. In answer to an enquiry from Mr Registrar Hunter, the Chairman said such payments would be made regardless of the availability of assets; the Department of Employment had prepared some figures which indicated that the burden on the redundancy fund would not be too great.

3. The Chairman said that the Department of Trade was promoting an Insolvency Bill which, because of pressure on parliamentary time, would only cover urgent matters. These would include the restoration of monetary limits to bring them up to date, and raising the limits of petitioning debts, thus relieving the Bankruptcy Service of a large number of small, domestic bankruptcies. With the agreement of the Lord Chancellor's department more use would be made of the Administration Orders system under the County Courts Act, and such courts would have power to make Receiving Orders where debtors had failed to comply with Administration Orders. Mr Titchener asked if other departments would have an opportunity of making representations; the Chairman replied that this could be done through the Home Affairs Committee and dealt with during the committee stages of the Bill. Mr Armstrong pointed out that the proposed Act would not actually change monetary limits but simply give power for such changes to be made.

4. Mr Titchener thought his department would view with concern any extension of the Administration Orders system; in some 30,000 cases where such orders had been used, nothing had happened. Mr Rowe thought it was the threat of bankruptcy that made debtors pay up, and there was no sanction for this under county court administration. The Chairman said that the Bankruptcy Service was getting clogged up with a large number of small domestic bankruptcies for which the system was not designed, and which usually had few, if any assets; they resulted in the Service being run at a loss, which was under criticism.

5. The Chairman continued that another matter in the Insolvency Bill was a proposal to review a bankruptcy after 5 years; in the majority of cases this would enable a discharge to be granted. Individual creditors would not be notified of proposed discharges which would be gazetted. Other provisions were for a simpler form of proof of debt and for the disqualification of directors who had been involved in a succession of company failures within a period of five years. Mr Doig commented that there might be merit in extending these measures to Scotland. Mr Armstrong said that the restoration of monetary limits would apply to the whole of the United Kingdom, but it had not been envisaged that the other matters would apply to Scotland; he did not think it would be a simple matter to amend existing Scots law, and any such proposals would need to be made quickly.

6. In answer to an enquiry from Mr Registrar Hunter, the Chairman said that as soon as the Bill was enacted a start would be made on 5 year old bankruptcies. Older cases would be given the opportunity of applying for discharge as now, or for review.

SCOPE OF THE CONVENTION

7. Mr Armstrong said that it was necessary to decide which proceedings would be covered by the Bankruptcy Convention and thus excluded from the Judgments Convention. We appeared to have two major problems: the question of compulsory liquidations for reasons other than insolvency and the question of creditors' voluntary liquidations. The latter did not start with a court order which at present was a pre-requisite for inclusion under the Bankruptcy Convention.

8. The Secretary said the Advisory Committee considered that creditors voluntary liquidations should be included in the Bankruptcy Convention and had suggested that this might be achieved by way of existing legislation for supervisory orders. The Chairman said it was hoped to get such liquidations included without the complication of supervisory orders.

9. Analogous proceedings for inclusion in Article 1(b) of the Protocol were discussed. It was acknowledged that Deeds of Arrangement and Scottish trust deeds under the common law would be excluded, but Arrangements under S206 of the Companies Act, 1948 and under S134 of the Bankruptcy (Scotland) Act 1913 should be included.

10. Referring to the cases in which a company could be wound-up by the Court under S222 of the Companies Act, 1948, Mr Armstrong said our view seemed to be that all should come under the Bankruptcy Convention, and this would certainly be of benefit to the liquidator in so far as jurisdiction and applicable law were concerned. However, Mr Clemetson thought it would be wrong in principle to bring solvent proceedings within the scope of the Bankruptcy Convention; he did not consider that it dealt satisfactorily with the rights of contributories.

One?

11. Mr Rowe raised the question of Criminal Bankruptcies; the Chairman said they would be included automatically, because they did not differ from normal bankruptcies, following the making of the receiving order.

ARTICLE 38

12. Mr Armstrong said this article had been the subject of considerable discussion in Brussels. The Dutch delegation wanted the lex situs to apply, as in other contracts; the Belgians proposed that the law of the State of the vendor should apply and others favoured the law of the State of the bankruptcy. The Chairman said it should be remembered that the article only related to the effect of bankruptcy on a contract of sale. It was generally agreed that the law of the State of the bankruptcy should apply unless there were strong grounds for any derogation therefrom.

ARTICLE 39 AND UNIFORM LAW, ARTICLE 6

13. The Chairman said that Germany was anxious to retain these provisions in the Convention. Reservation of title was used extensively in Germany as a means of ensuring payment; it had already created friction with some traders in this country, who only became aware of the reservation when an invoice was received. He was concerned that evidence of the reservation was only required to be by simple writing and the fact that the purchaser had accepted the conditions was not a requirement.

14. The Secretary drew attention to the Noel-Lemontey Report which indicated that Article 39 was intended to be a Uniform Law. In answer to an enquiry by Mr Rowe, who thought the article might be running contrary to the trend of consumer protection in this country, the Chairman said he would be pressing for more formality in its provisions as regards evidencing reservation. Mr Armstrong said that France wanted the article limited to capital goods, but other delegations were inclined to leave the article as it was.

EXTENSION OF BANKRUPTCY TO DIRECTORS AND MANAGERS

15. Mr Armstrong asked if there were any objections to the principle of extending the bankruptcy of a business concern to its directors and managers, if they had fallen foul of the provisions set out in Articles 1 or 2 of the Uniform Law. There were no objections, provided that a judgment had been given against the individual concerned and he had failed to pay the judgment debt.

NEXT MEETING

16. The next meeting was fixed for Wednesday 18 December at 2.15 pm. The Agenda would cover Articles 47 to 53.

T H Traylor
Secretary

6(12)

EEC BANKRUPTCY CONVENTION

INTER-DEPARTMENTAL WORKING PARTY

Report of the Twelfth Meeting held at Gavrelle House on 18 December 1974

Present:

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

MATTERS ARISING FROM THE ELEVENTH MEETING

1. Referring to the draft Insolvency Bill, Mr Armstrong said that in addition to the restoration of monetary limits, two other provisions in the Bill would be extended to include Scotland: those relating to a simpler form of proof of debt and to the disqualification of directors following a succession of company failures.

2. The Chairman said there were a number of other Bills which were likely to have priority over the Insolvency Bill, but he was hopeful that it would go through. Referring to the Employment Protection Bill, the Chairman said that some of the more objectionable provisions had been deleted but it was still the intention, in the event of a company failure, to pay all outstanding wages and salaries out of the redundancy fund, which would then make appropriate claims in the liquidation.

3. The Chairman said that one of the main items discussed at the recent meeting of the Brussels Panel was the scope of the Convention (Article 1 and Protocol, Article I(a) and (b)). The British delegation were as yet unable to negotiate on behalf of the Government; they were able to explain the present UK laws and they also had the benefit of the preliminary views of the Advisory Committee. There was mixed reaction to the suggestion that creditors' voluntary liquidations be included in the Convention; the three new Member States and France favoured inclusion but the other original Member States did not (Luxembourg was not represented during this discussion). The Chairman thought this could become a bargaining matter in the final negotiations, but on the other hand, those dealing with the Judgments Convention might want an earlier decision. Receiverships and floating charges were not discussed but are set down for the next meeting, as is further discussion of creditors' voluntary liquidations.

4. In answer to an enquiry from Mr Graham, the Chairman said it seemed likely that the inclusion of all compulsory liquidations would be accepted (see S.222 of the Companies Act, 1948). It was appreciated by the other delegates that the number of companies which were wound-up for reasons other than insolvency was very small.

5. Mr Armstrong said that in order to get on with the Judgments Convention, the Commission had asked for details of United Kingdom procedures which were likely to be included within the Bankruptcy Convention and of those likely to be excluded. He had prepared such a list, based on present information, but he wished to stress that it did not commit the United Kingdom and that our views might be amended in the light of the Advisory Committee's Report. Details of the list were as follows:

Protocol, Article I(a)

Bankruptcy in England and Wales
Bankruptcy in Northern Ireland
Sequestration in Scotland, which includes deceased estates
Administration of estates of persons dying insolvent in England and Wales
Administration of estates of deceased insolvents in Northern-Ireland
Compulsory winding-up of companies
Winding-up of companies under the supervision of the court.

Protocol, Article I(b)

Compositions and schemes of arrangement in England and Wales
Compositions in Northern Ireland
Arrangements under the control of the court in Northern-Ireland
Compositions in Scotland
Arrangements and reconstructions of companies in liquidation

Procedures which appear to be outside the scope of the Bankruptcy Convention

Deeds of Arrangement in England and Wales
Deeds of Arrangement in Northern Ireland
Trust Deeds for creditors in Scotland
Administration Orders under the County Courts Act, 1959

6. Mr Armstrong added that as indicated by the Chairman two procedures were to be the subject of detailed discussion at the next meeting in Brussels; these were creditors'voluntary winding-up of companies, and floating charges and receiverships. He requested that any comments on the list be submitted as quickly as possible.

7. The Chairman said that the attention of the Brussels Panel had been drawn to the work of the United Kingdom Advisory Committee and copies of its Consultative Paper had been issued to all delegates. The Panel fully understood our requirement to consult and to await the advice of the Advisory Committee before finally committing the United Kingdom. However, no decision had been taken to retard the intended Brussels programme.

8. The Chairman proposed that at future meetings the Working Party should have regard to the Consultative Paper when considering articles in the draft Convention.

ARTICLE 47

9. The Chairman referred to the disabilities, disqualifications and restrictions of rights which befall a bankrupt in this Country. The Secretary suggested that at present some of these restrictions might not apply topeople made bankrupt abroad. On the other hand, a person was disqualified from holding local authority office in Scotland no matter where he was adjudicated bankrupt. The Chairman agreed that it would be necessary to decide to what extent United Kingdom laws on the subject should apply to all EEC bankrupts. The Committee inclined to the view that bankruptcy in another Member State should lead to the same disqualifications in the United Kingdom as would a United Kingdom bankruptcy.

Liberté intérieure

ARTICLE 48

10. The Chairman said this article contained special provisions which were only applicable to analogous proceedings. Mr Registrar Hunter suggested that under the terms of this article, any extension of time for payment granted to a debtor under an arrangement or composition would not necessarily apply against preferential or secured creditors in another State. The Secretary drew attention to the Noel Lemontey Report which noted that in some EEC States, preferential creditors retained a right of individual proceedings and such extensions of time were not valid against them. Mr Armstrong thought the position was unlikely to arise in England because invariably the assets vested in a trustee but, as Mr Registrar Hunter pointed out, this was not the case in Norther-Ireland.

ARTICLE 49

11. Mr Armstrong said that this article defined 'judgment' for the purposes of the Convention. However, the Brussels Panel found some difficulty with the article which was to be re-drafted so as to include non-judicial decisions. The article was similar to Article 25 of the Judgments Convention.

ARTICLE 50

12. Mr Armstrong explained that this article also followed the Judgments Convention (Article 26) and provided that, with certain exceptions, judgments given in one Member State, as regards bankruptcy proceedings, would be recognised automatically in all other Contracting States. The exceptions related to non-traders and small traders in certain cases and to a successful impeachment.

13. There was a discussion on whether it was necessary to distinguish between recognition and enforcement, and also as to whether all such judgments should be registered in some way. Mr Rowe suggested that it would be as well to enquire what the United Kingdom intended as regards the Judgments Convention in this matter.

ARTICLES 51 AND 52

14. Mr Armstrong said these two articles gave rules to decide which of two or several judgments should be recognised and enforced. He pointed out that this was only likely to arise where, for example, receiving orders had been made in two States against the same debtor and they had not been advertised in the OJEC. The arbitrary rule given in 52(2), where two decisions had been given on the same day, was understood to follow Dutch law. The Noel-Lemontey Report at page 164 gives examples to illustrate these rules.

ARTICLE 53

15. This article deals with the position of a liquidator who had been enforcing a judgment subsequently rendered ineffective by the operation of the rules in Articles 51 or 52. The intention was that his acts would remain valid, subject to the national law of the State concerned. Mr Registrar Hunter suggested that similar protection should be afforded third parties who may have acted in good faith, but Mr Armstrong thought they would be adequately protected automatically, and he referred to the provisions of Article 26.

NEXT MEETING

16. The next meeting was fixed for Friday 24 January 1975 at 1000. The Agenda would be issued shortly and would probably cover matters to be discussed in Brussels in February 1975.

T H Traylor
Secretary

124

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Report of the Twelfth Meeting, held at Gavrelle House on 28 August 1974

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

REPORT OF THE ELEVENTH MEETING

1. No matters arising from the last meeting were raised and the Report was accepted.

SECRETARY'S REPORT

2. The Secretary said he had received a letter from Mr Armour, who was on holiday, giving his views on certain items in the agenda.

3. The Secretary drew attention to the following documents which were distributed:-

(a) English language version of the draft Bankruptcy Convention as agreed by the Commission and dated August 1974 ('Red Book').

(b) Blue loose-leaf file; this covered the draft Convention as far as Article 53 and would be completed as soon as possible. Blank paper would be available at future meetings so that Members could insert their own notes.

(c) Brown folder to house draft sections of the Consultative Document, together with the draft section on "Choice of Law Provisions".

PREFERENTIAL CREDITORS

4. The Chairman said that Mr Armstrong's paper dated 10 July 1974 did not correctly reflect the scheme preferred by the Committee, and therefore some of the criticisms expressed therein did not apply. Mr Avis felt that some of the arguments put forward in the paper were based on unlikely, exceptional cases; in general the bulk of wage claims would come from the State in which the bulk of the assets were situated. Mr Avis also asked whether U.K. banks would continue to enjoy rights of subrogation and if so, whether they would have to work out the likely preferential apportionments before advancing money for payment of wages. The Chairman

thought that in practice, U.K. banks would only advance money to pay workers in the U.K., but he asked for an enquiry to be made about subrogation. The Secretary said this would probably be dealt with at the next meeting in Brussels.

5. The Secretary read a letter from Mr Armour to the effect that Mr Armstrong's paper would not dissuade him from the stand which the Committee, after considerable deliberation, had agreed to take. Mr Graham said that it seemed essential that the Covention should take care of the general body of unsecured creditors. Mr Anton and Mr Dodd supported the views of other Members.

6. The Chairman said that both Mr Muir Hunter and he were concerned about the apparent difficulty which had been experienced in putting the Committee's scheme across to Members of the Department. It might, therefore, be too much to expect them to argue the scheme with conviction, in Brussels. In view of the fact that talks were continuing in Brussels while new Member States were conducting their preliminary enquiries into the effects of the draft Convention, he thought there might be a case for two members of the Committee - say a lawyer and a practising liquidator - to appear before the Brussels Panel to explain the Committee's views.

7. Mr Anton agreed and pointed out that there was a precedent for such a course of action in connection with the European Judgments Convention. Mr Dodd thought that unless strong measures were taken to make the Committee's views clear, we could be faced with a fait accompli, since the Brussels Panel were devoting their next meeting to this subject.

8. The Committee were unanimous in resolving that in view of the importance of the subject, it was imperative that two of its Members be allowed to express the views of the Committee on Preferences directly to the Panel of delegates in Brussels. It was agreed that the representatives should be the Chairman and Mr Muir Hunter. The Chairman said he would write to the Minister, copy to the Inspector General, to express the Committee's strong views on the subject and to ask for a formal application to be made to Brussels regarding attendance by the Committee's representatives. In particular he would stress that no negotiation was intended, only a statement of facts.

CONSULTATIVE DOCUMENT

9. Mr Anton and the Secretary were thanked for the work they had done in producing a draft of the Consultative Document.

10. It was visualized that the C.D. (Consultative Document) would comprise eight chapters which would probably be:-

(i) An introduction explaining certain references used in the C.D. and some of the terms used in the Convention, it would also contain background information, history and scope of the Convention.

(ii) A technical chapter on the scope of the Convention.

(iii) Provisions relating to jurisdiction.

(iv) Choice of Law.

(v) Preferences.

(vi) Recognition and enforcement of judgments and challenge.

(vii) Uniform Law.

(viii) Conclusions and questions.

11. After a general discussion on the C.D. it was decided that:-

(a) Mr Anton and the Secretary would continue working on the C.D. draft and forward it to Committee members, Professor Halliday and Mr Graham for comment.

(b) due to the urgency of sending the C.D. to consultees comments should be submitted on each section within two weeks, if none were received then the section would be sent for typing. To facilitate rapid completion of the draft, Mr Anton and the Secretary would be allowed a great deal of latitude in summarising the bulk of the Committee's views.

(c) at the front of the C.D. there would be a statement that the C.D. was not the final but merely the preliminary views of the discussions of the Committee.

(d) at the front of the C.D. there would be punch lines - which would preface the relevant paragraphs of the C.D. - containing the principle differences between the Convention and present law, with page references

(e) at the bottom of the pages there would be references to case law and relevant Acts.

(f) some of the questions already asked by consultees would be answered in the C.D.

(g) there would be a list of questions and a summary of contents with page references.

(h) the final extensive task of checking the C.D. would be the Secretary's responsibility.

ARTICLE 68

12. Mr Anton said this Article followed Article 45 of the European Judgments Convention with the difference that the Judgments Convention used the expression domiciled or resident. The Committee agreed that the two Conventions should be aligned and a reference made to domicile in the Bankruptcy Convention.

13. The Chairman thought the Article should stop after "....63" so that neither foreign nationals nor the countries own nationals would have to pay a deposit. If an individual had a judgment against him it was because he didn't have any money and the deposit requirement might deny him the chance of terminating the bankruptcy proceedings.

14. Mr Graham was concerned with what would happen if the court regarded the application as frivolous or vexatious. The Chairman thought the challenger would be ordered as to costs, after the action. Mr Graham thought this was too late as the respondant would be prejudiced. He thought it was going too far to rob the court completely of jurisdiction and there had to be an inherant jurisdiction in the court to order security but it could not do so simply because the applicant was a foreign national. The Chairman and the Committee then agreed with Mr Graham.

ARTICLE 69

15. Mr Anton said this Article was modelled on Article 49 of the European Judgments convention and had no effect on the U.K. The Committee had no comment to make on this Article.

ARTICLE 70

16. Mr Anton stated that this was Article 54 from the General Convention, which said, as a general rule, enforcement of treaties have no retroactive effect so as "not to change a state of affairs acquired under the aegis of legal relationships other than those created between the States by the Convention". Reading Articles 70 and 75 together he wondered whether the six months given was too short with regard to relation back. The Committee was worried about the effect on third parties and it was suggested that a clause be inserted protecting them. Mr Anton's offer of consulting Sir John Gibson, a former parliamentary draftsman and obtaining his views on the drafting of this clause was accepted.

ARTICLE 71, 72 and 73

17. The Committee thought that Article 71 would have no effect on the U.K. Mr Muir Hunter had investigated the problem of membership of other Conventions in his opinion and there did not seem to be a Convention that we were included in which would be effected. Mr Anton was concerned about the effect of these Articles on Imperial Legislation and that Article 73 made difficulties in concluding subsequent treaties with non-Contracting States such as Commonwealth Countries and the U.S.A. He pointed out that Contracting States could make what arrangements they pleased before the

entry into force of the Convention (although he felt the risk negligible due to the Joint Declaration - page 58 no. 3).

18. Mr Anton thought there were serious gaps in Article 73 as no provision was made for reciprocal enforcement by way of Imperial Legislation. Neither was any provision contained analogous to Article 59 of the E.E.C. Convention, which enables any Member State to conclude a treaty with a third state to the effect that it is not bound to enforce E.E.C. exorbitant jurisdiction against domicilories of these third states. He thought that if this was allowed there could be retortion from non-Member States. The Chairman recognised Mr Anton's point and suggested that it be noted in the C.D., although the rest of the Committee were content with this particular point.

ARTICLE 74

19. Mr Anton thought that to extend the Bankruptcy Convention and all its implications to these other countries was really quite serious. The Committee considered that no overseas department or territory should be included without the consent of all the Contracting States. The Secretary thought that only the principle should be stated in the Article with a reference made to the Protocol where the countries would be listed.

ARTICLE 75

20. See Article 73.

ARTICLE 76(1)

Not right in present form

21. The Committee accepted this Article.

ARTICLE 76(2)

22. Mr Anton remarked that it was not clear whether our law includes the presumption in Article 34(1) - views would be sought on this matter in the C.D. The Committee wondered whether their objection to 34(1) was still valid.

ARTICLE 76(3)

23. The Committee accepted this Article.

ARTICLE 76(4)

24. Mr Anton said that "to the extent that these provisions are capable of applying thereto" was too vague - this would be mentioned in the C.D. The Chairman noted that this Article would have to be re-examined when it was clear what was to be included in Article 1(b) of the Protocol.

ARTICLE 76(5)

25. The Secretary said that there was quite a problem with regard to relation back because reservations had been made by some States that the periods of time of relation back would be those of their own law and not those laid down in Article 4 of the Uniform Law, this practically did away with the Article. The Committee accepted the principle of the Article but noted that separate consideration would have to be given to the reservations in Annex II.

26. Mr Anton asked the Committee for their preliminary views on the reservations in Annex II as he was at present writing this section of the C.D. The Committee thought it was unacceptable to have different dates.

ARTICLE 77

27. Mr Anton noted that this Article was from Article 66 of the European Judgments Convention. The Committee found this article acceptable.

ARTICLE 78

28. Mr Anton commented that this was standard form at the end of a Convention, the Committee then accepted the Article.

ARTICLE 79

29. The Committee accepted this Article.

ARTICLES 80 and 81

30. Mr Anton thought it was unsatisfactory to conclude a Convention, as Article 80 did, with an unlimited period but as Article 81 had a provision for revision then, looking at the two together, they might be satisfactory. The Secretary understood that the latest thinking in Brussels was that these Articles could be left out as they were in the European Judgments Convention. The Committee thought the Articles should be left in and the Convention should subsist for a period of ten years and thereafter subject to two years notice by any Contracting Party.

ARTICLE 82

31. The Committee accepted this Article. Mr Dodd thought that this was a contract which was outside the Community and even if we withdrew from the Community we would still be bound by the ratification of the Convention. The Committee was in favour of being bound by the Convention in these circumstances.

DATE OF NEXT MEETING

32. The date of the next meeting was fixed for Thursday, 26 September '74.

AGENDA FOR THE NEXT MEETING

33. (i) Progress report on the Consultative Document.
(ii) Protocol Annex II.
(iii) Protocol, Articles I to XV.

Goodwin

G.H. GOODWIN (MISS)
Assistant Secretary

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

Agenda for the Thirteenth Meeting on Thursday, 26 September 1974 @ 10.00 at Gavrelle House, 2-14 Bunhill Row, London EC1

1. Consider the Report of the Twelfth Meeting and any matters arising.

2. Secretary's Report.

3. Consultative Document - Progress Report.

4. Annex II - To consider reservations made by other Member States and possible UK reservations. premature ?

5. Protocol, Article I(a) and (b) - Scope of the Convention.

6. Protocol, Article II - Proceedings excluded from the Convention.

7. Protocol, Articles III, IV, V and VI - Advertisement.

8. Protocol, Article VII - Transmission of documents for service.

(LUNCH)

9. Protocol, Article VIII - Redirection of mail.

10. Protocol, Articles IX, X, XI and XII - Details of various authorities.

11. Protocol, Article XIII - Additional proceedings to which Uniform Law applies.

12. Protocol, Articles XIV and XV - Procedure for amendments to national law and to the Protocol.

13. Confirm date for the next meeting (24 October) and arrange a provisional date for November meeting.

14. Agenda for next meeting.

T. H. Traylor

T H TRAYLOR
Secretary

6(12)

EEC BANKRUPTCY CONVENTION

INTER-DEPARTMENTAL WORKING PARTY

Report of the Thirteenth Meeting held at Gavrelle House on 24 January 1975

Present:

C A Taylor (Chairman)
E G Harper (D of T)
J B Clemetson (D of T)
W Armstrong (D of T)
J S Doig (Scottish Courts Administration)
R A Forth (Inland Revenue)
D F Graham (DTI(Solicitors))
J M Hunter (Bankruptcy Registrar, N. Ireland)
R B Rowe (Lord Chancellor's Office)
E Scott Robertson (Solicitor, Scottish Office)
D R Titchener (DHSS)
T H Traylor (Secretary)
Miss G H Goodwin (Assistant Secretary)

MATTERS ARISING FROM THE TWELFTH MEETING

1. Referring to paragraph 5 and the list of items to be included in Protocol, Article I(a), Mr Registrar Hunter said that if the reference to the administration of deceased insolvent's estates in Northern Ireland was listed as written, it would not be confined to estates being administered under the law of bankruptcy, but would include administrations in Chancery Division of estates which in fact turn out to be insolvent: there are provisions for the transfer of such estates to the Bankruptcy Court, but transfer is not automatic and the administration can proceed without being transferred; there are two entirely different procedures. Mr Hunter continued that there was no need to distinguish between the wording used for England and Wales and that used for N. Ireland. The Secretary said that the wording in paragraph 5 was purely descriptive and not the wording which would actually be submitted for inclusion in the Protocol. The Chairman said that he agreed there may be no need to distinguish between the wording for the different countries as between ourselves, but it was necessary to impress on the people in Brussels that we were dealing with three different sets of laws. Mr Hunter said that he accepted the point but the phrase "estates of persons dying insolvent" used in paragraph 5 for England and Wales should also be used for Northern Ireland; the Chairman agreed.

2. The Chairman said that there were one or two other matters proceeding in the EEC which impinged on the Bankruptcy Convention. Firstly, there was a draft Directive relating to Movables and Mr Clemetson had attended a meeting in Luxembourg; it was significant because it appeared to effect the position of floating charges. Secondly, as regards the Bankruptcy Convention, the question of the inclusion or omission of banks and insurance companies had been resolved, at least so far as the original six member States were concerned; our delegation had reserved the position as regards the United Kingdom, but it was clear that the other States considered that banks should be included in the Bankruptcy Convention and that its ground rules should apply to insurance companies. A joint Working Party had been set up to work out such modifications as might be required for insurance companies. Thirdly, there was a draft Convention on the law applicable to contractual and non-contractual obligations. The Secretary said that the two Law Commissions had set up a Working Group to consider this Convention and a Consultative Document had been issued; he undertook to let the Chairman have a copy. Mr Clemetson said that from a preliminary reading of the draft Convention on Contracts some of its rules appeared to conflict with those of the Bankruptcy Convention. It did not apply to companies or to their winding-up, whereas the Bankruptcy Convention did do so and this could cause confusion.

ARTICLE 54

3. The Chairman said it appeared that the Advisory Committee thought this Article satisfactory as regards judgments relating to the opening of bankruptcy proceedings,, but they were less sure about those taken in the course of bankruptcy proceedings. Mr Rowe pointed out that there was no automatic enforcement under the Judgments Convention and one had to use the normal registration procedure; he could appreciate that there was an urgency where the opening of bankruptcy proceedings was concerned, but he was not clear as to what other formalities might require to be automatic. The Chairman suggested these would include such as orders for delivery up of assets or records and orders for attendance.

4. Mr Registrar Hunter pointed out that judgments in the ancillary proceedings set out in Article 17 were specifically referred to in Article 61 as requiring orders for enforcement; the Chairman agreed and said it was clear that Article 54 referred to "the opening and course of proceedings" read together. Mr Armstrong said that the Working Party in Brussels had suggested the deletion of Articles 61 - 67 because they came under the Judgments Convention. Mr Rowe said it was a pity that the wording of Article 54 was not more precise; he thought it essential we make it clear that we assumed the Article related to the formalities of bankruptcy proceedings rather than judgments ancillary to bankruptcy proceedings.

ARTICLE 55

5. The Chairman said that this was the first of a series of Articles dealing with proceedings to challenge the bankruptcy. The Article simply said that in any Contracting State other than the State of the Bankruptcy, an action to challenge the judgment opening the bankruptcy could be brought in the cases specified in Article 56. In answer to an enquiry from Mr Rowe, the Chairman agreed that such challenges were admissible only in regard to judgments opening bankruptcy or analogous proceedings and not to other judgments referred to in Article 54.

ARTICLE 56

6. The Chairman said this Article set out the two circumstances in which a challenge could be brought: where the debtor had not received proper notice and infringement of public policy. Proper notice was dealt with in Clause (1) which he understood followed a similar provision in the Hague Convention. The Secretary said that the English text appeared to differ from the French text which made knowledge of the proceedings and time to prepare a defence cumulative. The French text followed the Noel-Lemontey Report which at page 140 specifically referred to the points as being cumulative. He added that the preliminary view of the Advisory Committee was that the English version was acceptable.

7. Mr Registrar Hunter said he found it hard to follow how the points could be cumulative because it would suggest that any ex parte order would offend; yet under Clause (2)(e), one of the grounds which could not be used was that the judgment had been given on the Court's own motion or ex parte, and if it was ex parte, then there had been no opportunity for defence. He suggested that this was an instance where we should ask the French to question their own draft. The Chairman agreed that to suggest that the points were cumulative did not appear to make sense; the debtor might have had time to arrange his defence but not to avail himself of legal remedies because they were subject to time bars. He said the point was noted.

8. The Chairman said that according to Clause (2) it appeared that the Bankruptcy judgment could be challenged on grounds of public policy with the exception of the five matters set out in the Article. The Secretary said that the Advisory Committee felt that this was an instance where the French expression "L'ordre Public" should be put in brackets after the term "Public Policy" to indicate its wider interpretation. This point was discussed at some length.

9. Mr Rowe said that the list of exclusions in Clause (2) appeared to exhaust public policy as we understood it, so one could only assume that the continental term had a wider meaning. Our Courts had already met cases where they had to consider the term in its continental context, but he agreed that the probable effect of putting the French expression in the English text would be to indicate to a Court dealing with such an application that the continental concept of public policy was applicable. The Secretary suggested that it might help if the continentals were invited to give examples of public policy not excluded by Clause (2); Mr Registrar Hunter said that some examples were given on page 141 of the Noel-Lemontey Report.

ARTICLE 57

10. The Chairman said that under this Article an action to challenge a bankruptcy order should be brought before the Courts specified in Article X of the Protocol. Referring to paragraph 6.8 of the Consultative Paper, he said that the Advisory Committee suggested that the Courts to be listed for the United Kingdom should be the High Court in England, the Court of Session in Scotland and the High Court in Northern Ireland. Mr Rowe said he thought this was probably correct because the High Courts would have the necessary expertise. Mr Doig said he agreed that, because the Judgments Convention favoured dealing with the Supreme Courts, we should be consistent and do the same under this Convention; but there were exceptions, such as under the Maintenance Orders Act where the matter went to local courts. The Chairman suggested that rules could be devised whereby although a matter was initially raised in the High Court, it could be transferred to a County Court. Mr Rowe said this was possible but he still favoured containing such actions in one place. His Department's view regarding the Judgments Convention and other matters was that machinery already existed in the High Court to deal with them.

11. Mr Registrar Hunter said that there was no problem as regards forum in Northern Ireland. He presumed that a successful challenge in, say, London would be effective throughout the United Kingdom. Mr Rowe agreed and added that presumably we would draw up internal rules of jurisdiction to determine whether a particular action should be heard in Belfast, Edinburgh or London.

ARTICLE 58

12. The Chairman said Clause (1) directed that an action to challenge the Bankruptcy Order should be brought against the liquidator, and it also listed who could bring such an action. He suggested that "Public Prosecutor" should be replaced by "Public Minister", as in his view this referred to the "Minister" charged with overseeing public policy and having power to act in the public interest. He agreed with Mr Rowe that this referred to the Attorney General in England and the Lord Advocate in Scotland.

13. Mr Armstrong said the Department's view was that notice of the action should be served on the petitioning creditor who should have power to oppose the application should he so wish; he understood that such an amendment was acceptable to the Brussels Working Group.

14. The Chairman said that Clause (2) required such an action to be brought within 3 months of advertisement in the OJEC or; in the absence of such advertisement, from the date when the person bringing the action had knowledge of the judgment. He added that the Brussels Working Group had agreed to amend the Clause so that in any case an action could not be brought later than 6 months after the opening of the bankruptcy.

15. Mr Armstrong said he was not in favour of such an amendment; it could be prejudicial to an aggrieved person who might have no knowledge of the bankruptcy simply because the liquidator had neglected to advertise it in the OJEC. The liquidator relied upon the OJEC to give notice to protect his interests and if he neglected to do so it would be at his own peril. Under Article 55 et seq a debtor had a right to attempt to limit the effect of a bankruptcy made in another State in the State in which he was living, and the amendment would deny him that right unless he became aware of the bankruptcy order within 6 months. Mr Doig suggested that it might be preferable to have no time limit other than the 3 months, but to require a person wishing to appeal after that time to show cause why he should be allowed to appeal. The Chairman said some people were adept at producing such reasons purely as delaying tactics; he considered it essential to have an overall time limit otherwise a liquidator might have difficulty in getting on with his task.

16. The Committee considered the position where an English bankruptcy had been in progress for a year before the trustee discovered that the bankrupt was living in Italy and had assets there, where upon he advertised the bankruptcy in the OJEC. Mr Registrar Hunter said that the proposed amendment would prevent the bankrupt from exercising his rights under Articles 55/56, but if there was no amendment, the trustee would only have to wait a further 3 months from the advertisement. He thought this was acceptable and was inclined to agree with Mr Armstrong. Mr Rowe also considered that a person should be given adequate notice and he added that it would be most unusual to have a set time limit without any possibility of extension; it seemed to be a question of balance as between allowing adequate opportunity for appeal and assisting the liquidator in dealing with the estate. The Chairman agreed, as did Mr Armstrong who added that in his view, the proposed amendment came down heavily against any possible aggrieved person living in a State other than the State of the bankruptcy.

17. The Chairman said that the amendment was intended to cover a very limited class of people who might tend to run away from financial troubles and for this reason he felt there should be an upper time limit. Mr Harper said that the question should rarely arise in practice because, if a debtor was known to be an alien or possibly already abroad, a liquidator should automatically advertise in the OJEC, otherwise he could be open to criticism.

ARTICLE 59

18. The Chairman said that this Article set out the effects of an action to challenge a bankruptcy judgment. Under Clause (1) a bankrupty order fell to be recognised until a challenge was successful, but the Court hearing the action could decide to stay enforcement until the action had been heard (see Clause (2)). Mr Armstrong pointed out that under Clause (3) a judgment in an action to challenge the bankruptcy took effect against all persons in the State in which it was given. This meant that if it was an adverse judgment, it took effect against everyone in that State, so no one else could subsequently open an action to challenge the bankruptcy. The Brussels Working Group had agreed that this was not the intention, so the Clause was being re-drafted to the effect that only a judgment upholding a challenge would take effect against all persons. The Secretary pointed out that Clause (3) only required a judgment in an action to challenge the bankruptcy to be advertised in that State; the Advisory Committee were of the view that such a judgment should also be advertised in the OJEC because it could have an effect on people in the other States. Mr Rowe noted that creditors in other States would probably wish to know that assets in the State in which the judgment had been upheld were no longer available to them. Mr Armstrong said that there would be nothing to stop a national bankruptcy taking place in the State in which a challengehad been upheld, and creditors in other States would require knowledge of such a successful challenge in order to petition for a national bankruptcy.

ARTICLE 60

19. The Chairman explained that the purpose of this Article was to enable a national bankruptcy to be opened in a State where the Community bankruptcy had been successfully challenged. The creditors in the Community bankruptcy would be able to claim for any shortfall in the national bankruptcy. The Committee had no comment to make on this article.

NEXT MEETING

20. The next meeting was fixed for Friday 21 February 1975 at 10.00. The Agenda would cover Articles 68 to 82.

T H Traylor
Secretary