EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 1 - JURISDICTION 27 February 1975

(a) Centre of Administration - Article 3

Recommendations:

Place of business

(i) Although the use of the centre of administration as a basic ground of jurisdiction presents difficulties, similar objections apply to possible alternatives (C.P.3.9)

(ii) The definition in Article 3(2) is too vague and should be amplified.

(iii) A provision should be added to Article 3 to the effect that for the administration of a deceased insolvent's estate, 'debtor' will mean the de cujus.

Comments

1. The Committee noted that at the stage of recognition, the problem of uncertainty of definition does not arise, because the grounds on which the original court assumed jurisdiction may not be challenged.

2. The Institute of Directors, Scottish Clearing Bankers and Faculty of Advocates all think the term vague but only the Faculty of Advocates offers an alternative - current Scots Law.

3. No other comments received.

4. A detailed examination of the matter is in the Report pages 26-32

5. Recommendation (iii) is a German proposal, raised because the present rules would present problems if there were several heirs in different States. The Brussels Panel is inclined to accept the proposal.

(b) Registered Office as the C/A - Article 3(2)

Recommendations

(i) The rule that a registered office is the centre of administration should be absolute (C.P.3.10)

(ii) As at present drafted, Article 3(2) is confusing in referring to firms having registered offices.

Comments

several regd. offices?

1. In the Proposed Statute for the European Company the rule is absolute.

2. The Faculty of Advocates points out that as at present drafted a debtor can dispute jurisdiction in the State of the registered office and so delay proceedings; this would be prejudicial to creditors.

3. The Report at page 30 indicates that proof to the contrary will be brought by the company when the registered office is not the seat of its main interests. Is this likely to raise many problems bearing in mind the issue is between States? Are many British registered companies likely to have their main interests centred abroad, and is it not right that those who do should be wound-up abroad?

4. Recommendation (ii) arises from the comments of a Scottish Chamber of Commerce, that Article 3(2) could imply that all firms, companies and legal persons must have registered offices. This can be obviated by a drafting amendment. Firms having to register under the Registration of Business Names Act, 1916, have to register a principal place of business; therefore should the presumption in Article 3(2) be expanded to include a registered principal place of business? (See C.P.3.10 line 3).

(c) Concept of an Establishment - Article 4

Recommendation:

A Clause should be added to Article 4 defining 'Establishment' for the purposes of that article (C.P.3.11)

Comments

1. This would be in line with Article 3 which defines C/A. A definition is given in the Report at page 33, but the Report also points out that the word has a different meaning in the context of Article 38.

2. The Institute of Directors says the term has no real meaning in English law.

(d) Exorbitant Jurisdiction - Article 5

Recommendation:

The direct rules of jurisdiction based on the C/A make the small risk of exorbitant jurisdiction being applied under Article 5 acceptable.

Comments

The Netherlands delegation want the risk of exorbitant jurisdiction removed from Article 5, and cite for example the bankruptcy of the same debtor simultaneously in the US (principal place of business) and in France, where the existence of a bank account would suffice to justify such jurisdiction; the French bankruptcy would be recognised throughout the Community. Non-Community countries could think this was going too far. The French delegation took the view that the plan followed in the Bankruptcy Convention was the same as that in Articles 3 and 4 of the Judgments Convention; Article 73 takes care of any obligations to a third country.

(e) Transfer Rules - Articles 6, 7 and 8 (C.P.3.6)

Recommendations:

(i) The underlying principles of these articles are acceptable but Article 6(2) is obscure due to faulty drafting.

"becomes seised"

(ii) The six months period should run from a clearly identifiable date; this would be the presentation of the petition in this Country.

Comments

1. The above recommendations were the Committee's preliminary views.

2. The Faculty of Advocates noted that these provisions involve considerable breaches of the unity of jurisdiction sought by the Convention, but offered no alternative solution.

3. The Report sets out reasons for these rules at pages 35-38, including the discovery of fraud, preventing a debtor from choosing the most amenable law for his bankruptcy, preventing a non-trader from evading bankruptcy by transfer to an appropriate State.

(f) Non-traders and small traders - Article 9

Recommendations:

big politics small traders.

(i) There is a strong case for the elimination of any distinction between traders and non-traders

(ii) If the harmonisation as in (i) above is not possible for the present, the rule in Article 9(2) that the resulting bankruptcy will not be recognised in the State of the C/A should be deleted (C.P.3-12)

Comments

1. Recommendation (i) is a German proposal. The Brussels Panel found such harmonisation impossible at present but it may be advocated in their final report.

2. Non-recognition of an Article 9 bankruptcy in the State of the C/A would in all probability deny creditors in the bankruptcy access to the main assets, unless they took individual action against such assets. Presumably such action would be taken if the assets were substantial, especially by local creditors, so why put them to such trouble? Moreover, such action would result in unfairness as between creditors and could be detrimental to creditors in States other than the State of the C/A.

Surely too small & worry about?

3. Some examples of the application of these rules are given on page 40 of the Report and are well worth reading: it could be argued that the varying effects are illogical.

4. The Faculty of Advocates: Article 9 reveals that the Convention makes no real progress towards a unified and uniform system of bankruptcy. Each State retains the right to define what persons may be rendered bankrupt and to what extent bankruptcies initiated elsewhere are to be recognised.

(g) Jurisdiction to declare associated persons bankrupt - Articles 10, 11 and 12. (C.P.3.15-3.17)

NOTE At this stage only jurisdiction is being considered and not the Uniform Law

Recommendations:

Extra-territorial application?

(i) Article 10 would be acceptable if the following clause is added: "Notwithstanding the foregoing, such bankruptcy may be declared only where the Court has found that the member is liable but unable or unwilling to discharge the debts of the firm, company or other legal person."

(ii) The jurisdiction under Article 11 is acceptable provided it is made clear in the Article that there must be a summoning and a hearing and that the onus of proof is on the prosecution.

non-extra-territorial?

(iii) The jurisdiction under Article 12 is acceptable as it implies that a judgment about the liability has already been given.

Comments

1. Mr Anton considered it wrong for a person to be adjudicated bankrupt in a foreign State and saw no reason why the liquidator of the bankrupt concern should not pursue the person in that person's own State, as he would any other debtor, and as would any other creditor.

2. The British Insurers Association and the Institute of Directors find the articles acceptable.

3. The General Council of the Bar points to a possible undesirable consequence of Article 10: the bankruptcy of major limited companies who take part in a joint venture abroad, which is wound-up. Its provisional view on Article 11 was to the effect that the French law in Uniform Law 1 was quite unacceptable and no English court should be required to recognise such a bankruptcy which has occurred abroad.

4. The Scottish Clearing Banks supports recommendations (i) and (ii).

5. The British Chamber of Commerce and the British Insurers Association consider it necessary to define 'management'.

6. The British Bankers Association supports recommendation (i), agrees in principle with (ii) and (iii), but thinks (ii) and (iii) should go in the draft Fifth Directive on Company Law.

7. The Faculty of Advocates discusses the articles at some length (members have copies) and finds them unacceptable in their present form; it also doubts whether any sufficient reason exists for such amendments to our partnership and company law.

(h) Conflicts of Jurisdiction- Articles 15 and 16

13+14

Recommendations:

(i) Article 15 is acceptable provided a clause is inserted, that it is the duty of parties to bring all relevant facts to the notice of the Court. (C.P.3.14)

(ii) The principles of Article 16 are acceptable, but 16(2) should be redrafted: "Where a court of a Contracting State has declared that it has no jurisdiction under Articles 3 and 4, that judgment shall be treated as conclusive by the courts of other Contracting States."

Comments

There are no comments to hand, other than that of the Faculty of Advocates who voiced our own concern about a court having to decide things "of its own motion."

(j) Jurisdiction in actions arising from the bankruptcy - Article 17

(i) Recommendation:

The exclusive jurisdiction given to the courts of the State of the Bankruptcy by clauses 17(1) and (2) is acceptable. (C.P.3.20).

Comments

1. This relates to acts done by the debtor during the period of relation-back, including those relating to immoveable property. By Article 35 the voidability of such acts is governed by the Uniform Law.

2. This is only a rule of jurisdiction; the applicable law will be determined by the law of the State of the Bankruptcy, including its rules of conflict. (Report page 56)

3. As regards immoveables, the question is not to ascertain whether the act is valid according to the lex situs, but whether the act may or may not be invoked against the general body of creditors according to the provisions of the law relating to the 'suspect period'. (Uniform Law) (Report page 57).

4. The Faculty of Advocates does not consider that Article 17 is warranted in the absence of a comprehensive system of common rules of bankruptcy law; that the Uniform Law on voidability of transactions only covers a limited field. The Faculty suggests that before accepting 17(1), both 'certain acts' and the 'suspect period' should be defined.

(ii) Recommendation:

Jurisdiction given by Article 17(3) to deal with actions to revoke acts executed by the debtor in Fraud of his creditors is acceptable (C.P.3.22)

Comments

1. The Committee provisionally accepted this clause but were concerned about the applicable law. Would it help if Article 19(2) specified the law of the State of the Bankruptcy including its rules of conflict, as does the Report?

2. The Faculty of Advocates think clause (3) is unclearly defined.

(iii) Recommendation:

The jurisdiction given by 17(5) regarding claims against the liquidator for the recovery of moveable property from the bankrupt's estate is acceptable (C.P.3.24)

Comments

This was provisionally accepted by the Committee, no comments have been received from consultees.

(iv) Recommendation:

The jurisdiction given by 17(6) regarding claims against the spouse of the bankrupt under bankruptcy law is acceptable, provided there is a reference to the rules of conflict in Article 19(2). (C.P.3.26)

Comments

1. The Report at page 59 says that this only relates to claims under bankruptcy law and does not relate to other suits which the liquidator may bring against the bankrupt's spouse.

2. Mr Anton thought a rider should be added to 17(6) that it was without prejudice to the application of normal rules of Private International Law.

(v) Recommendation:

Article 17(7) should be amended to read "complaints regarding professional conduct". (C.P.3.26)

(vi) Recommendation:

Disputes concerning the existence ~~of~~ and ranking of preferences and secured rights should bebrought before the courts of the State in which the assets charged are situated. (Article 17(8)) (C.P.3.27)

Comments

1. This is contrary to thepresent draft of Article 17(8). Proposed by Belgium it was supported by Germany and Ireland and it would seem to satisfy concern voiced by the Committee about this clause.

2. The Committee's provisional view was that if the clause remained in force, it should be made clear that it covers actions relating to the existence, rank and extent of preferences and secured rights other than with regard to the excepted matters. (Report pages 60 and 61).

(vii) Recommendation:

The courts or authorities normally having jurisdiction to deal with the exceptions in Article 17(8) should be specified, praticularly as regards debts arising out of contracts of employment (C.P.3.28)

Comment:

The Committee noted that this had no real meaning in the UK at present and that someone would need to be given power to deal with the exceptions quoted in 17(8).

(viii) Recommendation:

Jurisdiction in relation to the matters listed in C.P.3.30 should continue to be governed by the Judgments Convention. (Report page 61).

10(21) 2

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 2 - SCOPE 17 March 1975

(a) Deceased insolvents' estates (C.P.2.2)

RECOMMENDATION:

THE CONVENTION SHOULD EXTEND TO THE ADMINISTRATION IN BANKRUPTCY OF ESTATES OF PERSONS DYING INSOLVENT

Comments

1. This would appear to be the intention because the German delegation has put forward a proposal concerning the centre of administration in such a case. (See Memorandum No 1).

2. Institute of Chartered Accountants of Scotland - agrees.

3. The Law Society of Scotland - agrees.

4. Scottish Clearing Bankers - agree.

5. Chamber of Commerce, Dundee & Tayside - agree.

6. Legislative Draftsmen, Northern Ireland - agree, but add that there are still some difficulties about the Convention on International Administration of Estates; they do not see how we could have one convention without the other.

7. Article 11 of the Bankruptcy (Scotland) Act, 1913, embraces the sequestrations of both living and deceased debtors.

(b) Extra-judicial and purely contractual arrangements (C.P.2.3)

RECOMMENDATION:

IT IS ACCEPTABLE THAT DEEDS OF ARRANGEMENT, NON-JUDICIAL COMPOSITIONS AND PRIVATE TRUST DEEDS FOR CREDITORS BE EXCLUDED FROM THE BANKRUPTCY CONVENTION.

No under Dyfr ... protected

Comments

1. The Kilbrandon Committee assumed that such matters came within the scope of the European Judgments Convention. They reported at paragraph 68 "It seems that compositions and arrangements effected out of court by deed under the Deeds of Arrangement Act, 1914, in England, or under the common law in Scotland, are not covered by the draft Bankruptcy Convention."

2. The Scottish Clearing Bankers agree that the Convention should not apply to "Judicial Factories, Trust Deeds or other informal winding-up arrangements."

3. Association of Certified Accountants - agrees.

4. The Institute of Chartered Accountants, Scotland - agrees.

5. The Faculty of Advocates - agrees.

6. The Law Society of Scotland disagrees and assumes Voluntary Trust Deeds for behoof of creditors will be included. They add that the rules will require to be amended so as to bring Voluntary Trust Deeds under the supervision of the Scottish Courts.

7. The Chamber of Commerce, Dundee & Tayside - disagrees.

8. The Legislative Draftsmen, Northern Ireland, disagree and add: "Private arrangements should be included if practicable and, with reciprocal enforcement, this could be made to work."

9. The Committee's preliminary view was in line with the recommendation.

(c) Receivership for a debenture-holder (C.P.2.3)

RECOMMENDATION:

S.94
S.319

IT IS ACCEPTABLE THAT A RECEIVERSHIP FOR A DEBENTURE-HOLDER SHOULD NOT COME WITHIN THE SCOPE OF THE CONVENTION.

Comments

1. The Institute of Chartered Accountants, Scotland, disagrees: they consider there should be provision within the UK for the court to confirm the appointment of all receivers for debenture-holders. However, because the appointment of a receiver does not imply absolute insolvency, they feel that the Protocol should include special provisions to deal with receiverships.

2. The Committee's preliminary view was that the inclusion of receiverships should not be pursued, unless a very good reason was produced for their inclusion. (MR 5 paragraph 35).

(d) Voluntary Winding-Up (C.P.2.4)

RECOMMENDATION:

CREDITORS' VOLUNTARY LIQUIDATIONS SHOULD BE INCLUDED IN THE CONVENTION.

Comments

1. If this recommendation is adopted, it will be necessary to indicate possible procedures of ratification by court order (C.P.2.4)

2. If adopted, it willbe necessary to consider whether any difficulties will arise should a "Members Voluntary" (under the Judgments Convention) change into a "Creditors Voluntary" (s.288 CA 1948).

3. The Institute of Chartered Accountants, Scotland - agree and add that court confirmation of the appointment of the liquidator would necessitate a procedure similar to that obtaining at present for confirmation of the appointment of a trustee in sequestration, or the granting of probate or confirmation in executries.

4. The Association of Certified Accountants - agree, and accept that the appointment of the liquidators should be subject to an order or declaration by the court.

5. The Legislative Draftsmen, Northern Ireland - agree.

6. The Chamber of Commerce, Dundee & Tayside - agrees and suggests all liquidations should be included except those which the court has determined as being "Members' voluntaries"; automatically these would be where a declaration of insolvency has been lodged and not withdrawn.

7. The Institute of Directors - agree.

8. The Law Society of Scotland - agrees.

9. The Committee were given to understand that inclusion of creditors' voluntary liquidations would probably be acceptable provided there was greater control over them.

(e) Criminal Bankruptcy Orders (C.P.2.5)

RECOMMENDATIONS:

(i) A CRIMINAL BANKRUPTCY ORDER FALLS TO BE ENFORCED IN OTHER MEMBER STATES UNDER THE EUROPEAN JUDGMENTS CONVENTION.

(ii) IF A PETITION IS PRESENTED CITING A CRIMINAL BANKRUPTCY ORDER AS THE ACT OF BANKRUPTCY, ANY RESULTING RECEIVING ORDER AND ADJUDICATION IN BANKRUPTCY WILL COME WITHIN THE BANKRUPTCY CONVENTION.

Comments

1. The only comment received to date is from the Legislative Draftsmen, Northern Ireland, who say they do not have criminal bankruptcy in Northern Ireland.

2. There would seem to be a jurisdictional problem if a criminal bankruptcy order has been made against a person whose centre of administration is in another Member State.

(f) Persons and Entities (C.P.2.6)

RECOMMENDATION:

THE CONVENTION SHOULD EXPLICITLY INDICATE TO WHICH PERSONS AND ENTITIES IT APPLIES.

Comments

1. The Legislative Draftsmen, Northern Ireland - agree.

2. No other comments received.

3. The Committee's assumptions are set out in the Consultative Paper towards the end of paragraph 2.6. They require to be agreed for inclusion in the Report.

(g) Insurance Companies (C.P.2.7)

RECOMMENDATION:

THE EXCLUSION CLAUSE IN ARTICLE 1(3) RELATING TO INSURANCE UNDERTAKINGS SHOULD BE AMENDED SO THAT ONLY THOSE UNDERTAKINGS COMING WITHIN THE "DIRECTIVE TO CO-ORDINATE THE WINDING-UP OF DIRECT INSURANCE UNDER-TAKINGS" ARE EXCLUDED.

new Bill

Have we seen this?

Comments

1. Article 1 of the draft Insurance Directive restricts its application to the direct insurance undertakings covered by (a) the First Indemnity Co-ordination Directive and (b) the First Life Co-ordination Directive ie direct indemnity and life insurance undertakings only. Therefore, the exclusion clause as at present drafted in Article 1(3) of the Convention will mean that some, albeit small insurance undertakings, will be outside both the Convention and the Directive.

2. It is possible that the scope of the draft Directive may be extended. If this happened, the above recommendation would still hold good and be useful to cover some borderline insurance undertakings.

3. The British Insurers' European Committee is against any distinguishing of companies engaged only in re-insurance so far as the UK is concerned and propose the clause should be amended to read:

> "insurance undertakings of all kinds, irrespective of their legal form, with the exception of those which engage only in re-insurance and are not subject to the national insurance supervisory legislation of the Contracting State in which their Head Office is situated."

4. The Law Society of Scotland sees no valid reason for the exclusion of any form of insurance undertaking, but admits to a lack of specialist knowledge regarding those on the Continent.

(h) Other excluded undertakings (C.P.2.7, 2.8)

RECOMMENDATIONS:

we have not seen Eire's & Denmark's

(i) THE ADVISORY COMMITTEE SEES NO REASON FOR OBJECTING TO THE EXCLUSIONS LISTED BY MEMBER STATES IN ARTICLE II OF THE PROTOCOL.

(ii) THERE ARE NO CLASSES OF UNDERTAKINGS WHICH THE UK SHOULD LIST IN ARTICLE II OF THE PROTOCOL AS BEING OUTSIDE THE SCOPE OF THE CONVENTION.

Comments

1. The Report at page 158 refers to the undertakings listed in Article II of the Protocol as being "national enterprises" which are treated on the same footing as direct insurance as regards their system of realisation.

2. The Law Society of Scotland sees no valid reason why the Convention should not apply to bankruptcy proceedings taken in respect of the institutions listed in Article II of the Protocol.

(j) Territorial Scope (C.P.2.9, 2.10, 2.11)

RECOMMENDATIONS:

(i) THE UK SHOULD SECURE POWER TO ALLOW THE CHANNEL ISLANDS AND THE ISLE OF MAN TO BE INCLUDED BY DECLARATION.

(ii) LIKE THE NETHERLANDS, THE UK SHOULD HAVE OPTIONAL POWER TO EXTEND THE CONVENTION TO ITS NON-EUROPEAN OVERSEAS TERRITORIES.

(iii) THE CONVENTION SHOULD NOT, FOR THE TIME BEING, APPLY TO THE OVERSEAS TERRITORIES OF MEMBER STATES.

Comments

1. Similar recommendations were made in the Report on the Judgments Convention.

2. The Legislative Draftsmen, Northern Ireland agree and suggest power should be taken to include overseas territories by Order in Council. They add, "what is also needed in our law is the preservation of the general power to act in aid of other courts. See s71 of the 1872 Act. There should then be a power to apply that provision to any other country if we are satisfied that reciprocal facilities will be afforded to our courts by the courts of that country."

10(22)3

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 3 - SCOPE - Further comments 2 April 1975

(To be read in conjunction with Memorandum No 2)

(a) Deceased insolvents' estates

1. British Insurers' European Committee - agrees that the Convention should extend to the administration of deceased insolvents' estates.

2. Isadore Goldman & Son, solicitors - agree.

3. Association of British Chambers of Commerce - agree.

4. City of London Solicitors Company - agree.

5. Insolvency Practitioners Association - agree without reservation.

6. College of Justice, Scotland - agree, provided Member States agree that the jurisdiction is the same as that applicable in Bankruptcy.

(b) Exclusion of Deeds of Arrangement, Non-Judicial Compositions and Private Trust Deeds for Creditors

1. Association of British Chambers of Commerce - agree that the Convention should be restricted to judicial and judicially supervised proceedings.

2. City of London Solicitors Company - agree - at present trustees under Deeds of Arrangement and receivers under debentures do not have the powers of liquidators as regards "relation back", etc, and there is no reason why they should. Leave well alone.

3. Isadore Goldman & Son - disagrees - if there is to be some uniformity, insolvency practice in one State must not inhibit a trustee or liquidator appointed in another State. Deeds of Arrangement and non-judicial compositions, etc, should be included.

4. British Insurers' European Committee - disagree - inclusion would help afford rights to those creditors who were not parties to such arrangements. Also assist the reaslisation of assets.

5. Insolvency Practitioners Association - can see advantages if they can be included even though this may be difficult in the existing draft. All have to be registered in one way or another, and it should be possible for a trustee to obtain a certificate of authority from the court for use in other Member States.

6. College of Justice, Scotland - Convention in its present form cannot readily be extended to include extra judicial proceedings, but their exclusion could cause disruption.

(c) Exclusion of receivership for a debenture holder

See comments under (b) above, all of which are applicable here; the Insolvency Practitioners Association stress that receiverships should be included.

(d) Inclusion of Creditors Voluntary Liquidations

All consultees to date agree, with the exception of the British Chambersof Commerce and the London Chamber of Commerce and Industry, both fearing that inclusion will reduce the existing advantages of such informal proceedings.

(e) Inclusion of Criminal Bankruptcy

1. Assocation of British Chambers of Commerce - agree - the Convention should apply to all judicial and judicially supervised insolvency proceedings.

2. Insolvency Practitioners Association - agree; the liability is a civil liability, distinct from the possible penal liabilities from which it may have arisen.

3. Remaining consultees to date - no comments.

(f) The Convention should explicitly indicate to which persons and entities it applies

1. British Insurers' European Committee - agree.

2. Insolvency Practitioners Association - agree for the avoidance of doubt.

3. Association of British Chambers of Commerce - agree.

4. College of Justice, Scotland - agree and add:

"Scottish Law does not admit the sequestration of an unincorporated association and such bodies should not fall within the scope of the Convention."

(g) Exclusion of Insurance Companies

1. The Insolvency Practitioners Association feel individual exclusions will be unfortunate.

(h) Other Excluded Undertakings

1. The Insolvency Practitioners Association consider there should be none. Governments would almost certainly support concerns which might otherwise be insolvent and liable to be wound up.

2. College of Justice, Scotland consider that the acceptance of different rules for special cases in separate States (Protocol, Article II) will give rise to an undesirable complication: if certain kinds of organisation are to be excluded, they should be completely excluded wherever proceedings are opened.

(j) Territorial Scope

1. Insolvency Practitioners Association: a large number of concerns operate from the Channel Islands and the Isle of Man, which are presumably regarded as being part of the EEC. It is essential both areas be subject to the terms of the Convention. The inclusion of overseas territories which subsequently attain independence may present problems.

2. City of London Solicitors Company - agree there may be doubts about a common level of attainment in overseas territories, and therefore that they should not be included in the Convention.

3. The College of Justice in Scotland is also uneasy about the inclusion of overseas territories but stresses that the I.O.M. should be included. The College also considers that recognition of the differing bankruptcy law of Scotland and of the distinct and separate jurisdiction of its courts from the rest of the U.K., should be expressly incorporated in the Convention.

10(2 S) 4

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO4 - CHOICE OF LAW 15 April 1975

(a) Requirements for opening the bankruptcy (C.P.4.3)

RECOMMENDATION:

ARTICLE 18 IS ACCEPTABLE

Comments

1. The Report suggests that grounds for a declaration of bankruptcy do not vary greatly as between the original six States. In the C.P. we suggested that the accession of the UK enlarged basic divergences and that the rule in Article 18 could have inequitable effects. The College of Justice in Scotland agrees there could be inequities caused, not by Article 18, but by the court of the debtor's C/A having exclusive jurisdiction.

2. The City of London Solicitors Company suggest the possibility of inequities would be substantially reduced if the presumption that a registered office was the C/A was made absolute.

3. The Faculty of Advocates cites the fact that each State remains free to define its own grounds for initiating bankruptcy, as one of the reasons why the Faculty considers the Convention involves no progress in or improvement of the present State of affairs.

4. Comment by Secretary: so long as we all have different schemes and arrangements (Protocol I(b)), surely Article 18 is correct? Our preliminary view was that the article was straightforward and unexceptional.

(b) Effect of bankruptcy order against debtor (C.P.4.16)

RECOMMENDATION:

THE TERMS OF ARTICLE 20 REQUIRE RE-CONSIDERATION

Comments

1. The College of Justice, Insolvency Practitioners Association, Institute of Directors, Law Society of Scotland and Scottish Chartered Accountants all agree with the recommendation. The Institute of Directors say that the precise position of directors must be stated and the IPA and the Scottish Chartered Accountants think it should be clearly stated, who assumes powers lost by the debtor. The Law Society of Scotland accepts the principles of Article 20, but points out the confliction with Scots law on the requirement to record an Abbreviate of Sequestration in the Diligence Registers within 2 days.

2. Our preliminary view was that Article 20 was acceptable. The differing effects of bankruptcy and liquidation in the UK, as regards vesting title to the assets have been explained to the Brussels Panel. After discussion, the Panel thought it preferable not to alter the wording of Article 20.

(c) Staying of proceedings (C.P.4.28, 4.29)

RECOMMENDATIONS:

(i) THE PRINCIPLES OF ARTICLE 21 ARE ACCEPTABLE

(ii) IT WOULD BE MORE SATISFACTORY IF A COMMUNITY BANKRUPTCY INVALIDATED SUCH MEASURES RETROSPECTIVELY

Comments

1. Following a submission by Germany, the Brussels Panel has provisionally agreed to amend 21(5) to read:

> "Proceedings in respect of inherited property which are stayed by the bankruptcy proceedings may be brough afresh against the liquidator in the manner prescribed by the law governing those proceedings."

2. The Scottish Chartered Accountants welcome the provisions of Article 21 and agree with both recommendations. They think 'debts recoverable in like manner' in 21(3) should be more specific. They think 21(4) may give rise to practical difficulties because of differences in definition between 'heritable' and 'moveable' property between States.

3. The Insolvency Practitioners Association agree with both recommendations, but suggest a provision as to costs to a creditor who has acted without notice.

4. The City of London Solicitors Company would prefer that the court where an action was pending had a discretionary power to stay the action. They agree with the second recommendation, as does the College of Justice in Scotland.

(d) Stay of enforcement (C.P.4.30)

RECOMMENDATIONS:

(i) THE PRINCIPLE OF ARTICLE 22 IS ACCEPTABLE, BUT IT WOULD BE PREFERABLE IF THE BANKRUPTCY RELATED BACK, AS DOES A SEQUESTRATION IN SCOTLAND

(ii) COSTS OF AN ABORTIVE EXECUTION PRIOR TO THE DATE OF THE BANKRUPTCY SHOULD BE A PREFERRED DEBT.

Comments

1. The Scottish Chartered Accountants welcome the aim of Article 22 and agree with the first recommendation. As regards recommendation two, such costs are not preferential in Scotland, and this has the beneficial effect of discouraging vexatious claims.

2. The College of Justice in Scotland agrees with the first recommendation, as does the City of London Solicitors Company, who add that it would be reasonable for a creditor of a completed execution which has been set aside to retain his costs against the liquidator.

3. The Law Society of Scotland finds the principle of Article 22 acceptable, provided existing preference rules, such as for expenses, are retained.

4. The Insolvency Practitioners Association agrees with the first recommendation.

(e) Prescription-Periods of Limitation (C.P.4.31)

RECOMMENDATION:

THE PRINCIPLES OF ARTICLE 23 ARE ACCEPTABLE BUT DRAFTING COULD BE IMPROVED

Comments

1. The College of Justice in Scotland, Insolvency Practitioners Association and Scottish Chartered Accountants think the article is not unreasonable.

2. The Scottish Law Society prefers existing Scots Law (s.105 B.A. 1913, s.318 C.A. 1948).

3. Comment by Secretary: the article does not aim to extend periods of limitation. It is intended to lay down that a document forwarded by a third party to the bankrupt instead of to the liquidator will be valid provided the prescribed time limit has been complied with. The reference to Article 26 implies that the provision only applies to third parties in Member States other than the State of the bankruptcy.

(f) Exercise of certain legal remedies (C.P.4.5/4.8)

N.B. At the request of the Irish delegation in Brussels, Article 24 has been provisionally amended as follows:

> "Such applications to set aside judgments as may be permitted under national legislations to the debtor or to third parties not participating in the proceedings must be initiated within a period which shall not be less than 31 days followin g ....."

RECOMMENDATIONS

(i) THE SCOPE OF ARTICLE 24 REQUIRES ELUCIDATION

(ii) THE PERIOD IN THE AMENDED VERSION IS ACCEPTABLE

Comments

1. During the Brussels' discussions the French delegation made it clear that the supposition in C.P.4.6 was correct, viz: the remedies in Article 24 are only for cases in which the debtor or third party concerned was not represented in the proceedings.

2. The College of Justice in Scotland thinks the terms of the article unduly restrictive and in need of re-consideration. They refer to ss.30 and 31 of B.A. (Scotland)1913.

3. The City of London Solicitors Company, Insolvency Practitioners Assoc. and Chartered Accountants, Scotland all think 31 days is reasonable. The first named suggest Article 24 should not apply to applications based on events subsequent to the bankruptcy. The I.P.A. suggest it should cover an appeal against a Bankruptcy Order and an application for a Scheme as an alternative (s.16 B.A. 1914).

4. The Law Society of Scotland said that a maximum of 31 days would entail consequential changes in UK national laws.

(g) Advertisement (C.P.4.12)

RECOMMENDATION:

THE PRINCIPLES IN ARTICLE 25 ARE ACCEPTABLE

Comments

1. The City of London Solicitors Company think publication in a paper not read by those concerned is useless.

2. The Insolvency Practitioners Association see problems arising but cannot think of a suitable alternative system.

3. The Law Society of Scotland think that in the majority of cases, only one insertion in the OJC will be necessary.

4. The College of Justice in Scotland suggest it might be preferable if 25(2) is amended to require the liquidator to advertise in the Official Journal of those States in which the bankrupt (a) has assets or (b) has been in contractual relationship with third parties. They also suggest costs could be reduced if the first advertisement said all future adverts would be only in the OJC.

(h) Effect of bankruptcy against third parties (C.P.4.24)

RECOMMENDATION

THE PROVISIONS OF ARTICLE 26 ARE ACCEPTABLE

Comments

1. The Insolvency Practitioners Association would like the effect to be immediate but realise there must be protection for innocent third parties.

2. The Scottish Chartered Accountants also think immediate effect is desirable, but accept it is not practical.

3. The Institute of Directors stress the importance of consistency (eg with Article 32).

4. The Law Society of Scotland think 8 days is not enough. They also wish to retain the provisions of s.107 of the B.A. (Scotland) 1913 which protects a bona fide purchaser for value without limitation of time.

5. The College of Justice in Scotland thinks this might conflict with Article 22, but they appear to accept the provisions of Article 26.

(i) Effects of bankruptcy with regard to assets required to be registered (C.P.4.26)

N.B. We asked consultees if Article 27 should be wider and to suggest the classes of property which should be affected.

Comments

1. The Law Society of Scotland accepts the principle underlying the article.

2. The Insolvency Practitioners Association think the provision should apply to all property capable of being registered publicly, and suggest the list in s.95 of the C.A. 1948 as a basis.

3. The Scottish Chartered Accountants agree with the article and suggest classes should include heritable property, ships, copyrights, patents, trademarks and similar assets.

4. The College of Justice in Scotland is concerned that a liquidator may not be aware of assets in another State and so may not note the bankruptcy judgment in the register within the prescribed time. They consider that Article 27 should be deleted, a liquidator being entitled to found on the terms of Article 26.

5. The properties covered are mentioned briefly on p.73 of the Report.

(j) The powers of the liquidator (C.P.4.50 to 4.55)

RECOMMENDATIONS:

(i) ARTICLE 28 SHOULD BE QUALIFIED SO THAT A LIQUIDATOR CAN, IN ANOTHER MEMBER STATE, ONLY EXERCISE THE POWERS CONFERRED ON HIM BY THE LAW OF THE STATE OF THE BANKRUPTCY TO THE EXTENT THAT THESE ARE NOT INCONSISTENT WITH THE LAW OF THAT OTHER MEMBER STATE

(ii) THE PROVISIONS OF 28(3) REGARDING POWERS OF DELEGATION ARE ADEQUATE

Comments

1. The College of Justice in Scotland makes no comment on Article 28 in general, but welcomes 28(3)

2. The Scottish Chartered Accountants agree with the first recommendation, but find 28(3) inadequate. They appear to want a Uniform Law for the appointment of local liquidators.

3. The Insolvency Practitioners Association suggest that the problem raised in C.P. 4.54 emphasises the need for harmony of laws. They welcome 28(3).

4. The City of London Solicitors Company agree with the recommendations.

(k) Redirection of Mail (C.P.4.58 and Article 29)

RECOMMENDATION:

THE REDIRECTION ORDER SHOULD BE MADE BY THE COURT OF THE STATE WHERE THE BANKRUPT IS RESIDENT AND SHOULD HAVE A TIME LIMIT OF 3 MONTHS

Comments

1. The College of Justice in Scotland disagrees with the first part of the recommendation, but agree that a time limit should be imposed. The Insolvency Practitioners Association also consider the recommendation pointless.

2. The Scottish Chartered Accountants, British Chambers of Commerce and City of London Solicitors Company support the recommendations.

(l) Lodging of claims (C.P.4.13 and 4.14)

RECOMMENDATION:

THE INFORMAL PROCEDURE IN ARTICLE 30 IS ACCEPTABLE FOR CREDITORS WHO DO NOT RESIDE IN THE STATE OF THE BANKRUPTCY

Comments

1. The College of Justice in Scotland, City of London Solicitors Company, Insolvency Practitioners Association and Scottish Chartered Accountants would all prefer a formalised procedure, using a standard form. The "College" think it should be by affidavit. No one sees any problems for the U.K. The Scottish Chartered Accountants suggest our list of authorities in Protocol IX should include a judicial factor in sequestration. They also think a copy of a standard claim form should be annexed to the Convention.

(m) Continuation of debtor's business (C.P.4.17)

RECOMMENDATION:

ARTICLE 31 SHOULD BE AMENDED SO AS NOT TO INFRINGE UPON THE POWERS OF NATIONAL AUTHORITIES (E.G. REGARDING DISPENSING CHEMISTS, RAILWAYS, ETC)

Comments

1. The Institute of Chartered Accountants in Scotland has doubts on the desirability of an authority in one State having power to authorise a continuation of the debtor's business in another State, but would accept it, provided it is made clear that 'competent authority' includes a liquidator or trustee.

2. The College of Justice thinks creditors' voluntary liquidations will cause problems.

3. The Insolvency Practitioners Association say it would be inequitable for creditors to bear the responsibility for the needs of the Community at large. So they are against the State of the Bankruptcy having the authority given in Article 31.

(n) Realisation of assets (C.P.4.56 and 4.60)

RECOMMENDATIONS:

(i) ARTICLE 32 SHOULD BE AMENDED SO AS TO MAKE IT CLEAR THAT A LIQUIDATOR MUST ACT IN THE MANNER PRESCRIBED BY THE LEX SITUS.

(ii) THE PROVISIONS OF 32(3) ARE ADEQUATE.

Comments

1. The Court of Justice in Scotland find 32(1) and (2) acceptable but think 32(3) will impose additional costs on a complainant and should be reconsidered.

2. The Insolvency Practitioners Association say that a liquidator must clearly have regard to local law.

3. The Scottish Chartered Accountants find the article acceptable apart from heritable property, to which lex situs must apply. In particular, they consider 32(3) to be adequate.

4. The Insolvency Practitioners Association think 32(3) is adequate and on a general point say there appear to be no provisions for the giving of security.

(o) Assets held in trust by the debtor (C.P. 4.19 and 4.21)

RECOMMENDATIONS:

(i) ARTICLE 33 SHOULD STATE EXPLICITLY THAT A LIQUIDATOR'S AUTHORITY DOES NOT EXTEND TO ASSETS HELD BY A DEBTOR IN TRUST.

(ii) THE PROVISIONS OF ARTICLE 33(2) ARE ACCEPTABLE

Comments

1. The Brussels Panel has a proposed alternative to 33(3) under consideration which might assist our problems, viz:

> "Paragraph 1 shall not apply to property, other than that referred to in the preceding paragraph, which is excluded from the assets in the bankruptcy by virtue of the law of the Contracting State in which it is situated."

2. The Insolvency Practitioners Association is concerned about trust property whereever it is situated; so are the H.P. Trade Association and the Scottish Chartered Accountants. The IPA dislike any reservations about after acquired property but want all exceptions to be specified.

3. The College of Justice feel that a person who is made bankrupt in a country other than that of his residence should be no worse off than if bankrupted in his own country.

4. The Scottish Chartered Accountants think the risk of inequity is slight and acceptable. The City of London Solicitors Company agree that it is a matter for the State of the Bankruptcy.

(p) Rights of spouses (C.P.4.20, 4.34, 4.35 and 4.36)

RECOMMENDATIONS:

(i) THE PRINCIPLE OF ARTICLE 34(1) IS ACCEPTABLE

(ii) BENEFITS UNDER MARRIAGE PROPERTY AGREEMENTS SHOULD BE GOVERNED BY THE LAW OF THE MATRIMONIAL REGIME (ARTICLE 34(2)).

(iii) THE PROTECTION AFFORDED BY THE MARRIED WOMEN'S PROPERTY ACTS SHOULD NOT BE AFFECTED BY THE CONVENTION

Comments

1. The College of Justice suggests representations should be made so that only gifts made at a time of insolvency could be caught, either by 34(1) or by 34(2).

2. The Insolvency Practitioners Association think a spouse should not have rights in a bankruptcy which were inferior to those in her own country. At the same time they refer to the possibility of abuse and suggest something similar to s.42 B.A. 1914 should apply.

3. The Scottish Chartered Accountants think 34(1) is acceptable for practical purposes, but agree that existing protection should continue as regards 34(2).

4. The City of London Solicitors Company think 34(2) should not be governed by the law of the State of the Bankruptcy.

5. The British Insurers European Committee supports recommendations (ii) and (iii) and suggest that at present, the Convention jeopardises the benefits afforded by the MWPA's. Recommendation (iii) is also supported by the Bar Council, Northern Ireland.

Disabilities and disqualifications (C.P.4.22 and Article 47)

(q) RECOMMENDATION:

BANKRUPTCY IN ANOTHER MEMBER STATE SHOULD LEAD TO THE SAME DISQUALIFICATIONS UPON A BANKRUPT AS WOULD A UK BANKRUPTCY

Comments

1. The City of London Solicitors Company agree with the recommendation.

2. The Insolvency Practitioners Association and the Institute of Directors go further and consider there should be universal disqualification set out in a Uniform Law.

2(3)(d) Item 4

MEMORANDUM NO 4 - SUMMARY OF RECOMMENDATIONS

Would Members kindly signify agreement or otherwise alongside each recommendation and return one copy to the Secretary. This will help to concentrate discussion on points of difficulty.

---

1. Article 18 is acceptable.

2. (a) The terms of Article 20 require re-consideration because of differences in UK bankruptcy and liquidation laws, re: vesting of title.

   (b) (a) is not essential.

3. (a) The principles of Article 21 are acceptable.

   (b) It would be more satisfactory if a bankruptcy invalidated retrospectively the measures in Article 21.

4. (a) The principle of Article 22 is acceptable;

   (b) but it would be preferable if the bankruptcy related back.

   (c) Costs of an abortive execution should be a preferential debt.

5. Article 23 is acceptable subject to improved drafting.

6. (a) Article 24 requires elucidation.

   (b) The period in the amended version of Article 24 is acceptable.

7. Article 25's principles are OK.

8. Article 26 is acceptable.

9. (a) Article 28(1) should be amended so that a liquidator's powers are not inconsistent with the law of a State in which he wishes to exercise them.

   (b) Article 28(3) re: delegation of liquidator's powers is adequate.

10. (a) Mail re-direction orders should be made by a court of the State where the bankrupt resides.

(b) Should be limited to 3 months.

11. The informal procedure for submitting claims is adequate (Article 30).

12. Article 31 should be amended so as not to infringe national powers.

13. (a) Article 32 should be amended to clarify that a liquidator must conform to the lex situs.

(b) Article 32(3) is adequate.

14. (a) There should be a specific reference to trust property in Article 33.

(b) Article 33(2) is acceptable.

15. (a) Article 34(1) is acceptable.

(b) Marriage property agreements should be governed by the lex loci celebrationis.

(c) Protection of Married Women's Property Acts should not be affected.

16. Bankruptcy in another Member State should lead to the same disqualifications in the UK, as a UK bankruptcy.

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10(2.4)

5

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 5 - EFFECT OF THE BANKRUPTCY ON CURRENT CONTRACTS AND IN RELATION TO SET OFF

16 April 1975

(a) Agencies (C.P.4.38)

RECOMMENDATION:

THE LAW APPLICABLE IN THE BANKRUPTCY OF AN AGENT SHOULD BE SET OUT IN A UNIFORM LAW

Comments

1. This is proposed by the British Insurers European Committee, supported by the British Insurance Association, on the ground that otherwise, the law will vary according to the P.I.L. of the State of the Bankruptcy. We hint at this effect in C.P.4.38 but I think we are only suggesting that the Convention should state that the "law of the State of the Bankruptcy" includes its rules of P.I.L. The Scottish Chartered Accountants and the Insolvency Practitioners Association agree with our proposal but no one else takes up the point.

(b) Contracts of employment (C.P.4.39)

RECOMMENDATION:

THE PRINCIPLE IN ARTICLE 36 IS ACCEPTABLE, BUT IT SHOULD NOT DIFFERENTIATE BETWEEN MEMBER STATES AND NON-MEMBER STATES

Comments

1. In the C.P. we suggested that this exception to the general application of the law of the State of the Bankruptcy was unnecessary. The Insolvency Practitioners Association agree difficulties might arise if employees in different States are treated differently, but the Scottish Chartered Accountants think the Article will assist a liquidator and therefore should remain.

2. The College of Justice in Scotland have no comment to make.

3. The Report appears to stress the necessity for the exception provided for by Article 36.

4. The City of London Solicitors Company feel that Articles 36 to 39 may lead to considerable confusion of third parties and it would be preferable if all contracts relating to immoveables came under the lex situs and all other contracts came under the proper law of the contract, determined in accordance with the law of the State of the Bankruptcy.

(c) Leasing contracts (C.P.4.40 and 4.41)

RECOMMENDATIONS:

(i) ARTICLE 37(1) IS ACCEPTABLE BUT THE LIQUIDATOR'S RIGHT TO DISCLAIM ONEROUS CONTRACTS SHOULD NOT BE IMPAIRED

(ii) CLAUSES 2 AND 3 OF ARTICLE 37 SHOULD BE DELETED.

Comments

1. The Scottish Chartered Accountants think 37(1) should not be extended beyond heritable property, but it should cover all forms of contract relating to heritable property. There should be no unnecessary exceptions to the general principle of application of the law of the State of the Bankruptcy. Articles 37(2) and 37(3) should be deleted.

2. The Insolvency Practitioners Association agrees.

3. The Equipment Leasing Association says that most leasing contracts stipulate the proper law of the contract, usually that of the lessor's country. Because it might frustrate the intentions of parties to a contract, Article 37 should not apply to contracts entered into prior to the Article coming into force. 37(2) and 37(3) should be deleted.

4. The British Chambers of Commerce say that a clear distinction should be maintained between moveables and immoveables. They agree with recommendation (ii).

5. Isadore Goldman & Son give examples to show that it would be unacceptable for contracts for the sale and purchase of land and leases to be governed by a foreign law. They are concerned that this is not allowed for in the Convention. They also think there may be confusion as to which law governs a liquidator's right to disclaim.

6. The College of Justice in Scotland says it has no comment to offer on Article 37.

(d) Contracts of sale (C.P. 4.42, 4.43)

RECOMMENDATION

THE ESTABLISHMENT OF SPECIAL CHOICE OF LAW RULES IN ARTICLE 38 TO COME INTO OPERATION ONLY IN THE EVENT OF BANKRUPTCY IS UNDESIRABLE

Comments

1. The British Chambers of Commerce and the Insolvency Practitioners Association agree and think ordinary contract law should apply.

2. The Scottish Chartered Accountants think the law of the State of the Bankruptcy should apply.

3. The H.P. Trade Association objects strongly to Article 38, whose effects would be unexpected, untoward and uncertain.

4. The Bar Council, Northern Ireland says that once one has conceded jurisdiction to the State of the C/A (or establishment), then that country's P.I.L. rules as to choice of law should apply. To provide otherwise would introduce a wholly undesirable element of uncertainty into commercial transactions.

5. The College of Justice in Scotland comments that Article 38 does not appear to deal with the possibility that a contract might have an express condition as to which law governs its terms.

(e) Contracts of sale with reservation of title (C.P. 4.44 and 4.45)

RECOMMENDATION:

THE PRECISE SCOPE OF ARTICLE 39 AND U.L. 6 REQUIRE TOBE ASCERTAINED IN THE COURSE OF NEGOTIATIONS

Comments

1. M. Lemontey's lecture to the symposium last December is worth reading on this matter (pages 11-14); particularly, that "extended reservations" such as in German law, are not included.

2. The Scottish Chartered Accountants do not find Article 39 unreasonable; they are concerned in case U.L. 6 would require a liquidator to incur personal liability for claims brought against the seller, thus depriving the liquidator of the right to revoke, if in the creditor's interests.

3. The Insolvency Practitioners Association suggest U.L.6 should only apply to multi-State contracts; then it would not clash with internal laws, such as the Consumer Credit Act, 1974.

4. The Equipment Leasing Association suggest that reservation of title should be governed by the proper law of the contract.

5. The H.P. Trade Association supports the recommendation but adds that it is prepared to accept and indeed entirely supports the concept of Article 39; it does not appear to take exception to U.L.6.

6. The College of Justice in Scotland supports the recommendation and adds that the position of a liquidator must be ascertained - U.L.6 appears to preclude him repudiating liability.

(f) Set off (C.P.4.46 to 4.49)

N.B. Consultees were asked (a) whether or not set off rules should be mandatory and (b) the desirability of allowing set off for contingent debts.

Comments

1. Our preliminary view was that the first three clauses of U.L.5 were acceptable and U.L.5(4) might be, provided there was an acceptable definition of "suspension of payments."

2. The I.D.W.P. thought U.L.5(4) was made unnecessarily complicated by its specific reference to negotiable instruments.

3. The Scottish Chartered Accountants say that the provisions of U.L.5 are not inconsistent with Scottish rules of set off and no exception is taken to them. They accept U.L.5(3) regarding contingent debts.

4. The Association of British Chambers of Commerce and the Insolvency Practitioners Association find U.L.5 acceptable. Both say that mandatory rules are essential and that to allow set off on contingent debts would be undesirable.

5. The College of Justice in Scotland find U.L.5 unexceptional. Its provisions are more in line with Scots law than English law, and the latter will require to be amended.

MEMORANDUM No 5

5

1. The law applicable in the bankruptcy of an agent should be set out in a uniform law.

2. (a) The principle in Article 36 is acceptable, but

   (b) it should not differentiate between Members and non-Member States.

3. (a) Article 37(1) is acceptable, but it should stipulate that a liquidator retains the right to disclaim onerous contracts,

   (b) Articles 37(2) and 37(3) should be deleted.

4. Article 38 is undesirable.

5. The precise scope of Article 39 and U.L.6 need to be ascertained in the course of negotiations.

6. The set off rules in U.L.5 are acceptable, subject to an acceptable definition of 'suspension of payments'.

2(3)(c)

Share 5

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

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RECOMMENDATION:

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2. The Scottish Chartered Accountants do not find Article 39 unreasonable; they are concerned in case U.L. 6 would require a liquidator to incur personal liability for claims brought against the seller, thus depriving the liquidator of the right to revoke, if in the creditor's interests.

3. The Insolvency Practitioners Association suggest U.L.6 should only apply to multi-State contracts; then it would not clash with internal laws, such as the Consumer Credit Act, 1974.

4. The Equipment Leasing Association suggest that reservation of title should be governed by the proper law of the contract.

5. The H.P. Trade Association supports the recommendation but adds that it is prepared to accept and indeed entirely supports the concept of Article 39; it does not appear to take exception to U.L.6.

6. The College of Justice in Scotland supports the recommendation and adds that the position of a liquidator must be ascertained - U.L.6 appears to preclude him repudiating liability.

(f) Set off (C.P.4.46 to 4.49)

N.B. Consultees were asked (a) whether or not set off rules should be mandatory and (b) the desirability of allowing set off for contingent debts.

Comments

1. Our preliminary view was that the first three clauses of U.L.5 were acceptable and U.L.5(4) might be, provided there was an acceptable definition of "suspension of payments."

2. The I.D.W.P. thought U.L.5(4) was made unnecessarily complicated by its specific reference to negotiable instruments.

3. The Scottish Chartered Accountants say that the provisions of U.L.5 are not inconsistent with Scottish rules of set off and no exception is taken to them. They accept U.L.5(3) regarding contingent debts.

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6. The set off rules in U.L.5 are acceptable, subject to an acceptable definition of 'suspension of payments'.

10(75) 6

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM No 6 - RECOGNITION AND ENFORCEMENT OF JUDGMENTS

17 April 1975

(a) Judgments (C.P.6.1, Note 1)

RECOMMENDATION:

ARTICLE 49 SH~~OULD BE REDRAFTED SO AS TO INCLUDE~~ NON JUDICIAL DECISIONS Accept

Comments

1. The College of Justice in Scotland says that the article is satisfactory so far as it goes, but certain matters are adjudicated upon in the first instance by a trustee or liquidator (admission and ranking of claims) and only go before the court on appeal. This is also true in at least England, Ireland and Germany.

2. The Brussels Panel have in mind putting an article in the Protocol listing the non-judicial decisions to be considered as coming under Article 49; delegations were asked to submit lists of such decisions.

(b) Recognition as of right (C.P.6.1 to 6.4)

RECOMMENDATIONS:

(i) ARTICLE 50 SHOULD PROVIDE FOR UNIFORM METHODS OF AUTHENTICATING JUDGMENTS OTHER THAN THOSE APPOINTING A LIQUIDATOR AND FOR THEIR TRANSLATION

(ii) DRAFTING OR TRANSLATION OF ARTICLE 50 SHOULD BE IMPROVED: A REFERENCE TO THE LIBERTY OF THE SUBJECT WOULD BE MORE APPROPRIATE THAN "THE FREEDOM OF THE INDIVIDUAL". ALSO "WITHOUT ANY SPECIAL PROCEDURE BEING REQUIRED" IS PREFERABLE TO "WITHOUT THE NEED FOR ANY FORMALITY."

Comments

1. These were our preliminary views and they are supported by the College of Justice in Scotland and the Institute of Directors.

2. The Insolvency Practitioners Association says the difficulties envisaged in the C.P. underline the possible need for standardisation but they do not think problems will arise in practice. The British Chambers of Commerce also feel that such a document, which they assume will be translated, will be clear and unambiguous.

3. The Legislative Draftsmen, Northern Ireland suggest adoption of the procedure used in the Convention for the legalisation of foreign documents (Cmd. 4503).

4. The Kilbrandon Report makes no comment on a similar provision in the Judgments Convention.

(c) Conflicting jurisdictions (C.P. 6.4)

RECOMMENDATIONS:

(i) THE PRINCIPLES IN ARTICLES 51 AND 52 ARE ACCEPTABLE

(ii) PROVISION SHOULD BE MADE FOR THE PROTECTION OF PERSONS WHO HAVE ~~MISTAKENLY~~ ACTED ON THE BASIS OF THE VALIDITY OF A CERTAIN JUDGMENT in good faith

Comments

The College of Justice has proposed the second recommendation but it otherwise considers the articles both necessary and acceptable.

(d) Validity of liquidator's acts (C.P. 6.4)

RECOMMENDATION:

ARTICLE 53 SHOULD BE EXTENDED TO PROTECT PERSONS AGAINST WHOM THE LIQUIDATOR MAY HAVE ENFORCED A JUDGMENT WHICH IS RENDERED INEFFECTIVE

Comments

1. This is supported by the College of Justice in Scotland, the British Chambers of Commerce, the City of London Solicitors Company, the Insolvency Practitioners Association (who refer to ss. 45 and 46 of the B.A. 1914) and the Legislative Draftsmen, Northern Ireland who think Continental systemsmay give protection already by subrogation.

(e) Enforcement as of right (C.P.6.11)

RECOMMENDATIONS:

(i) ARTICLE 54 IS ACCEPTABLE.

(ii) IF ARTICLES 61-67 ARE TO BE DELETED AS BEING ALREADY IN THE JUDGMENTS CONVENTION, THEN IT IS FOR CONSIDERATION THAT ARTICLE 54 SHOULD SPECIFY THAT JUDGMENTS ANCILLARY TO BANKRUPTCY PROCEEDINGS ARE GOVERNED BY THE JUDGMENTS CONVENTION.

Comments

1. The College of Justice in Scotland finds the article unexceptional.

(f) Action to challenge the bankruptcy (C.P.6.6 and 6.7)

RECOMMENDATIONS:

(i) THE EXCLUSION OF CHALLENGE ON THE GROUND THAT THE COURT OF ORIGIN LACKED JURISDICTION IS UNDESIRABLE (ARTICLE 56 (2)(b)).

(ii) THE GROUND OF CHALLENGE THAT THE JUDGMENT WAS OBTAINED BY FRAUD SHOULD BE MADE SPECIFIC.

Comments

1. The first recommendation is supported by the Legislative Draftsmen, Northern Ireland and the College of Justice in Scotland who also propose the second recommendation. They point out that this ground is specified in the Foreign Judgments (Reciprocal Enforcement) Act, 1933 and it should not be left, to be covered by "public policy."

2. As regards 56(2)(d): what would happen if a bankruptcy was opened in the U.K. and one in Paris, and under the Convention, only the French bankruptcy prevailed. Would the UK courts recognise the French liquidator without the Receiving Order, Sequestration Order or Winding-up Order being rescinded?

(g) Courts having jurisdiction to entertain actions to challenge the bankruptcy (C.P.6.8)

RECOMMENDATION:

IN ACCORDANCE WITH ARTICLE 57, ARTICLE X OF THE PROTOCOL SHOULD LIST THE HIGH COURT IN ENGLAND, THE COURT OF SESSION IN SCOTLAND AND THE HIGH COURT IN NORTHERN IRELAND

Comment

This is supported by all who have commented on it.

(h) Parties to such actions and time limits (C.P.6.9 and 6.10)

RECOMMENDATION:

THE PROVISIONS OF 58(1) AND 58(2) ARE ACCEPTABLE BUT THE ENGLISH TRANSLATION SHOULD REFER TO THE APPROPRIATE PUBLIC MINISTER

Comments

The British Chambers of Commerce, the Insolvency Practitioners Association and the College of Justice in Scotland support this; the latter agree it should be the Lord Advocate as regards Scotland.

(i) Effects of a challenge (C.P.6.3 - Article 59)

Comments

1. Our preliminary views were that this article was generally acceptable but 59(3) should also stipulate advertisement in the O.J.E.C. and 59(4) should also cover the acts of third parties.

2. The College of Justice in Scotland find the article unexceptional, except for the last sentence of 59(4), where they agree with us.

3. It does seem to me that under 59(3) an adverse judgment would prevent anyone else in that State from challenging the bankruptcy.

(j) Articles 61 to 67

At the request of the German, Belgian and Netherlands delegations, the Brussels Panel discussed the necessity for these articles; they are pratically the same as articles 26 to 49 of the Judgments Convention and they relate to matters which fall to be dealt with under that Convention.

The Panel recalled that this part of the Bankruptcy Convention had been drafted before work on the relative part of the Judgments Convention had been completed. The delegations of the original six Member States were unanimously of the opinion that it would be preferable to delete articles 61-67 and to insert a reference to the fact that the Judgments Convention applied to such matters. The delegations of the three new Member States reserved their position on this decision.

It would seem to be a matter on which our Committee should advise and I have therefore omitted to list the consultees comments on these articles for the time being. However, it is of interest that the College of Justice in Scotland says of Article 61 that it does not

> "see any particular advantage or necessity in the making of separate rules for the enforcement of bankruptcy judgments as against other judgments and on the contrary feel that it is desirable in the interests of clarity and simplicity that the same set of rules should govern the enforcement of all judgments."

They make similar observations about Articles 62, 63 and 64.

MEMORANDUM NO 6

1. Article 49 should be re-drafted to include non-judicial decisions.

2. (a) Article 50 should provide for uniform methods of authentication of judgments.

   (b) Drafting/translation of Article 50 requires to be improved.

3. (a) The principles of Articles 51 and 52 are acceptable.

   (b) Provision should be made for the protection of third parties who have acted in good faith.

4. Article 53 should be extended to protect third parties.

5. Article 54 is acceptable.

6. (a) The exclusion of a challenge to the bankruptcy on grounds of the court's lack of jurisdiction is undesirable.

   (b) There should also be a specific ground that the judgment was obtained by fraud.

7. Article 58 is acceptable, subject to amending "public prosecutor".

8. (a) Article 59(3) should also stipulate advertisement in the OJEC.

   (b) Article 59(4) should cover the acts of third parties.

9. The deletion of Articles 61-67 is acceptable.

V 20 Emtg 6

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM No 6 - RECOGNITION AND ENFORCEMENT OF JUDGMENTS

17 April 1975

(a) Judgments (C.P.6.1, Note 1)

RECOMMENDATION:

Reject

ARTICLE 49 SHOULD BE REDRAFTED SO AS TO INCLUDE NON JUDICIAL DECISIONS

Comments

1. The College of Justice in Scotland says that the article is satisfactory so far as it goes, but certain matters are adjudicated upon in the first instance by a trustee or liquidator (admission and ranking of claims) and only go before the court on appeal. This is also true in at least England, Ireland and Germany.

2. The Brussels Panel have in mind putting an article in the Protocol listing the non-judicial decisions to be considered as coming under Article 49; delegations were asked to submit lists of such decisions.

(b) Recognition as of right (C.P.6.1 to 6.4)

RECOMMENDATIONS:

(i) ARTICLE 50 SHOULD PROVIDE FOR UNIFORM METHODS OF AUTHENTICATING JUDGMENTS OTHER THAN THOSE APPOINTING A LIQUIDATOR AND FOR THEIR TRANSLATION

(ii) DRAFTING OR TRANSLATION OF ARTICLE 50 SHOULD BE IMPROVED: A REFERENCE TO THE LIBERTY OF THE SUBJECT WOULD BE MORE APPROPRIATE THAN "THE FREEDOM OF THE INDIVIDUAL". ALSO "WITHOUT ANY SPECIAL PROCEDURE BEING REQUIRED" IS PREFERABLE TO "WITHOUT THE NEED FOR ANY FORMALITY."

Comments

1. These were our preliminary views and they are supported by the College of Justice in Scotland and the Institute of Directors.

2. The Insolvency Practitioners Association says the difficulties envisaged in the C.P. underline the possible need for standardisation but they do not think problems will arise in practice. The British Chambers of Commerce also feel that such a document, which they assume will be translated, will be clear and unambiguous.

3. The Legislative Draftsmen, Northern Ireland suggest adoption of the procedure used in the Convention for the legalisation of foreign documents (Cmd. 4503).

4. The Kilbrandon Report makes no comment on a similar provision in the Judgments Convention.

(c) Conflicting jurisdictions (C.P. 6.4)

RECOMMENDATIONS:

(i) THE PRINCIPLES IN ARTICLES 51 AND 52 ARE ACCEPTABLE

(ii) PROVISION SHOULD BE MADE FOR THE PROTECTION OF PERSONS WHO HAVE [MISTAKENLY] ACTED ON THE BASIS OF THE VALIDITY OF A CERTAIN JUDGMENT in good faith.

Comments

Bar Council

The College of Justice has proposed the second recommendation but it otherwise considers the articles both necessary and acceptable.

(d) Validity of liquidator's acts (C.P. 6.4)

RECOMMENDATION:

ARTICLE 53 SHOULD BE EXTENDED TO PROTECT PERSONS AGAINST WHOM THE LIQUIDATOR MAY HAVE ENFORCED A JUDGMENT WHICH IS RENDERED INEFFECTIVE

Comments

1. This is supported by the College of Justice in Scotland, the British Chambers of Commerce, the City of London Solicitors Company, the Insolvency Practitioners Association (who refer to ss. 45 and 46 of the B.A. 1914) and the Legislative Draftsmen, Northern Ireland who think Continental systemsmay give protection already by subrogation.

(e) Enforcement as of right (C.P.6.11)

RECOMMENDATIONS:

(i) ARTICLE 54 IS ACCEPTABLE.

(ii) IF ARTICLES 61-67 ARE TO BE DELETED AS BEING ALREADY IN THE JUDGMENTS CONVENTION, THEN IT IS FOR CONSIDERATION THAT ARTICLE 54 SHOULD SPECIFY THAT JUDGMENTS ANCILLARY TO BANKRUPTCY PROCEEDINGS ARE GOVERNED BY THE JUDGMENTS CONVENTION.

Comments

1. The College of Justice in Scotland finds the article unexceptional.

(f) Action to challenge the bankruptcy (C.P.6.6 and 6.7)

RECOMMENDATIONS:

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College of Justice

(ii) THE GROUND OF CHALLENGE THAT THE JUDGMENT WAS OBTAINED BY FRAUD SHOULD BE MADE SPECIFIC.

Comments

1. The first recommendation is supported by the Legislative Draftsmen, Northern Ireland and the College of Justice in Scotland who also propose the second recommendation. They point out that this ground is specified in the Foreign Judgments (Reciprocal Enforcement) Act, 1933 and it should not be left, to be covered by "public policy."

2. As regards 56(2)(d): what would happen if a bankruptcy was opened in the U.K. and one in Paris, and under the Convention, only the French bankruptcy prevailed. Would the UK courts recognise the French liquidator without the Receiving Order, Sequestration Order or Winding-up Order being rescinded?

(g) Courts having jurisdiction to entertain actions to challenge the bankruptcy (C.P.6.8)

RECOMMENDATION:

IN ACCORDANCE WITH ARTICLE 57, ARTICLE X OF THE PROTOCOL SHOULD LIST THE HIGH COURT IN ENGLAND, THE COURT OF SESSION IN SCOTLAND AND THE HIGH COURT IN NORTHERN IRELAND

except the Scottish Ch. Dels.

Comment

This is supported by all who have commented on it.

(h) Parties to such actions and time limits (C.P.6.9 and 6.10)

RECOMMENDATION:

THE PROVISIONS OF 58(1) AND 58(2) ARE ACCEPTABLE BUT THE ENGLISH TRANSLATION SHOULD REFER TO THE APPROPRIATE PUBLIC MINISTER

Comments

The British Chambers of Commerce, the Insolvency Practitioners Association and the College of Justice in Scotland support this; the latter agree it should be the Lord Advocate as regards Scotland.

(i) Effects of a challenge (C.P.6.3 - Article 59)

Comments

1. Our preliminary views were that this article was generally acceptable but 59(3) should also stipulate advertisement in the O.J.E.C. and 59(4) should also cover the acts of third parties.

2. The College of Justice in Scotland find the article unexceptional, except for the last sentence of 59(4), where they agree with us.

3. It does seem to me that under 59(3) an adverse judgment would prevent anyone else in that State from challenging the bankruptcy.

(j) Articles 61 to 67

At the request of the German, Belgian and Netherlands delegations, the Brussels Panel discussed the necessity for these articles; they are pratically the same as articles 26 to 49 of the Judgments Convention and they relate to matters which fall to be dealt with under that Convention.

The Panel recalled that this part of the Bankruptcy Convention had been drafted before work on the relative part of the Judgments Convention had been completed. The delegations of the original six Member States were unanimously of the opinion that it would be preferable to delete articles 61-67 and to insert a reference to the fact that the Judgments Convention applied to such matters. The delegations of the three new Member States reserved their position on this decision.

It would seem to be a matter on which our Committee should advise and I have therefore omitted to list the consultees comments on these articles for the time being. However, it is of interest that the College of Justice in Scotland says of Article 61 that it does not

> "see any particular advantage or necessity in the making of separate rules for the enforcement of bankruptcy judgments as against other judgments and on the contrary feel that it is desirable in the interests of clarity and simplicity that the same set of rules should govern the enforcement of all judgments."

They make similar observations about Articles 62, 63 and 64.

2(3)(6)

6

MEMORANDUM NO 6

1. Article 49 should be re-drafted to include non-judicial decisions.

2. (a) Article 50 should provide for uniform methods of authentication of judgments.

   (b) Drafting/translation of Article 50 requires to be improved.

3. (a) The principles of Articles 51 and 52 are acceptable.

   (b) Provision should be made for the protection of third parties who have acted in good faith.

4. Article 53 should be extended to protect third parties.

5. Article 54 is acceptable.

6. (a) The exclusion of a challenge to the bankruptcy on grounds of the court's lack of jurisdiction is undesirable.

   (b) There should also be a specific ground that the judgment was obtained by fraud.

7. Article 58 is acceptable, subject to amending "public prosecutor".

8. (a) Article 59(3) should also stipulate advertisement in the OJEC.

   (b) Article 59(4) should cover the acts of third parties.

9. The deletion of Articles 61-67 is acceptable.

2(2.2)

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 7 - THE UNIFORM LAW 1 May 1975

(a) Article 76 - Incorporation of the Uniform Law into national legislation (C.P.7.4)

RECOMMENDATION:

REFERENCES TO ARTICLE 39 SHOULD BE DELETED

Comment

This would appear to follow from our recommendation that Article 39 should be brought into line with our view of Article 38 (law of the bankruptcy unless the contract contains an express condition). If this is accepted then presumably Article 39 is no longer a uniform law.

(b) Article 76(4)

RECOMMENDATION:

THE PRINCIPLE OF THIS CLAUSE IS ACCEPTABLE

Comments

It has been suggested that every creditor has a free choice, either to agree to an arrangement, or to institute formal bankruptcy proceedings; therefore the extension in 76(4) is unnecessary and undesirable. But, it may be that some of the provisions of U.L. 3 to 6 do in fact apply to certain continental analogous proceedings; therefore 76(4) is necessary. But perhaps it should be more explicit: that the provisions only apply to the extent allowed by the national law governing the particular proceeding.

2. The City of London Solicitors Company think Articles 3-6 of the U.L. should apply only where there are bankruptcy proceedings.

3. The Insolvency Practitioners Association takes the opposite view and find 76(4) necessary.

(c) Article 76(5) - Reservations in Annex II

RECOMMENDATION:

THIS CLAUSE SHOULD NOT BE ACCEPTED. THE PROVISIONS OF THE UNIFORM LAW MUST BE MADE GENERALLY ACCEPTABLE TO ALL MEMBER STATES

Comments

1. The College of Justice in Scotland is against reservations: "If the provisions of the U.L. cannot be made generally acceptable to the Contracting States the failure to achieve agreement must reflect on the validity of the overall approach of the Convention.

2. The Insolvency Practitioners Association and the Bar Council, N. Ireland agree with the recommendation, as do all consultees who have commented thereon.

(d) Uniform Law 1 (C.P.7.6 - 7.11)

RECOMMENDATIONS

(i) THE WORDS "MAY BE DECLARED BANKRUPT" IN CLAUSE 1 SHOULD BE AMENDED TO READ "MAY BE DECLARED A DEBTOR OF THE PARTNERSHIP, COMPANY OR BODY CORPORATE IN APPROPRIATE PROCEEDINGS .....AND MAY BE PROCEEDED AGAINST IN BANKRUPTCY AS SUCH DEBTOR" (See the Report of our Fifth Meeting)

(ii) CLAUSE 2 SHOULD BE WORDED: "THE BANKRUPTCY OF SUCH DEBTOR SHALL BE DEEMED TO RELATE BACK TO AND TO COMMENCE AT THE SAME DATE AS THAT ON WHICH THE PARTNERSHIP, COMPANY OR BODY CORPORATE BECAME INSOLVENT, AND UNABLE TO PAY ITS DEBTS" (See Fifth Meeting Report)

(iii) THE WORDS "OF BANKRUPTCY" SHOULD BE OMITTED FROM LINE 1 OF CLAUSE 3. (See Fifth Meeting Report)

(iv) ADD CLAUSE 4 "THE RIGHTS CONFERRED ON THE CREDITORS OF THE PARTNERSHIP, COMPANY OR BODY CORPORATE BY THE PROVISIONS OF THIS ARTICLE SHALL BE IN ADDITION TO, AND NOT IN SUBSTITUTION FOR, THOSE ALREADY PRESCRIBED BY THE LAW OF EACH CONTRACTING STATE." (See Fifth Meeting Report).

(v) THE SUBJECT MATTER OF THIS ARTICLE IS AN APPROPRIATE MATTER FOR BANKRUPTCY LAW (C.P.7.8)

(vi) THE ARTICLE SHOULD BE SPECIFIC IN ITS REQUIREMENTS AS TO KNOWLEDGE AND INTENT (C.P.7.9)

(vii) GERMANY's RESERVATION NOT TO INTRODUCE THE ARTICLE IS NOT ACCEPTABLE (C.P.7.11)

(viii) THE UK SHOULD MAKE A RESERVATION IF THE ARTICLE IS NOT AMENDED SATISFACTORILY (C.P.7.11)

NOTE Recommendations (vii) and (viii) will not apply if Article 76(5) is deleted.

Comments

1. Our preliminary views were that the article was generally acceptable subject to the above first four recommendations. We also thought that the word "wrongfully" should be omitted from 1(b) and 1(c). Please also note the comments of Mr Muir Hunter (Fourth Meeting Report, paragraph 6) that, as at present drafted, the article did not convey the intentions set out in the NL Report.

"surreptitiously"

2. The College of Justice in Scotland has commented in detail on this article at pages 43-51 of their report. There should be a clear statement of the onus of proof in any uniform law, and a clear and positive requirement of notice to the defendant. Before any possibility of bankruptcy his liability should be determined and he should have had an opportunity to pay. The College proposes an alternative Clause 3. They appear to agree with recommendation (v). See also, their remarks on U.L.2.

3. The Association of British Chambers of Commerce says there is a need to strengthen the law and to deter potential misfeasors. To be fair and effective the law must be fixed and precisely stated. An artificial date in Clause 2 is inevitable and should be accepted.

4. The City of London Solicitors Company agree that U.L.1 is vague and must be made more specific; but they want it introduced into English law, because of the difficulty in establishing liability under s.332 of C.A.1948, which is in need of amendment. They agree that the claim should be quantified and there should be a failure to pay, before bankruptcy proceedings. They accept 1(2).

5. The Bar Council, Northern Ireland has firm views about onus. They want both U.L.1 and U.L.2 to be amended to make clear the vicarious liability of parent companies, and that the onus of proof is on the parent company to show that it was not responsible for the acts of the directors and managers appointed by it to the subsidiary company.

6. The H.P. Trade Association agree with our views about quantifying the liability and failure to pay. They also say there is a requirement for precise specification on onus of proof, knowledge and intent, for what amounts to a criminal offence.

7. The Insolvency Practitioners Association think the principles of U.L.1 are acceptable; they dislike reservations and are of the view that even if parts of the law as finally negotiated are thought to be unsatisfactory by the UK, we should not make any reservation.

8. The Institute of Directors think U.L.1(1) should be limited by the words "and knowingly". They do not agree that the UK should express reservations on the Uniform Law.

9. The Law Society supports our general objections to the present draft; they also question whether a senior clerk with real management responsibilities in an English partnership could be at risk.

Bar Council
L. Ch. Accts.
Law Soc. of Scotland p.20. (e)
I.P.A.

Uniform Law 2 (C.P.7.12)

RECOMMENDATION:

THIS ARTICLE IS ACCEPTABLE

Comments

1. Although we accepted this article, we did note that "personne morale" had a wide meaning and included a group of companies having no combined legal personality. The English translation does not reflect this.

2. The College of Justice in Scotland suggest that if U.L.1 was limited to providing grounds on which a manager could be found liable to compensate the firm, the two articles could be made to operate to advantage.

3. The Institute of Directors, Insolvency Practitioners Association and Association of British Chambers of Commerce agree with the recommendation.

BBA say this is different from Article 1.
Does not this -4- include mens rea or negligence

(f) Uniform Law 3 (C.P.4.20)

RECOMMENDATION:

THERE IS NO OBJECTION TO THE PROVISIONS OF THIS ARTICLE

Comments

1. This was our preliminary view (7th Meeting Report, paragraph 11).

2. The Scottish Chartered Accountants feel that it will only be in very isolated cases that foreign law will be applicable to a wife resident in the UK and from a practical view point both Article 34 and U.L.3 are acceptable.

(g) Cessation of Payments (C.P.7.21 - 7.23)

RECOMMENDATIONS:

(i) A DEFINITION OF CESSATION OF PAYMENTS, ADOPTED BY ALL MEMBER STATES, IS ESSENTIAL.

(ii) THE DEFINITION SET OUT IN C.P.7.21 SHOULD BE PUT FORWARD BY THE UK

Comments

1. The College of Justice in Scotland agrees, provided the words "Unless it be proved ..... rather than permanent" are deleted. The concept only requires consideration in the event of bankruptcy. If the debtor was insolvent at the time of the "act", that should be sufficient. If he has become bankrupt his temporary solvency was probably freakish or perhaps deliberately designed. The College also argues (p.54) that in the interests of effective and uniform operation of the law, the opening of the bankruptcy should also be defined, either in the Uniform Law, or in Article 18.

2. The Association of British Chambers of Commerce suggest Clause 1 should read:

"1. Cessation of payments shall be constituted:

(a) by any failure on the part of a debtor to pay his debts in the ordinary course of business or as they fall due unless it be proved that such failure to pay was temporary; or

(b) by a debtor committing or suffering an act or acts demonstrating his insolvency."

They also think that express reference should be made to the less archaic parts of s.1(1) B.A.1914 in Clause 2; in particular it is important to provide for some form of Bankruptcy Notices, not only in the case of individuals, but for all legal entities.

3. The Law Society and the British Bankers Association think our definition is too vague; absolute certainty and clarity are essential.

4. The City of London Solicitors Company and the Insolvency Practitioners Association agree with our definition. The IPA add that the acts specified in s.1 B.A.1914 should be acceptable evidence, together with the suffering of an execution or distraint, dishonouring a bill of exchange or failure to pay a formal demand within 21 days.

5. The Institute of Chartered Accountants in England and Wales prefer our relevant Acts of Bankruptcy.

6. The Institute of Chartered Accountants in Ireland agree that Cessation of Payments should be defined in the Uniform Law.

7. The Bar Council would prefer a definition corresponding to a modern version of our existing "act of bankruptcy", thus:-

> "1. Cessation of payments shall be constituted
>
> (a) by anyfailure on the part of a debtor to pay his debts in the ordinary course of business or as they fall due; or
>
> (b) by a debtor committing or suffering any act or acts demonstrating his insolvency.
>
> 2. Without prejudice to the generality of the foregoing, the following acts shall constitute a cessation of payments by a debtor:-
>
> (Here set out a list of specific events to be agreed)."

They would particularly want the list to include a failure by the debtor to comply, within a specified period, with an agreed international form of "bankruptcy notice" or "statutory demand" requiring personal service on the debtor.

Law Soc. of Scotland,

(h) Uniform Law 4(A) (C.P.7.14, 7.29)

RECOMMENDATIONS:

(i) THE PERIOD APPROPRIATE TO THIS CLAUSE SHOULD BE TWO YEARS AND NOT ONE YEAR

(ii) THE PROVISIONS OF U.L.4(A) ARE ACCEPTABLE SUBJECT TO CERTAIN SAFEGUARDS

Comments

1. The Committee had diverse views on this clause during preliminary discussions (see 8th Meeting Report, paragraphs 4-8). Recommendation (ii) together with the required safeguards will be found in C.P.7.29.

2. The College of Justice in Scotland doubts whether 4(A)(1) can be amended sufficiently to make it acceptable (see p.55 of their report). However they think 4(A)(2) may be accepted if our required safeguards are written in.

3. The Association of British Chambers of Commerce and the City of London Solicitors Company both agree with a 2 year period. The Insolvency Practitioners Association find the periods specified in s.42 B.A.1914 eminently practicable and say that shorter periods would be undesirable. The British Bankers Association are unclear as to whether collections are covered under 4(A). They think 4(A)(2) would deprive banks of flexibility to the disadvantage of customers.

4. The Law Society also prefer 2 years. They dislike the idea of different rules as between Member States in respect of transactions in fraud of creditors (presumably they refer to the various reservations) but they think there should be no reduction in powers under current English law. They think it is wrong to classify dowries along with other gifts and therefore void, and consider that the protection of s.42 B.A. 1914 should be preserved.

5. The City of London Solicitors Company agree in general with the basis of 4(A) but have difficulty with the phrase "in fulfilment of a moral obligation" and consider it requires a more concise definition. They also think consideration should be given to the question of payments made under orders of Divorce or other Family Courts.

6. I suggest that the Committee might consider recommending that the proviso to 4(A)(1) is too vague and indeterminate; that its principle is acceptable but that it should be redrafted so as to clarify such things as "unusual circumstances" and "moral obligation." We might also consider whether voluntary transfers

College of Justice on 4(A)(2)

should be protected where (a) they are made in consideration of marriage or (b) if the donor was solvent without the transferred property at the date of the transfer - onus of proof to be on the donee.

(i) Uniform Law 4(B)(1) (C.P.7.30-7.31)

COMMITTEE'S PRELIMINARY RECOMMENDATION:

GENERALLY ACCEPTABLE, SUBJECT TO ULTIMATE MEANING OF 'CESSATION OF PAYMENTS." 4(B)(1)(b) SHOULD INCLUDE THE WORDS "BY THE DEBTOR" AND IT SHOULD NOT UPSET BONA FIDE TRANSACTIONS ENTERED INTO AFTER THE CESSATION OF PAYMENTS. 4(B)(1)(c) SHOULD INCLUDE THE WORDS "TO THE PREJUDICE OF CREDITORS".

Comments

1. The College of Justice in Scotland have no objections to these clauses other than those arising out of the concept of cessation of payments.

2. The Law Society say payments in advance should not be void but voidable, but they agree it should be for the bankrupt or payee to show that there was consideration and no unlawful preference. The burden of proof should not be on the liquidator as at present. They think 4(B)(1)(b) is directed at payments in kind, but think it should be clarified.

3. The British Bankers Association point out that overdrafts are virtually unknown to continental drafting and the Convention therefore makes no allowance for this practice. Articles 4(B) and 4(C) would have the effect of overriding the traditional principles of English law as they imply that, although banks cannot be placed in a preferential position by receipts after the announcement of the cessation of payments, neither can they be placed at risk by payments out of the account. They think this could have implications for the UK overdraft system.

4. The British Chambers of Commerce find all clauses of 4(B)(1) acceptable in their present form and suggest (c) refers to the performance of contractual obligations other than the payment of debts expressed to be payable in terms of money.

5. The Bar Council question whether the provisions of Article 4 will be in addition to our existing provisions, and if not, whether a fraudulent preference would be recoverable by a Paulian action. They think payment in advance or in an unusual manner is to be regarded as evidence from which an intention to prefer may be inferred. This is acceptable provided it is made clear that the inference may be rebutted.

6. The Insolvency Practitioners Association and the City of London Solicitors Company agree with our preliminary views as set out in the C.P.

(j) Uniform Law 4(B)(2) (C.P.7.32)

COMMITTEE'S PRELIMINARY RECOMMENDATION

ACCEPTABLE (see 8th Meeting Report, paras 10 and 11). However, in the C.P. we suggest there should be a proviso that the clause does not apply where the security is created in terms of an antecedent obligation to that effect.

Comments

1. The College of Justice raise the objection covered by the above proviso. The Law Society also supports this but suggest provision should be made to take account of the situation where full consideration is given for security by way of a charge. They say the burden of showing the antecedent obligation should be on the creditor, not the liquidator, and a 1 year relation back period is not enough.

2. The Bar Council, British Chambers of Commerce and the Insolvency Practitioners Association agree with the article and our proviso. The Bar Council say a substantial change in English law is involved but it is an improvement on the existing position. They stress the importance of proper transitional provisions.

(k) Uniform Law 4(C)(C.P.7.34, 7.35)

COMMITTEE'S PRELIMINARY RECOMMENDATION:

ACCEPTABLE (8th Meeting Report, paras 12 and 13). However in the C.P. we suggested 4(c)(1) was not acceptable and that 4(c)(2) raised technical questions on which we sought advice.

Comments

1. The remarks of the British Bankers Assocation are given above in dealing with 4(B).

2. The College of Justice in Scotland consider 4(C)(1) clear and acceptable; but the Bar Council, the City of London Solicitors Company, the British Chambers of Commerce and the Law Society find it unacceptable. The latter consider that the protection given under ss. 46 and 47, B.A.1914 should be preserved.

Scottish Ch. Accts. say not materially different.

Certified Accts say not unreasonable

Law Society to say difficult

C.P.

3. The Insolvency Practitioners Association find 4(c)(1) unacceptable because it often results in some creditors being paid to the detriment of others. They dislike the English "fiction" of payment under "pressure" and suggest provisions like s.227 C.A.1948 might form a useful basis.

(l) Uniform Law 4(D) (C.P.7.36, 7.37)

COMMITTEE'S PRELIMINARY RECOMMENDATION

ACCEPTABLE IN PRINCIPLE BUT A 21 DAY PERIOD PREFERABLE AND GUIDANCE AS TO GROUNDS FOR INVALIDITY.

Comments

1. The College of Justice find 4(D) acceptable but the Law Society think it inappropriate to confer a discretion without giving guidelines. They think that the certainty given in ss.95 and 106A, C.A. 1948 desirable and should not be lost.

2. The City of London Solicitors Company want guidance lines laid down, and the British Chambers of Commerce want a 21 day period, with automatic extensions for foreign contracts, postal difficulties, etc. They point to the existing discretion under s.95 C.A. 1948.

3. The Chartered Accountants, N.Ireland consider the legislation should follow s.93 Companies Act (N.Ireland) 1960.

(m) Uniform Law 4(E) (8th Meeting, para 16)

Comment

We were somewhat undecided about this clause. It was not discussed in the C.P., but the College of Justice in Scotland find it acceptable.

(n) Uniform Law 4(F) (C.P.7.38, 7.39)

COMMITTEE'S PRELIMINARY RECOMMENDATION:

NO OBJECTIONS TO THIS CLAUSE (8th Meeting Report, paras 17-18) In the C.P. we asked (a) what UK rules of law should be retained as coming within the spirit of the Paulian action, and (b) what modifications and additions would be required to those rules to complement the U.L.

Comments

1. Stewart Wrightson (Credit Management)Ltd suggest that Scots Law and Article 1167 of the French Civil Code provide the seller with a less onerous task than does English law, which should be amended. They would also like clear provision made for action to be brought by the Credit Insurer where it is clear that that organisation has an interest in recoveries.

2. The City of London Solicitors Company think thereshould be retained the right to set aside (a) any transaction with intent to defraud creditors, and (b) any improper disposition of the property of a company. They suggest something like the 10 year period of s.42 B.A. 1914 might be useful.

Reservation (d)

3. The Law Society think s.172 of the Law of Property Act, 1925 should be retained, and the need to prove fraudulent or dishonest intent on the debtor's part.

4. The College of Justice in Scotland does not find the loss of intitative on the part of a creditor objectionable, provided he can compel the liquidator to act in normal course.

(o) Floating Charges (C.P.7.40, 7.41)

Note In the C.P. we discuss the retrospective effect of U.L.4 and draw attention to possible problems concerning floating charges.

Comments

1. The Bar Council thinks special provisions should be included in the Convention (not the U.L.) to afford them recognition. They should then be expressly included in the U.L. as a security for the purposes of the law.

2. The Law Society says that it would be unacceptable for the Convention to inhibit the use of floating charges. The Insolvency Practitioners Society agree that a F.C. should be recognised throughout the EEC and that it should not be capable of being subject to a Paulian action. At the same time they point out that a F.C. can only be registered in England in respect of a company registered in England and in most instances its C/A will be in England.

3. The Association of British Chambers of Commerce suggest we should import a Paulian action more generally into U.K. law as a quid pro quo for the general validity of floating charges.

(p) Uniform Law 5 - Set-off

NOTE Please see Section (f) of Memorandum No 5. Additional comments are as follows:

1. The Bar Council consider U.L.5 to be seriously deficient and that it ought to deal with the points made in the C.P. They also think specific reference should be made to moneys paid for a special purpose, which are not capable of set-off under English law. They disagree with our suggestion that English law does not allow set-off for contingent debts.

2. The Association of Certified Accountants think the advantages of mandatory rules will outweigh any disadvantages. Set-off should be allowed for contingent debts subject to protection rules to exclude liabilities incurred with knowledge of insolvency.

7

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 7 - THE UNIFORM LAW 1 May 1975

(a) Article 76 - Incorporation of the Uniform Law into national legislation (C.P.7.4)

RECOMMENDATION:

REFERENCES TO ARTICLE 39 SHOULD BE DELETED

Comment

This would appear to follow from our recommendation that Article 39 should be brought into line with our view of Article 38 (law of the bankruptcy unless the contract contains an express condition). If this is accepted then presumably Article 39 is no longer a uniform law.

(b) Article 76(4)

RECOMMENDATION:

THE PRINCIPLE OF THIS CLAUSE IS ACCEPTABLE

Comments

It has been suggested that every creditor has a free choice, either to agree to an arrangement, or to institute formal bankruptcy proceedings; therefore the extension in 76(4) is unnecessary and undesirable. But, it may be that some of the provisions of U.L. 3 to 6 do in fact apply to certain continental analogous proceedings; therefore 76(4) is necessary. But perhaps it should be more explicit: that the provisions only apply to the extent allowed by the national law governing the particular proceeding.

2. The City of London Soliciters Company think Articles 3-6 of the U.L. should apply only where there are bankruptcy proceedings.

3. The Insolvency Practitioners Association takes the opposite view and find 76(4) necessary.

(c) Article 76(5) - Reservations in Annex II

RECOMMENDATION:

THIS CLAUSE SHOULD NOT BE ACCEPTED. THE PROVISIONS OF THE UNIFORM LAW MUST BE MADE GENERALLY ACCEPTABLE TO ALL MEMBER STATES

Comments

1. The College of Justice in Scotland is against reservations: "If the provisions of the U.L. cannot be made generally acceptable to the Contracting States the failure to achieve agreement must reflect on the validity of the overall approach of the Convention.

2. The Insolvency Practitioners Association and the Bar Council, N. Ireland agree with the recommendation, as do all consultees who have commented thereon.

(d) Uniform Law 1 (C.P.7.6 - 7.11)

RECOMMENDATIONS

(i) THE WORDS "MAY BE DECLARED BANKRUPT" IN CLAUSE 1 SHOULD BE AMENDED TO READ "MAY BE DECLARED A DEBTOR OF THE PARTNERSHIP, COMPANY OR BODY CORPORATE IN APPROPRIATE PROCEEDINGS .....AND MAY BE PROCEEDED AGAINST IN BANKRUPTCY AS SUCH DEBTOR" (See the Report of our Fifth Meeting)

(ii) CLAUSE 2 SHOULD BE WORDED: "THE BANKRUPTCY OF SUCH DEBTOR SHALL BE DEEMED TO RELATE BACK TO AND TO COMMENCE AT THE SAME DATE AS THAT ON WHICH THE PARTNERSHIP, COMPANY OR BODY CORPORATE BECAME INSOLVENT, AND UNABLE TO PAY ITS DEBTS" (See Fifth Meeting Report)

(iii) THE WORDS "OF BANKRUPTCY" SHOULD BE OMITTED FROM LINE 1 OF CLAUSE 3. (See Fifth Meeting Report)

(iv) ADD CLAUSE 4 "THE RIGHTS CONFERRED ON THE CREDITORS OF THE PARTNERSHIP, COMPANY OR BODY CORPORATE BY THE PROVISIONS OF THIS ARTICLE SHALL BE IN ADDITION TO, AND NOT IN SUBSTITUTION FOR, THOSE ALREADY PRESCRIBED BY THE LAW OF EACH CONTRACTING STATE." (See Fifth Meeting Report).

(v) THE SUBJECT MATTER OF THIS ARTICLE IS AN APPROPRIATE MATTER FOR BANKRUPTCY LAW (C.P.7.8)

(vi) THE ARTICLE SHOULD BE SPECIFIC IN ITS REQUIREMENTS AS TO KNOWLEDGE AND INTENT (C.P.7.9)

(vii) GERMANY's RESERVATION NOT TO INTRODUCE THE ARTICLE IS NOT ACCEPTABLE (C.P.7.11)

(viii) THE UK SHOULD MAKE A RESERVATION IF THE ARTICLE IS NOT AMENDED SATISFACTORILY (C.P.7.11)

NOTE Recommendations (vii) and (viii) will not apply if Article 76(5) is deleted.

Comments

1. Our preliminary views were that the article was generally acceptable subject to the above first four recommendations. We also thought that the word "wrongfully" should be omitted from 1(b) and 1(c). Please also note the comments of Mr Muir Hunter (Fourth Meeting Report, paragraph 6) that, as at present drafted, the article did not convey the intentions set out in the NL Report.

2. The College of Justice in Scotland has commented in detail on this article at pages 43-51 of their report. There should be a clear statement of the onus of proof in any uniform law, and a clear and positive requirement of notice to the defendant. Before any possibility of bankruptcy his liability should be determined and he should have had an opportunity to pay. The College proposes an alternative Clause 3. They appear to agree with recommendation (v). See also, their remarks on U.L.2.

3. The Association of British Chambers of Commerce says there is a need to strengthen the law and to deter potential misfeasors. To be fair and effective the law must be fixed and precisely stated. An artificial date in Clause 2 is inevitable and should be accepted.

4. The City of London Solicitors Company agree that U.L.1 is vague and must be made more specific; but they want it introduced into English law, because of the difficulty in establishing liability under s.332 of C.A.1948, which is in need of amendment. They agree that the claim should be quantified and there should be a failure to pay, before bankruptcy proceedings. They accept 1(2).

5. The Bar Council, Northern Ireland, has firm views about onus. They want both U.L.1 and U.L.2 to be amended to make clear the vicarious liability of parent companies, and that the onus of proof is on the parent company to show that it was not responsible for the acts of the directors and managers appointed by it to the subsidiary company.

6. The H.P. Trade Association agree with our views about quantifying the liability and failure to pay. They also say there is a requirement for precise specification on onus of proof, knowledge and intent, for what amounts to a criminal offence.

7. The Insolvency Practitioners Association think the principles of U.L.1 are acceptable; they dislike reservations and are of the view that even if parts of the law as finally negotiated are thought to be unsatisfactory by the UK, we should not make any reservation.

8. The Insitute of Directors think U.L.1(1) should be limited by the words "and knowingly". They do not agree that the UK should express reservations on the Uniform Law.

9. The Law Society supports our general objections to the present draft; they also question whether a senior clerk with real management responsibilities in an English partnership could be at risk.

(e) Uniform Law 2 (C.P.7.12)

RECOMMENDATION:

THIS ARTICLE IS ACCEPTABLE

Comments

1. Although we accepted this article, we did note that "personne morale" had a wide meaning and included a group of companies having no combined legal personality. The English translation does not reflect this.

2. The College of Justice in Scotland suggest that if U.L.1 was limited to providing grounds on which a manager could be found liable to compensate the firm, the two articles could be made to operate to advantage.

3. The Institute of Directors, Insolvency Practitioners Association and Association of British Chambers of Commerce agree with the recommendation.

(f) Uniform Law 3 (C.P.4.20)

RECOMMENDATION:

THERE IS NO OBJECTION TO THE PROVISIONS OF THIS ARTICLE

Comments

1. This was our preliminary view (7th Meeting Report, paragraph 11).

2. The Scottish Chartered Accountants feel that it will only be in very isolated cases that foreign law will be applicable to a wife resident in the UK and from a practical view point both Article 34 and U.L.3 are acceptable.

(g) Cessation of Payments (C.P.7.21 - 7.23)

RECOMMENDATIONS:

(i) A DEFINITION OF CESSATION OF PAYMENTS, ADOPTED BY ALL MEMBER STATES, IS ESSENTIAL.

(ii) THE DEFINITION SET OUT IN C.P.7.21 SHOULD BE PUT FORWARD BY THE UK

Comments

1. The College of Justice in Scotland agrees, provided the words "Unless it be proved ..... rather than permanent" are deleted. The concept only requires consideration in the event of bankruptcy. If the debtor was insolvent at the time of the "act", that should be sufficient. If he has become bankrupt his temporary solvency was probably freakish or perhaps deliberately designed. The College also argues (p.54) that in the interests of effective and uniform operation of the law, the opening of the bankruptcy should also be defined, either in the Uniform Law, or in Article 18.

2. The Association of British Chambers of Commerce suggest Clause 1 should read:

"1. Cessation of payments shall be constituted:

(a) by any failure on the part of a debtor to pay his debts in the ordinary course of business or as they fall due unless it be proved that such failure to pay was temporary; or

(b) by a debtor committing or suffering an act or acts demonstrating his insolvency."

They also think that express reference should be made to the less archaic parts of s.1(1) B.A.1914 in Clause 2; in particular it is important to provide for some form of Bankruptcy Notices, not only in the case of individuals, but for all legal entities.

3. The Law Society and the British Bankers Association think our definition is too vague; absolute certainty and clarity are essential.

4. The City of London Solicitors Company and the Insolvency Practitioners Association agree with our definition. The IPA add that the acts specified in s.1 B.A.1914 should be acceptable evidence, together with the suffering of an execution or distraint, dishonouring a bill of exchange or failure to pay a formal demand within 21 days.

5. The Institute of Chartered Accountants in England and Wales prefer our relevant Acts of Bankruptcy.

6. The Institute of Chartered Accountants in Ireland agree that Cessation of Payments should be defined in the Uniform Law.

7. The Bar Council would prefer a definition corresponding to a modern version of our existing "act of bankruptcy", thus:-

"1. Cessation of payments shall be constituted

(a) by anyfailure on the part of a debtor to pay his debts in the ordinary course of business or as they fall due; or

(b) by a debtor committing or suffering any act or acts demonstrating his insolvency.

2. Without prejudice to the generality of the foregoing, the following acts shall constitute a cessation of payments by a debtor:-

(Here set out a list of specific events to be agreed)."

They would particularly want the list to include a failure by the debtor to comply, within a specified period, with an agreed international form of "bankruptcy notice" or "statutory demand" requiring personal service on the debtor.

(h) Uniform Law 4(A) (C.P.7.14, 7.29)

RECOMMENDATIONS:

(i) THE PERIOD APPROPRIATE TO THIS CLAUSE SHOULD BE TWO YEARS AND NOT ONE YEAR

(ii) THE PROVISIONS OF U.L.4(A) ARE ACCEPTABLE SUBJECT TO CERTAIN SAFEGUARDS

Comments

1. The Committee had diverse views on this clause during preliminary discussions (see 8th Meeting Report, paragraphs 4-8). Recommendation (ii) together with the required safeguards will be found in C.P.7.29.

2. The College of Justice in Scotland doubts whether 4(A)(1) can be amended sufficiently to make it acceptable (see p.55 of their report). However they think 4(A)(2) may be accepted if our required safeguards are written in.

3. The Association of British Chambers of Commerce and the City of London Solicitors Company both agree with a 2 year period. The Insolvency Practitioners Association find the periods specified in s.42 B.A.1914 eminently practicable and say that shorter periods would be undesirable. The British Bankers Association are unclear as to whether collections are covered under 4(A). They think 4(A)(2) would deprive banks of flexibility to the disadvantage of customers.

4. The Law Society also prefer 2 years. They dislike the idea of different rules as between Member States in respect of transactions in fraud of creditors (presumably they refer to the various reservations, but they think there should be no reduction in powers under current English law. They think it is wrong to classify dowries along with other gifts and therefore void, and consider that the protection of s.42 B.A. 1914 should be preserved.

5. The City of London Solicitors Company agree in general with the basis of 4(A) but have difficulty with the phrase "in fulfilment of a moral obligation" and consider it requires a more concise definition. They also think consideration should be given to the question of payments made under orders of Divorce or other Family Courts.

6. I suggest that the Committee might consider recommending that the proviso to 4(A)(1) is too vague and indeterminate; that its principle is acceptable but that it should be redrafted so as to clarify such things as "unusual circumstances" and "moral obligation." We might also consider whether voluntary transfers

should be protected where (a) they are made in consideration of marriage or (b) if the donor was solvent without the transferred property at the date of the transfer - onus of proof to be on the donee.

(i) Uniform Law 4(B)(1) (C.P.7.30-7.31)

COMMITTEE'S PRELIMINARY RECOMMENDATION:

GENERALLY ACCEPTABLE, SUBJECT TO ULTIMATE MEANING OF 'CESSATION OF PAYMENTS." 4(B)(1)(b) SHOULD INCLUDE THE WORDS "BY THE DEBTOR" AND IT SHOULD NOT UPSET BONA FIDE TRANSACTIONS ENTERED INTO AFTER THE CESSATION OF PAYMENTS. 4(B)(1)(c) SHOULD INCLUDE THE WORDS "TO THE PREJUDICE OF CREDITORS".

Comments

1. The College of Justice in Scotland have no objections to these clauses other than those arising out of the concept of cessation of payments.

2. The Law Society say payments in advance should not be void but voidable, but they agree it should be for the bankrupt or payee to show that there was consideration and no unlawful preference. The burden of proof should not be on the liquidator as at present. They think 4(B)(1)(b) is directed at payments in kind, but think it should be clarified.

fixed loans?

3. The British Bankers Association point out that overdrafts are virtually unknown to continental drafting and the Convention therefore makes no allowance for this practice. Articles 4(B) and 4(C) would have the effect of overriding the traditional principles of English law as they imply that, although banks cannot be placed in a preferential position by receipts after the announcement of the cessation of payments, neither can they be placed at risk by payments out of the account. They think this could have implications for the UK overdraft system.

4. The British Chambers of Commerce find all clauses of 4(B)(1) acceptable in their present form and suggest (c) refers to the performance of contractual obligations other than the payment of debts expressed to be payable in terms of money.

5. The Bar Council question whether the provisions of Article 4 will be in addition to our existing provisions, and if not, whether a fraudulent preference would be recoverable by a Paulian action. They think payment in advance or in an unusual manner is to be regarded as evidence from which an intention to prefer may be inferred. This is acceptable provided it is made clear that the inference may be rebutted.

6. The Insolvency Practitioners Association and the City of London Solicitors Company agree with our preliminary views as set out in the C.P.

(j) Uniform Law 4(B)(2) (C.P.7.32)

COMMITTEE'S PRELIMINARY RECOMMENDATION

ACCEPTABLE (see 8th Meeting Report, paras 10 and 11). However, in the C.P. we suggest there should be a proviso that the clause does not apply where the security is created in terms of an antecedent obligation to that effect.

Comments

1. The College of Justice raise the objection covered by the above proviso. The Law Society also supports this but suggest provision should be made to take account of the situation where full consideration is given for security by way of a charge. They say the burden of showing the antecedent obligation should be on the creditor, not the liquidator, and a 1 year relation back period is not enough.

2. The Bar Council, British Chambers of Commerce and the Insolvency Practitioners Association agree with the article and our proviso. The Bar Council say a substantial change in English law is involved but it is an improvement on the existing position. They stress the importance of proper transitional provisions.

(k) Uniform Law 4(C)(C.P.7.34, 7.35)

COMMITTEE'S PRELIMINARY RECOMMENDATION:

ACCEPTABLE (8th Meeting Report, paras 12 and 13). However in the C.P. we suggested 4(c)(1) was not acceptable and that 4(c)(2) raised technical questions on which we sought advice.

Comments

1. The remarks of the British Bankers Assocation are given above in dealing with 4(B).

2. The College of Justice in Scotland consider 4(C)(1) clear and acceptable; but the Bar Council, the City of London Solicitors Company, the British Chambers of Commerce and the Law Society find it unacceptable. The latter consider that the protection given under ss. 4, 6 and 7, B.A.1914 should be preserved.

3. The Insolvency Practitioners Association find 4(c)(1) unacceptable because it often results in some creditors being paid to the detriment of others. They dislike the English "fiction" of payment under "pressure" and suggest provisions like s.227 C.A. 1948 might form a useful basis.

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Comment

We were somewhat undecided about this clause. It was not discussed in the C.P., but the College of Justice in Scotland find it acceptable.

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COMMITTEE'S PRELIMINARY RECOMMENDATION:

NO OBJECTIONS TO THIS CLAUSE (8th Meeting Report, paras 17-18) In the C.P. we asked (a) what UK rules of law should be retained as coming within the spirit of the Paulian action, and (b) what modifications and additions would be required to those rules to complement the U.L.

Comments

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3. The Association of British Chambers of Commerce suggest we should import a Paulian action more generally into U.K. law as a quid pro quo for the general validity of floating charges.

(p) Uniform Law 5 - Set-off

NOTE Please see Section (f) of Memorandum No 5. Additional comments are as follows:

1. The Bar Council consider U. L. 5 to be seriously deficient and that it ought to deal with the points made in the C. P. They also think specific reference should be made to moneys paid for a special purpose, which are not capable of set-off under English law. They disagree with our suggestion that English law does not allow set-off for contingent debts.

2. The Association of Certified Accountants think the advantages of mandatory rules will outweigh any disadvantages. Set-off should be allowed for contingent debts subject to protection rules to exclude liabilities incurred with knowledge of insolvency.

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 8 - FISCAL AND QUASI-FISCAL DEBTS 30 May 1975

(a) Direct rights of recovery of Fiscal and quasi-fiscal debts (C.P.5.7, 5.10; Convention, Articles 21(3) and 42(1))

RECOMMENDATION:

THE CONTINUANCE OF INDIVIDUAL STATES' RIGHTS OF SELF-HELP IN THE RECOVERY OF PREFERENTIAL FISCAL OR QUASI-FISCAL DEBTS IS ACCEPTABLE.

Comments

1. The College of Justice in Scotland think such rights of self-help are not consistent with the basic philosophy of the Convention, but suggest that the question may be academic, particularly if the Revenue's claim has a prior ranking to other preferential claims in its own State.

2. The Scottish Chartered Accountants also consider such rights to be inconsistent with the basic philosophy of the Convention, but think their acceptance is the only practical approach, certainly in the initial period of the operation of the Convention.

3. The Law Society of Scotland also agree about the inconsistency. However, in their Interim Report outlining an alternative scheme to the draft Convention, they envisage the retention within each State of its existing rules of preference as against assets within that State (page 7).

4. The Law Reform Committee of the Bar Council say that the continued existence of prerogative rights of self-help raises questions of a political nature on which they feel unable to express an opinion.

5. The Insolvency Practitioners Association see a danger in permitting self-help to continue: it may swallow up all the assets in a particular State; leaving that State's other preferential creditors to look to the assets in other Member States for settlement. They suggest that the right to allow any unsatisfied portion of a fiscal debt to rank as unsecured in other Member States is a good reason for abolishing the right to self-help.

6. The Association of Certified Accountants finds the continuance of self-help consistent with the basic philosophy of a Convention which endeavours to maintain for various States, the systems, rules and practices they already enjoy.

7. The City of London Solicitors Company think the position may have to be accepted, but they obviously deprecate the considerable preferential claims of Revenue authorities.

8. The Bar Council, Northern Ireland think the right to self-help should be abolished as a quid pro quo for ranking as an unsecured creditor against assets in other States (ie for any unsatisfied balance).

9. The Chartered Accountants of England and Wales recommend that the definition and extent of preferentiality of revenue and similar claims need to be mutually agreed between Member States, and then all preferential claims should rank pari passu. They note that the Revenue and similar authorities retain existing rights of attachment and preferentiality over local assets, but say that it needs to be made clear that this cannot apply to preferences based on attachments or other unregistered charges obtained either without prior agreement or after the date of commencement of the proceedings.

10. Professor Douglas Lawton, Barrister, in his report to the Department of Commerce, Northern Ireland condemns the "well-known self-help of the French fisc" and advises that both government preferences and their alternative or additional remedies should be abolished.

(b) Cross frontier claims by Fiscal and other government departments (C.P.5.12)

RECOMMENDATION

ARTICLE 42 IS NOT ACCEPTABLE. FISCAL AND SIMILAR DEBTS SHOULD BE CONFINED TO SETTLEMENT OUT OF ASSETS SITUATED IN THE STATE IN WHICH THE LIABILITY AROSE.

Comments

1. This was the Committee's preliminary view, to which there was a rider that alternatively, any balance ranking as unsecured pari passu with the general body of creditors should not include fines and penalties, which should rank as deferred debts.

2. The College of Justice in Scotland says that Article 42 conflicts with the accepted rules of P.I.L. and is at the expense of the general body of creditors. Even so, they feel that to reject the claim of a Revenue authority of another Member State even to an unsecured ranking would be contrary to the principle of unity of bankruptcy. So does the Law Reform Committee of the Bar Council which adds that it is arguable that membership of a Community necessarily involves reciprocal recognition of the fiscal obligations owed to the public authorities of each Member State. They regard this as consistent with the underlying spirit of P.I.L. rules and so advise acceptance of Article 42. The Certified Accountants also think that the enforcement of revenue debts in other Member States is inevitable if the Community is to result in closer ties between States.

3. The Scottish Chartered Accountants take a practical, if pessimistic, view that, since there is little left after the secured and preferential claims have been satisfied, the extension in Article 42 will have little effect.

4. The Law Society of Scotland and the City of London Solicitors Company support the recommendation.

5. The Insolvency Practitioners Association, British Chambers of Commerce and the Bar Council, Northern Ireland suggest Article 42 should be a bargaining point (eg against direct rights of recovery).

6. The Chartered Accountants of England and Wales say that if mutual agreement on the definition and extent of preferential claims is not attainable (see (a) 9 above), then the Revenue should not possess an unsecured claim across frontiers or at best, should only have a right restricted by reference to the law of the State of the bankruptcy.

NOTE BY SECRETARY

COMPARATIVE LAW RELATING TO FISCAL AND QUASI-FISCAL PREFERENCES

1. The following notes on fiscal and similar charges may assist Members of the Committee in their consideration of this problem. Much of the information relating to the position in the original Six Member States has been obtained from a study carried out by M J C Sauveplanne in 1963.

General preferences

2. Under German law only taxation claims arising during the year preceding the opening of the bankruptcy proceedings are preferential and they rank after wages and salaries. All fiscal claims rank equally but arrears of social security and national insurance contributions rank with wages and salaries.

3. In France, most fiscal debts lose their right to preference after 2 years. However, for this reason all deferments of payments of tax are required to be secured by securities over specific assets of the debtor. Moreover, arrears of tax incur heavy penalties which appear to form a part of the ultimate claim. Legal costs, preferential wages and salaries, and arrears of social security and national insurance contributions are paid in priority to taxation preferences, which take precedence over all other preferences.

4. In Holland and Luxembourg, all arrears of taxation and social security and national insurance payments are preferential and they are paid in precedence to all other preferences, including wages and salaries.

5. In Italy, a distinction is made between indirect tax claims, which are special preferences of high priority, and direct taxation which is accorded a general preference of low priority, ranking after all other preferences with the exception of those relating to national insurance.

6. Under Belgian law all taxation claims are preferential but rank behind all other preferences with the exception of those relating to national insurance.

Denmark no preferences at all?

Secured rights and special preferences

7. It should be noted that the securities acquired by taxation authorities in France and in Italy (see paragraphs 3 and 5 above) come under Article 43 of the draft Convention; Article 44 is also relevant. In his paper on the subject, M. Sauveplanne indicated that most of the Six States granted taxation authorities securities over specific assets in certain circumstances. In addition to those quoted

above, there appear to be secured rights or special preferences in respect of land tax in France, Holland and Italy. Excise payments and other indirect taxation may be either a general preference against the property taxed or, as in Belgium and Italy it may be a secured charge on the property. In Germany, excise duties and "consumption charges" on assets held by the authorities (such as in bond) are a first charge on those assets.

Position in the U.K.

8. Please see C.P. 5.3.

T H Traylor
Secretary

14a preferences in France
4a in Belgium

2 (2.3)

8

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 8 - FISCAL AND QUASI-FISCAL DEBTS 30 May 1975

(a) Direct rights of recovery of Fiscal and quasi-fiscal debts (C.P.5.7, 5.10; Convention, Articles 21(3) and 42(1))

RECOMMENDATION:

THE CONTINUANCE OF INDIVIDUAL STATES' RIGHTS OF SELF-HELP IN THE RECOVERY OF PREFERENTIAL FISCAL OR QUASI-FISCAL DEBTS IS ACCEPTABLE.

Comments

1. The College of Justice in Scotland think such rights of self-help are not consistent with the basic philosophy of the Convention, but suggest that the question may be academic, particularly if the Revenue's claim has a prior ranking to other preferential claims in its own State.

2. The Scottish Chartered Accountants also consider such rights to be inconsistent with the basic philosophy of the Convention, but think their acceptance is the only practical approach, certainly in the initial period of the operation of the Convention.

3. The Law Society of Scotland also agree about the inconsistency. However, in their Interim Report outlining an alternative scheme to the draft Convention, they envisage the retention within each State of its existing rules of preference as against assets within that State (page 7).

4. The Law Reform Committee of the Bar Council say that the continued existence of prerogative rights of self-help raises questions of a political nature on which they feel unable to express an opinion.

5. The Insolvency Practitioners Association see a danger in permitting self-help to continue: it may swallow up all the assets in a particular State; leaving that State's other preferential creditors to look to the assets in other Member States for settlement. They suggest that the right to allow any unsatisfied portion of a fiscal debt to rank as unsecured in other Member States is a good reason for abolishing the right to self-help.

6. The Association of Certified Accountants finds the continuance of self-help consistent with the basic philosophy of a Convention which endeavours to maintain for various States, the systems, rules and practices they already enjoy.

7. The City of London Solicitors Company think the position may have to be accepted, but they obviously deprecate the considerable preferential claims of Revenue authorities.

8. The Bar Council, Northern Ireland think the right to self-help should be abolished as a quid pro quo for ranking as an unsecured creditor against assets in other States (ie for any unsatisfied balance).

9. The Chartered Accountants of England and Wales recommend that the definition and extent of preferentiality of revenue and similar claims need to be mutually agreed between Member States, and then all preferential claims should rank pari passu. They note that the Revenue and similar authorities retain existing rights of attachment and preferentiality over local assets, but say that it needs to be made clear that this cannot apply to preferences based on attachments or other unregistered charges obtained either without prior agreement or after the date of commencement of the proceedings.

10. Professor Douglas Lawton, Barrister, in his report to the Department of Commerce, Northern Ireland condemns the "well-known self-help of the French fisc" and advises that both government preferences and their alternative or additional remedies should be abolished.

(b) Cross frontier claims by Fiscal and other government departments (C.P.5.12)

RECOMMENDATION

ARTICLE 42 IS NOT ACCEPTABLE. FISCAL AND SIMILAR DEBTS SHOULD BE CONFINED TO SETTLEMENT OUT OF ASSETS SITUATED IN THE STATE IN WHICH THE LIABILITY AROSE.

Comments

1. This was the Committee's preliminary view, to which there was a rider that alternatively, any balance ranking as unsecured pari passu with the general body of creditors should not include fines and penalties, which should rank as deferred debts.

2. The College of Justice in Scotland says that Article 42 conflicts with the accepted rules of P.I.L. and is at the expense of the general body of creditors. Even so, they feel that to reject the claim of a Revenue authority of another Member State even to an unsecured ranking would be contrary to the principle of unity of bankruptcy. So does the Law Reform Committee of the Bar Council which adds that it is arguable that membership of a Community necessarily involves reciprocal recognition of the fiscal obligations owed to the public authorities of each Member State. They regard this as consistent with the underlying spirit of P.I.L. rules and so advise acceptance of Article 42. The Certified Accountants also think that the enforcement of revenue debts in other Member States is inevitable if the Community is to result in closer ties between States.

3. The Scottish Chartered Accountants take a practical, if pessimistic, view that, since there is little left after the secured and preferential claims have been satisfied, the extension in Article 42 will have little effect.

4. The Law Society of Scotland and the City of London Solicitors Company support the recommendation.

5. The Insolvency Practitioners Association, British Chambers of Commerce and the Bar Council, Northern Ireland suggest Article 42 should be a bargaining point (eg against direct rights of recovery).

6. The Chartered Accountants of England and Wales say that if mutual agreement on the definition and extent of preferential claims is not attainable (see (a) 9 above), then the Revenue should not possess an unsecured claim across frontiers or at best, should only have a right restricted by reference to the law of the State of the bankruptcy.

2(2.5)

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EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 9 - CIVIL AND COMMERCIAL GENERAL PREFERENCES

16 June 1975

(a) Principles governing distribution (Articles 40 and 41. C.P.5.7(4)(a), 5.8, 5.11(1)(2), 5.13)

RECOMMENDATIONS

(i) THE PRINCIPLE THAT PREFERENTIAL CREDITORS SHOULD ENJOY THE MOST FAVOURABLE RIGHTS ACCORDED TO THEM BY THE LAWS OF ANY MEMBER STATE IN WHICH THERE ARE ASSETS IS NOT JUSTIFIABLE, IS UNFAIR TO UNSECURED CREDITORS AND IS NOT ACCEPTABLE (C.P.5.13, 5.16)

(ii) THE CORK METHOD IS A MORE ACCEPTABLE INTERIM ALTERNATIVE (C.P.5.17)

Comments

1. The Committee's previous discussions on Articles 40 and 41 are recorded in the Reports of the following meetings:

8 at paragraphs 20 to 27
9 at paragraphs 7 to 12
10 at paragraphs 5 to 18
12 at paragraphs 4 to 8

2. The College of Justice in Scotland say that under the Convention method a liquidator will be required to carry out complicated mathematical exercises which may be impossible where a creditor holds a floating charge over the property and undertaking of a company. It adds that a uniform code of preferential claims would be desirable in principle, but points out that "Revenue" claims would then be admitted preferentially against the general pool of "free assets".

3. The Certified Accountants think the Cork method lends a degree of simplification and probably reflects existing practice in the U.K.

4. The Bar Council consider that harmonisation of preferential rights should be sought without delay. In the meantime the Cork method is preferable to that in the Convention which is calculated to produce haphazard and adventitious results.

5. The Chartered Accountants of England and Wales consider that the provisions of 41(2) and 41(3) will be unworkable; State preferences should be limited to assets wholly within their jurisdiction. They press for the definition and extent of preferentiality to be mutually agreed between Member States.

6. The Chartered Accountants in Ireland put forward an interim alternative scheme diagrammatically; the basis appears to be that preferential claims accord to the laws of own State and if not all paid in full, are all paid pro rata. They also want harmonisation of preferential rules.

7. The Chartered Accountants of Scotland support the Cork method. So does the City of London Solicitors Company.

8. The Insolvency Practitioners Association say efforts should be made to negotiate a greater or even complete degree of uniformity as regards preferences.

9. The Law Society of Scotland say the rules in the Convention appear to increase the classification of preferential debts to the detriment of unsecured creditors. They suggest simplification, so that a preferential creditor, to the extent that his debt had not been satisfied in his own State only ranks as unsecured in other States.

10. The Department of Employment suggest that if it was desired to restrict an employee's broad right of preference, Article 40 and 41 might be amended as follows:

> "A creditor for debts arising out of a contract of employment may invoke such general rights of preference as are accorded to such debts by the law of the State of the bankruptcy and the State whose law is applicable to the contract of employment, over assets situated in each of those States".

(b) Subrogation (C.P.5.4, 5.14, 5.15)

RECOMMENDATION

THE RIGHTS OF SUB ROGATED CREDITORS SHOULD BE RECOGNISED BY ALL MEMBER STATES AND SPECIFICALLY REFERRED TO IN THE CONVENTION.

Comments

1. The British Chambers of Commerce and the College of Justice in Scotland agree and point to the importance of such advances to commerce and industry. The Certified Accountants suggest that banks might be less likely to provide financial support to companies if subrogated rights are not recognised. The British Bankers Association indicate that the loss of subrogatory rights would be a loss to client companies rather than to banks.

2. The Chartered Accountants of England and Wales suggest that the ability of banks to finance companies through temporary difficulties would be seriously diminished by loss of subrogatory rights. The Scottish Chartered Accountants agree, but add that conversely, there is a substantial body of opinion which considers that under existing UK laws, banks obtain an undue degree of preference.

3. The Bar Council agree that the Convention must make the position clear as regards subrogation, but adds that it would not be sorry to see the UK rule abrogated, both for domestic and international liquidations.

4. The Bar Council, Northern Ireland say subrogated creditors should be protected, to encourage what is a socially useful facility.

5. The Insolvency Practitioners Association say the general right of subrogation claimed by banks is resented by English creditors, and no doubt it would be equally resented by foreign creditors. They suggest it should be restricted to specific wages advances on a designated wages account.

6. The Department of Employment points out that to provide in the Convention that subrogated creditors be given preferential status, would presumably mean changing the law of some Member States; this might be unacceptable.

(c) Miscellaneous matters

1. The UK Insurance Brokers European Committee say unpaid insurance premiums should be preferential because the insured assets would be in jeopardy if premiums are unpaid.

2. The Chartered Accountants in England and Wales say a liquidator should be able to call for notification of claims within a specified period, failing which any further claims may be disregarded.

3. The Bar Council dislike the term"Civil and commerical matters" and suggest it means and should say, "debts other than debts in respect of fiscal and social security matters". They urge that the two classes of debts be clearly defined in the Convention in such a way that they are seen to be exhaustive.

2(2.6) 16

EEC BANKRUPTCY CONVENTION ADVISORY COMMITTEE

MEMORANDUM NO 10 - SECURED RIGHTS AND POSSESSORY LIENS

17 June 1975

(a) Article 43 (C.P.5.2; MR 9 paragraphs 14 - 16)

Comments

1. 43(1) provides that the applicable law for secured rights and special preferences should be the law of the Member State in which the property charged was situated at the date when the bankruptcy was opened. 43(2) provides that secured rights over ships, aircraft and land vehicles should be governed by the law of the flag or of the State in which the property is registered. 43(3) provides that the applicable law for possessory liens should be the lex situs.

2. Our preliminary views were that 43(1) should be amended to permit methods of realisation allowed under the lex situs (eg realisation by a receiver for a debenture holder). We considered whether 43(2) should be qualified so as to be without prejudice to the operation of valid charges under the lex situs, such as local arrestments and repairer's liens; but Mr Avis was troubled by this. Mr Muir Hunter was of opinion that under International Maritime Law, the law of the Flag or State of registration recognised local arrestments. We also thought a clear definition of what constituted a possessory lien under 43(3) might help.

3. The College of Justice in Scotland consider the terms of Article 43 require to be renegotiated to recognise rights under floating charges, particularly in relation to property situated abroad.

4. The Law Society of Scotland find Article 43 acceptable.

5. The Noel Lemontey Report (page 126) refers to certain international conventions concerning maritime and aviation preferences and says that where a Member State is a party to one of these conventions, the lex situs will include any rules under the convention incorporated into that State's internal law. As regards maritime preferences, the Brussels Convention of 10/4/1926 (which was ratified by France, Belgium and Italy) is being replaced by the Brussels Convention of 27/5/67. The UK has ratification under consideration. A copy of the Convention is attached.

6. The Committee may wish to consider whether the law of the Flag is acceptable in 43(2) having regard to "Flags of convenience", also that the clause may mean the application of the law of a non-Member State. Again, if a ship had been arrested under eg a maritime lien, and bankruptcy followed, could not 43(2) involve a change of applicable law upon the opening of the bankruptcy?

7. Alternative solutions to 43(2) would seem to be:

(a) existing text but delete reference to "law of the flag".

(b) apply the law of the State in which the property is being sold.

(c) apply the law of the State of the bankruptcy.

(d) apply the law of the State in which the property is registered, inscribed or otherwise recorded if effected in a Member State; if not, then apply (b) or (c).

8. I am not sure whether 43(3) is in line with the 1926 and 1967 Conventions on maritime liens. The Dutch government say it is divergent. If this is so, then under Article 73, France, Belgium and Italy would be unable to apply 43(3).

(b) Article 44 (C.P.5.2; MR 9 paragraph 17)

Comments

1. This article provides that the order of ranking between general and special preferences should be determined by the law of the State in which the property is situated. (For instance, s.94 C.A. 1948).

2. We saw no objections to this article and this view is shared by the Law Society of Scotland.

(c) Article 45 (MR 9 paragraph 18 and MR 10 paragraphs 19 and 20)

Comment

1. We had some difficulty when considering this article, which determines where certain moveable property was deemed to be situated. We thought the article should be re-drafted, omitting the reference to Article 37(2) but defining the moveable property covered by the article.

(d) Article 46 (MR 9 paragraph 19)

Comment

1. We saw no objection to this article, which provides rules for determining the place where property is situated where bankruptcy supersedes an arrangement, composition etc.