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RWH/GES

25th March, 1975

T. H. Traylor, Esq.,
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Dear Mr. Traylor,

E.E.C. Bankruptcy Convention

I refer to my recent correspondence and telephone conversation.

I am pleased to say that our Sub-Committee's report is now available and a copy is enclosed herewith.

It was our intention that this report should be considered first by our General Committee before being sent to you, however, in view of the limited time I am sending it to you now and it will be considered by our General Committee on April 18th. If following that meeting there are further points for consideration, or amendments, I will let you know.

Yours sincerely,

R. W. HELLYER
Hon. Secretary

E.E.C. PRELIMINARY DRAFT OF A CONVENTION ON BANKRUPTCY WINDING UP, ETC.

Comments by Insolvency Practitioners' Association on the Consultative Paper prepared by the Cork Committee

INTRODUCTION

Miscellaneous

1.11. The English Courts have often said in their Judgements that it has to interpret the legislation itself and not the expressed intention of that legislation as might be found from referring to Hansard or other extraneous material. It is accordingly considered desirable that the Convention, when finally approved, should include perhaps an appendix dealing with the question of interpretation of such parts of the Convention as may require it.

1.12. In general terms it is felt that the arrangement of the text is acceptable but it is clearly impossible to comment upon the apparent inadequacy of literal translations of French into English. Every language has words and expressions which have their own peculiar meanings in that language, the sense of which may be incapable of translation. Presumably the Convention, when finally agreed in French, will be accompanied by agreed translations into the languages of other member countries and since the Convention in its final form may have to be considered by the Courts of the respective countries at some time or another the need for

harmony, uniformity, and clarity of meaning and intention will be paramount.

SCOPE OF THE CONVENTION

Procedures to which the Convention applies

2.2. It is felt, without reservation, that the Convention should cover the winding up of the estates of insolvent deceased debtors.

2.3. Whilst on the basis of the Convention as at present drafted there is a problem in how to deal with non-judicial proceedings it is considered that if at all possible it would be better to legislate for these in the Convention itself, perhaps by means of an additional section, rather than rely upon such powers as may be contained in the Judgements Convention. It is not known what, if any, types of non-judicial proceedings are operated in other member countries nor what their views on this particular issue may be. It is felt, however, that on the basis that this Convention is designed, inter alia, to achieve reciprocity, it would be a great pity if non-judicial legal procedures operated in a member country were not enabled to be recognised in other member countries. In England deeds of arrangement, creditors' voluntary liquidations, receiverships, particularly receiverships created under a floating charge, and possibly even members' voluntary liquidations, come under this heading. It is recognised that receiverships in particular may create a special problem but nevertheless one suggestion for consideration is that the fact of these non-judicial proceedings, all of which

have to be registered in some form or another in this country, should, on the application of the liquidator, be granted a certificate from a Court or other relevant authority which certificate could then be registered, as appropriate, in another member country, and advertised in the European Journal, so as to enable the liquidator to exercise his powers in another member country to the extent necessary to discharge his responsibilities.

2.4. This problem has already been dealt with under 2.3. If the principle is agreed either wholly or in part then it is felt that lawyers are better qualified to devise a suggested procedure which might be followed.

2.5. Since the liability under criminal bankruptcy proceedings is a civil liability entirely distinct from the possible penal liabilities from which it may have arisen, it is considered that such should be included in Article 1 of the Protocol.

Persons and entities to which the Convention applies

2.6. It is unfortunate that some indication of the various species has not been given and perhaps this is not really practical. Nevertheless it is agreed that the Convention ought to specify so as to remove any question of doubt.

2.7. It is difficult to comment but it would seem that any Convention of this nature will be less than perfect if there are to be individual exclusions.

2.8. We suggest that there should be no exclusions, bearing in mind that where issues of Government or public policy are concerned in a member state, the Government would be almost certain to take steps to support a concern which might otherwise be insolvent and liable to be wound up.

Territorial scope of the Convention

2.9. In the knowledge that there are a large number of concerns operating within the member countries and otherwise which have bases in the Channel Islands and the Isle of Man, which are presumably regarded as being part of the European Community, it is essential that both these areas should be included in and subject to the terms of the Convention.

2.10. The note at the foot of page 23 suggests that any difficulties might be overcome by making provision for "orders in aid" to be applied to overseas territories wherever appropriate.

2.11. There can be no basic objection to the suggestion, even though the proposal in 2.10. may be adequate. It is not known what problem might ultimately arise should overseas territories or some of them attain independence.

JURISDICTION TO DECLARE THE DEBTOR BANKRUPT

The basic rules

3.9. The concept of "centre of administration" is acceptable since, a creditor will usually know whether he has been dealing

with, say, a German or a French concern and should be enabled to act on that knowledge. As a possible alternative, since a limited company is now required to specify its place of registration and its number, should not some provision be required under Community law for traders generally to register in an acceptable form and like a limited company be required to give particulars of that registration in all documents. In England this would possibly require an extension of the Business Names Registration Act.

3.10. Since it will obviously be possible to cause the winding up of a company which has its registered office outside the Community, it is not clear why there should necessarily be a problem in winding up a company in a member country even though that company's registered office is situate in another member country. Thus it is felt that it may be undesirable to have an absolute rule.

3.11. It is agreed that the Court should have little difficulty in deciding what is an "establishment".

3.12. This situation is felt to be most unsatisfactory since, if an insolvent administration is not recognised in all member countries, it could lead to abuse and might cause considerable inequity for creditors. If there is to be proper reciprocity there must be Harmony in the law.

3.13. It has been presumed that the exclusion contemplated by Article 2 relates only to possible proceedings in

different countries which might be deemed to be concurrent. If this is correct then it would seem that there is no real problem in that a second bankruptcy ought to be possible, as it is under English law, in relation to matters arising subsequent to the first bankruptcy. Elsewhere it is stated that under German law a liquidator cannot claim after acquired property. It is surely not suggested that a German trader could not be made bankrupt a second time in respect of debts incurred subsequent to his first bankruptcy. It would seem that Article 15 refers quite clearly to concurrent proceedings and in that event the time taken to complete a particular bankruptcy administration would not appear to be relevant.

3.14. Whilst it is agreed in general terms that a Court ought to satisfy itself as to its jurisdiction it is suggested that the need to do so would only arise if it is aware that similar proceedings are pending in another member country.

Jurisdiction to declare an associated person bankrupt

3.16. The power to declare a person bankrupt under Articles 10, 11 and 12 should only be exercised on a Judgement being made if the person so liable fails to pay within a stated period of time.

Jurisdiction in actions arising from the bankruptcy

3.20. So far as immovable property is concerned it is thought

that it would be impossible to concede exclusive jurisdiction. The only practical procedure is for the "lex situs" to apply and perhaps it should be made mandatory for the Court of Bankruptcy to have due and proper regard to that law in the event of it being required to decide questions of this nature.

3.22. The difficulty envisaged underlines the already expressed need for work to be done towards harmonisation of law and practice. Thus in general terms there is a need to incorporate some form of protection for innocent third parties and one possible suggestion is that any suspect transaction should not be capable of challenge if it could not be impugned in the country where the transaction took place. Clearly such a reservation ought not to apply if it can be shown that there was fraudulent intent.

3.24. The rule is not thought to be unreasonable.

3.25. The question of the rights of and possible claims against a spouse, normally a wife, are referred to elsewhere in the Consultative Paper, and it is as well to summarise the general view on such issues as may arise. It is considered that ignoring questions of possible fraud, regard must be had to the increasingly enlightened views as expressed not only in recent Acts of Parliament but also in decisions handed down by English Courts. As suggested earlier in a different context, it may be desirable to provide that a spouse in England, if technically subject to the law of another member state, should not have rights inferior to those accorded by the

law of this country. As this matter is considered to be of considerable importance it may be necessary, in the absence of a satisfactory agreement, to reserve the position.

3.30. As suggested earlier in paragraph 2.3., it may be undesirable for these matters to be governed by the Judgements Convention. These matters have to be considered in relation to insolvency procedures and it would, therefore, be better to include them under the Convention. It is suggested that provision should be made for a liquidator to have the right to apply to the appropriate Court for directions and it may be appropriate to include such a right under Article 17.

CHOICE OF LAW PROVISIONS

Substantive requirements of a Bankruptcy Order

4.3. It is considered unsatisfactory that there should be any exclusions although so far as small traders are concerned, the point may have no practical significance. The position may be entirely different so far as a non-trader is concerned, such as a guarantor, and creditors could be seriously prejudiced if a right in bankruptcy did not exist. This problem again underlines the need for uniformity so that full reciprocity can be achieved. It should be emphasised that the Business Community may not be aware, except possibly after a period of time, that exceptions do exist and this could not only cause hardship but also produce contempt for a law which is apparently

not universal in its operation. Thus small traders and non-traders should be capable of being made bankrupt in any member country.

Procedure

4.8. It is suggested that Article 24 should cover an appeal against a Bankruptcy Order and an application for a Scheme of Arrangement as an alternative to bankruptcy, the latter assuming that the laws of other contracting states incorporate a provision similar to Section 16 of the Bankruptcy Act 1914. The proposed time limit is agreed, subject to the right of the Court of Jurisdiction to extend the time on good reason being shown.

4.10. Although views have not been sought on Article 25 generally, some comment is thought to be desirable. Under English procedure the Official Receiver is the first person concerned with an administration once a Winding Up Order or Receiving Order has been made, and it may be some weeks before there is an appointment of a Liquidator or Trustee. Thus if delay is to be avoided it seems that so far as this country is concerned, and assuming the day to day procedures remain the same, it would be necessary for the Official Receiver to undertake the duty of causing the initial Orders to be advertised. Equally he might also have to advertise the subsequent appointment of another Liquidator or Trustee as the case may be.

4.12. The proposed system has given rise to considerable discussion and concern since it is felt that in practice the proposal might be found to be unworkable in the sense

that it will never achieve the desired effect. There will be problems, inter alia, of translation difficulties, communication,and delay,but at this stage it has not been possible to conceive of a practical and viable alternative.

4.13. Proofs of Debt as required by English law tend to cause considerable problems since many creditors are incapable of completing such a document in a correct manner despite the notes that are provided. Nevertheless it is suggested that a standard document of simple design should be required which in turn could be supported by collateral evidence. A problem may, however, arise where a Liquidator feels bound to dispute the validity of a claim submitted although the Convention as drafted does have provision for the Court of Jurisdiction to determine questions of this nature.

4.14. It is not thought that any particular problem will arise.

The effects of a Bankruptcy Order
Effects in relation to the debtor

4.16. Despite the provisions in English law which permits of disclaimer in certain circumstances, the problem of the personal liability attaching to Trustees as a result of automatic vesting (the same problem does not concern a Liquidator under English law)has always been and still is a matter of considerable concern to practitioners. Article 20 merely refers to the loss of a debtor's powers without specifying how his powers are to be exercised thereafter or by whom or under what conditions, and liability. Thus considerable further clarification is

required on this point and as envisaged in 4.18.

4.17. It is considered that it would be quite inequitable for creditors to bear the responsibility for the needs of the Community at large. This is a problem which should be dealt with at Government level and any decision taken should have due regard to the existing and residual rights of creditors generally. It is thus felt that the State of the Bankruptcy cannot have the authority to impose an Order which could be deemed, in general terms, to be interfering with the economic or other policies of another member country.

4.19. It is agreed that there should be a specific inclusion, and indeed some thought should be given to extending the provision to include trust property wherever it is situated. A consideration of this point will no doubt depend upon the internal laws of the state where the property is situated, which may not be either the State of the Bankruptcy or indeed a state within the Community.

4.20. It is only necessary to emphasise what has already been stated in 3.25.

4.21. Any exception to the general rule as to after acquired property is regarded as unsatisfactory. However, it is felt that if there are to be exceptions then they should be specified.

4.22. Having regard to the ease of travel and so on,it is felt that there ought to be universal disqualification, covering

an agreed range of offices, etc. to which such disqualifications should apply.

Effects in relation to third parties

4.24. The view has been expressed that immediate effect is desirable and whilst banks in particular may be entitled to receive some limited protection, it has been pointed out that they form, with other creditors, a part of the trading community at large. However, no doubt it will be considered that some form of protection for innocent third parties should be provided.

Assets subject to registration

4.26. As in a number of other issues, a consideration of this issue is clouded by a lack of knowledge of the systems in other member states. In principle the provision should apply to all property that is capable of registration and available for inspection by the "public" and it is further suggested that the list set out in Section 95 of the Companies Act 1948 might prove to be a useful basis.

4.28. Comment is difficult but it is felt that the provision is a natural extension of that discussed in 4.27.

4.29. The suggestion is agreed in principle but consideration should be given to the desirability of affording some protection, at least in respect of costs, to a creditor who has acted without notice.

4.30. This suggestion is agreed.

The interruption of prescription

4.31. The force of these proposals is not fully understood. However, on the basis that the clause is designed to give some protection to creditors in certain circumstances, there would seem to be no objection.

Effects of the bankruptcy upon prior transactions

4.34. Whilst it is desirable to bear in mind the general view expressed in 3.25, the possibility that benefits under marriage agreements could be abused must not be overlooked. It is suggested that there should be no specific exemption in respect of such settlements which would thereupon be subject to the ordinary rules of relation back. Indeed it is considered that what under English law is referred to as the "two years and ten years law" should apply.

4.35. See 4.34.

4.36. The problem is that there can be considerable variation and this provision has been suspected at times of being abused. It is suggested that the present protection should be excluded since, in one sense, it is archaic in the terms of modern thinking, and accordingly that provisions similar to those contained in Section 42 should apply.

Effects of the bankruptcy on current contracts

4.38. Since the law of the State of the Bankruptcy normally

prevails, there must be a specific provision.

4.39. Whilst in principle there is no objection to this provision, problems could well arise if employees in different states are treated differently. The difficulty will again be referred to later in considering the ambit of preferential claims. In the absence of knowledge as to the differences in the laws of the respective states, it is not possible to appreciate to what extent such problems will arise.

4.40. Specific reference is clearly desirable.

4.41. On the basis that the law should not create obvious problems, deletion is probably desirable.

4.43. Ordinary contract law should be applicable in all cases.

4.45. The primary purpose of the Consumer Credit Act 1974 is to protect members of the public who are the ultimate consumers. A possible solution might be to limit the effect of Article 6 of Annexe 1 to transactions involving parties in different contracting states. This might avoid a clash with internal law.

Effects in relation to set-off or compensation

4.48. Absolute uniformity is considered to be most essential and any agreed rules should be mandatory.

4.49. Since there can be too much uncertainty, particularly on a question of quantum, a right of set-off in respect of

contingent debts is clearly undesirable.

Powers and functions of the Liquidator

4.54. This emphasises the need for harmony of laws. It will not have been forgotten that the novelty referred to will operate in the reverse direction so that in considering what powers should be given to a "Liquidator" the interests of due administration should be paramount.

4.55. This would seem to be a sensible provision although problems could arise over costs. It is far from clear what is meant by the expressions"are authorised to act as Liquidators" or "persons capable of exercising the functions of Liquidator".

4.56. Comment is difficult since only experience will demonstrate the need for this, but at this stage the provision would seem to be adequate.

It may be a matter for comment that in considering questions relating to the control of a Liquidator, there would seem to be no provision for the giving of security.

4.58. At this stage there would appear to be very little point in the suggestion made. Surely any Court would be bound to make an Order and so far as a bankrupt is concerned this could be regarded as one of the penalties.

4.60. It is clearly desirable in all matters for a Liquidator to have due regard to local law. This again emphasises the need for harmony of the law.

PREFERENTIAL AND SECURED DEBTS

5.2. No comment appears necessary.

5.3. By way of comment only, it is suggested that the Revenue's right to claim as preferential the "best year", with the right to select different years for different taxes, is regarded as extremely unsatisfactory and not strictly in accordance with the Act despite the case law on the point. Creditors in other countries could well find this right to be objectionable, although it could well be that the rights of fiscal authorities in other countries are as great or even greater. There will be a reference later to the question of the right of "self help".

5.10. Some of the provisions in Articles 40, 41 and 42 which are discussed in 5.8. are complex in character and it is not possible to appreciate how these will operate in practice. With regard to 5.9. it may be considered desirable to try to negotiate a greater or even complete degree of uniformity in the internal provision of each state in relation to preferential debts. The need to do so is underlined by the danger of a proliferation of preferential claims or an increase or extension of the rights of specified preferential creditors which a member state might have the power to legislate for without regard to the internal provisions of another state. As to the right of "self help", this could have the effect of swallowing up all the assets in that particular state leaving that state's other preferential creditors to look for settlement to the assets in another member state. Since any unsatisfied portion of a fiscal

debt can be the subject of an unsecured claim in the State of the Bankruptcy there seems to be good reason why the right of "self help" should be abolished.

5.11. Although no comment is asked for, and whilst there is no objection to the right of preferential creditors to be satisfied out of local assets, it is considered that it would be preferable for all unpaid preferential claims to be assembled and dealt with in the State of the Bankruptcy which should also receive all surplus assets which might arise in other member states.

5.12. This point has been dealt with under 5.10.

5.13. This point has been dealt with under 5.11.

5.15. Without dealing with the issue at length it is desirable to place on record that the general right of subrogation claimed by banks is resented by English creditors. No doubt it would be equally resented by foreign creditors, and perhaps could be restricted to specific wages advances on a designated wages account.

5.16. Since the law is striving for uniformity there seems to be no reason why preferential creditors should not be able to have recourse to all the assets wherever they may be. Special comments and observationson individual rights have already been made.

5.17. See previous observations.

5.18. It has earlier been suggested that in general terms the High Court of Justice would clearly seem to be appropriate.

A Liquidator should have an unquestioned right of appearance without qualification, including the right to appoint a representative "ad litem". In the interests of uniformity, a Liquidator should have a right of hearing before Courts of Jurisdiction in respect of fiscal debts in another member country.

5.19. See 6.5.

5.20. Comment has already been made in general terms on the need for standardisation and the risks of proliferation and the extension of existing rights. Any system which permits of unilateral extension of preferences must inevitably be regarded as being highly unsatisfactory.

RECOGNITION AND ENFORCEMENT OF JUDGEMENTS

6.4. It is assumed that the use of the words "Order" and "Orders" are to be regarded as synonymous with the words "Judgement" and "Judgements".

The multi-linqual certificates provided by Article 28(2) could possibly be improved. It might be useful to remember as an example the proof of debt form that was at one time issued by Official Receivers to foreign creditors. Basically this was in the normal form with an attached translation in several languages of the essential parts thereof. The present form would become quite unwieldy as at present drafted if any further languages needed to be added. Incidentally, the form does not state whose photograph should be fixed although it is assumed to be that of the

"Liquidator".

A similar comment could be directed towards the certificate provided for in Article 28 of the Convention.

The difficulty in understanding the terms of any Judgement is fully recognised and this factor possibly underlines the need for some agreed standardisation of basic documents.

So far as the difficulty of the individual is concerned it seems that he ought to be given protection similar to that given to a Liquidator where good faith can be shown. It will be borne in mind that Sections 45 and 46 of the Bankruptcy Act 1914 give such protection to the individual in the circumstances outlined in those Sections and it seems that there ought to be no difficulty in drafting something that will give appropriate protection to the individual in the circumstances outlined.

6.5. The difficulty envisaged does underline the possible need for standardisation. Whilst the problem from the United Kingdom point of view is emphasised it must be borne in mind that the reverse also operates. On the basis of universal recognition, the other E.E.C. Courts must recognise English Judgements and it is difficult to see why English Courts and persons coming under their jurisdiction should not recognise Judgements emanating from another authority.

Bearing in mind the proposal that jurisdiction should be

centred at the High Court of Justice, it seems reasonable to suggest that foreign Judgements directed to the United Kingdom should be formally registered with the High Court, with a certified translation, and the High Court could be empowered to issue an Office Copy of the Judgement as translated, which Office Copy might incorporate a declaration that the Judgement is binding under E.E.C. law subject to any right of challenge that may exist.

6.7. The question of "centre of administration" has been dealt with under 3.9. and 3.10. Clearly there is a need for a better definition and equally work may need to be done to secure a greater harmony in the laws of the respective countries concerned. However, without attempting at this point to define a solution, reference may be made to 3.3. and to the question of the Registered Office of a company. It may well be necessary to consider how to deal with companies registered outside the community countries.

6.8. It would seem desirable for the High Court of Justice to be specified but so far as procedures are concerned, here again it may be necessary to attempt the harmonisation of procedures with other countries within the community.

6.9. In other circumstances the bringing of an action by a Law Officer is not entirely unknown and the intervention of, for example, the Official Solicitor in certain cases in recent years will be remembered. There seems to be little objection to provision being made for the intervention of a public official in case of need.

6.12. Once again the fact that different countries nominate Courts of different standings indicates a need for further harmonisation. As earlier stated, it is considered that the High Court of Justice as an example should be designated as the appropriate Court but consideration will have to be given to the effect on County Courts in the United Kingdom which have bankruptcy jurisdiction. Since the likely number of international bankruptcies cannot be estimated, it is not possible to assess what burdens might be placed upon the High Court administration. It would probably be undesirable to remove jurisdiction from the County Courts but this should be subject to the overriding jurisdiction of the High Court when international matters arise.

This provision should only affect bankruptcies as we understand them since companies as such will probably be covered in the main by the provision that all companies over a certain size are automatically wound up in the High Court.

6.13. So far as can be seen no immediate and obvious objection presents itself to the acceptance of Article 62 in its present form. In this context the comments on 6.15 regarding Article 63 may be thought to be equally pertinent.

6.14. It is agreed that it would be reasonable for a Liquidator to provide an address but even if he does not it is noted that he would in any event be required to appoint a representative "ad litem" and this provision would seem to be of particular importance when the Liquidator is himself

outside the jurisdiction of the particular Court. Once again the desirability of uniformity and harmony arises.

6.15. Once the principle of "exclusive jurisdiction" is accepted, as apparently it must, it seems to follow, in the interests of harmony, that some restriction in the potential loss of rights in law or equity may have to be accepted.

6.16. Emphasising again the need for uniformity and harmony it seems undesirable that administrative detail should vary and it is accordingly felt that individual states should not make their own prescription. Furthermore, the time limits at present specified would not appear to be unreasonable. Too much time can cause delay in administration and otherwise to the possible detriment of creditors generally.

6.17. In general terms it is agreed that the High Court of Justice and the other Courts specified should be specified as having universal jurisdiction. In this context the question of the jurisdiction of local Courts would not arise if the suggestions made in 6.12. are capable of adoption in a satisfactory form.

6.18. Having expressed a view in 6.15. on the principle of "exclusive jurisdiction" it is felt that the suggestion is acceptable.

6.19. There would appear to be no objection to this recommendation.

7.2. It is noted that the Uniform Law is to be mandatory, yet the right of reservation must surely nullify the basic desire for uniformity. Thus it is hoped that the indication referred to in 7.3. will not be unduly injurious to the interests of creditors generally.

7.4. The question of "non-judicially supervised proceedings" may well cause problems since the existence of such proceedings are well recognised under English law. Indeed, when considering creditors and to some extent members voluntary liquidations similar provisions apply under the Companies Act 1948 as for compulsory liquidations. Deeds of Arrangement are also important and it may well be that there are similar procedures in other member states. Thus it is considered desirable that provision should be made for such procedures to be recognised under the Uniform Law and it is further suggested that the rights accorded under Articles 3 to 6 should apply to such procedures. See also 2.3.

7.7. In terms it is agreed that any person who has been adjudged as being liable to pay a sum of money ought first to have a stated period of time in which to pay, and that he should only be declared bankrupt in the event of non-payment. It may, however, be desirable to consider whether such a person ought by reason of his conduct to be subject to some disability for a period of time in the management of another company as would have been the case had he been declared bankrupt.

7.8. Having accepted the principle of Article 1 it seems that some criteria must be provided. Thus it is not considered that the present provisions are objectionable.

7.9. Whilst the apparent vagueness of Article 1 may be deliberate, the view has been expressed that the persons liable should extend at least to those who may have acted as directors or managers within a specified period prior to liquidation. As previously indicated any person who has been found liable under Articles 1 and 2 ought to be subject to some disability and in particular should be debarred from acting in a similar capacity for a period of time without the permission of the Court.

7.10. So far as third parties are concerned reference may be made to 6.4. as to the need to give some protection to third parties. Otherwise the provision is thought to be acceptable despite the difficulty of determining a date of cessation of payment. It may be necessary to consider the problems that might arise on the application of the "two years and ten years rule" if these should apply.

7.11. In the interests of uniformity it is most undesirable that any member state should reserve its position with regard to any part of the Uniform Law. It follows that even if some part of that law as finally negotiated may be thought to be unsatisfactory in certain respects, the United Kingdom should not itself make any reservation.

7.12. Article 2 is thought to be acceptable.

Periods of relation back

7.14. The periods specified in Section 42 of the Bankruptcy Act 1914 appear to be eminently practicable. It is most undesirable for shorter periods to be specified.

7.15. This problem again underlines the need for uniformity in order to achieve a workable Convention.

7.16. There is need for negotiation so as to reach a definition acceptable to all member states. A query has been raised why a period of six months only is specified in Article 4(B)(compared with a period of one year in the other Sections. It has also been suggested that the period of relation back could be considerably shortened by reference to what is agreed to be a somewhat artificial date and it may well be that the Article could be strengthened by omitting any reference to the date of cessation of payments.

7.17. This would not appear to be a major point, and whilst it is felt that the rights of individual creditors should be preserved, it is doubtful whether that right has been exercised to any extent.

7.23. The definition suggested in 7.21. is felt to be reasonable and it is suggested that the acts specified in Section 1 of the Bankruptcy Act 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 twenty-one days.

Acts lacking consideration

7.24. The terms "ordinary presents" and "moral obligation" defy definition and specific reference thereto would seem to be undesirable.

7.25. It should be borne in mind that the precise terms of Section 42 of the Bankruptcy Act 1914 creates a gap in English Law since, apart from Section 172 of the Law of Property Act 1925, where fraud must be proved, transactions taking place between an Act of Bankruptcy and a Receiving Order may escape attack. However, if the appropriate provisions of the Convention are accepted such transactions might possibly be attacked under a Paulian Action.

7.29. The general principles of Article 4(A) are acceptable and it is felt that there should be no exception in order to avoid abuse. It has been pointed out that Section 42 of the Bankruptcy Act 1914 works reasonably well and that it ought to be possible for the Convention to embody similar principles.

Payment of debts not yet due

7.30. The Article is acceptable subject to the observations referred to earlier.

Unusual performance

7.31. The precise wording of Article 4(B)(1)(b) should be noted since this infers that a payment in "cash" would

not be unusual whereas the Consultative Paper suggests that it would be, although perhaps this is largely a question of degree. However, it is suggested that anything which might help a possible bankrupt in this sense should be avoided and that an attempt should be made to strengthen the Article having due regard to current English law and practice.

Securities for prior debts

7.32. Article 4(B)(2) is thought to be generally acceptable subject to the qualification indicated.

Voidable transactions

7.34. This is felt to be unacceptable and as distinct from the view expressed in the Consultative Paper, it is not thought to be particularly sensible since this often results in some creditors being paid, leaving others worse off. The present "fiction" under English law of payment under "pressure" ought to be covered and it is suggested that provisions similar to those contained in Section 227 of the Companies Act 1948 might form a useful basis.

7.37. There seems to be no reason why registration within a set period of time should not be mandatory since, assuming that the public search of an official file is universally possible, creditors should be able to ascertain at the earliest possible moment whether charges do exist. However, late registration has been permitted

by English Courts in exceptional circumstances and perhaps some form of discretion should be built into the Article on it being shown that late registration is unlikely to prejudice the interests of creditors.

The Paulian Action

7.39. The principle of this type of action ought to be integrated into current English law but perhaps lawyers are better qualified to deal with the points specified under (a) and (b). It is further suggested that during negotiation the United Kingdom should establish the validity throughout the community of the floating charge subject to the qualification contained in English law. It is thought to be of paramount importance that such a charge, if valid in England, should not be capable of being subject to a Paulian Action.

7.41. Having commented in 7.39. on the general position of a floating charge, it is of course a fact that such a charge can only be registered in England in respect of a company with its registered office in England. In most instances this will be the "centre of administration" with the result that any winding up will take place in England and be subject to English law.

GENERAL OBSERVATION

Throughout the draft Convention the word "bankruptcy" is used exclusively, even though the expression is also directed towards companies and other legal persona. The

word "bankruptcy" has a universal connotation and its meaning is recognised by the layman as applying to a condition of insolvency. However, throughout the Convention the word "Liquidator" is used to describe the person to administer a "bankruptcy". In the Consultative Paper the words "Trustee" and "Liquidator" are sometimes used with some lack of consistency but this point will no doubt be dealt with in due course.