PRESS NOTICE

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DEPARTMENT OF TRADE

December 17 1974

CONSULTATIONS ON EEC BANKRUPTCY CONVENTION

A consultative document seeking views on the draft EEC Bankruptcy Convention has been sent to more than 70 interested organisations by a committee appointed by the then Secretary of State for Trade and Industry in July 1973 to study it.

The purpose of the document is to present to trade unions, employers' associations, representatives of commerce and industry and professional organisations and the public an analysis of the implications for Britain of the Convention and the main questions on which the committee must give its advice.

The document stresses the wide scope of the Convention. It applies to practically all forms of compulsory insolvent administration involving individuals, partnerships or companies. Because of the Convention's wide scope the Committee regards the consultative process as being very important.

"We may also stress," says the document "that the acceptance of the Convention will call for radical changes in the laws of these countries particularly in matters of bankruptcy and liquidation, but also in a number of questions of general law which assume importance in insolvency situations."

The Convention, says the document, is based on a series of novel principles: they have wide implications, in jurisdiction, choice of law and recognition of judgements in bankruptcy and associated matters.

Among these new principles are rules for:

* a bankruptcy order made in one contracting state to exclude such an order in any other;
* that in such cases, the liquidator will have powers extending to all contracting states;
* most disputed questions arising from bankruptcy will be a matter for the courts of the State of the bankruptcy and for the law of that State;
* virtually automatic recognition and enforcement of judgements relating to such questions in other contracting States.

Continued/.....

The document seeks views on the scope of the convention, jurisdiction to declare the debtors bankrupt, choice of law, preferential and secured debts, recognition and enforcement of judgements and Uniform Law.

The Committee's views as expressed in the document, it says, are necessarily provisional, and subject to revisions in the light of comments received. The deadline for comments is March 31 1975.

The consultations are being made as a matter of urgency because, the Committee understands, the second round of discussions on the draft Convention will start in Brussels early next year: however the Government will not commit themselves in discussions until they have the considered advice of the Committee.

NOTES TO EDITORS

1 The EEC Bankruptcy Convention Advisory Committee was appointed on July 27 1973, with the following terms of reference:

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

2 The chairman of the Committee is Mr Kenneth Cork FCA and the members are:

Mr Charles Dodd, Mr Peter Avis, Mr Muir Hunter QC, Mr Peter Armour MA LLB CA, and Mr Alexander Anton CBE FBA.

3 The legal basis of the Convention is Article 220 of the Treaty of Rome, which provides that member states shall enter into negotiations "with a view to securing for the benefit of their nationals ..... the simplification of formalities governing the reciprocal recognition of judgements of courts or tribunals and of arbitration awards."

4 Comments on the consultative document should be sent to the Committee's secretary, Mr Trevor Traylor MBE, Department of Trade, 2-14 Bunhill Road London EC1Y 8LL, by March 31 1975.

1 Victoria Street, London SW1H OET
01 215 5678

Ref: 250

SUBMISSION OF BEHALF OF THE GENERAL COUNCIL OF THE BAR OF NORTHERN IRELAND

to

The Department of Trade Advisory Committee on the E.E.C. Preliminary Draft Convention on Bankruptcy, Winding up, Arrangements, Compositions and similar proceedings.

Bar of Northern Ireland 10(3)

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1. Introduction.

This submission is made on behalf of the General Council of the Bar of Northern Ireland("the Council"). It does not purport to deal exhaustively with all the matters raised by the E.E.C. Preliminary Draft Convention on Bankruptcy, Winding up, Arrangements, Compositions and similar proceedings(" the Convention") or by the consultative paper of the Department of Trade Advisory Committee dated November, 1974 (" The consultative paper"). Nor does it attempt, with limited exceptions, to put forward a specifically Northern Irish view point, the Council taking the view that although there are a number of significant differences between the law of bankruptcy in Northern Ireland and the law of bankruptcy in England and Wales, most of the problems raised by the Convention are common to both jurisdictions. Rather, the submission is intended as a commentary on a number of aspects of the Convention as they affect the administration of justice.

2. Given that the United Kingdom is to remain a part of the E.E.C, the Council acknowledges the need for some degree of unity in the jurisdiction, recognition and enforcement of the law of bankruptcy and insolvency. It is noted that although the reason for the Convention's existence arose from the exclusion of bankruptcy judgments from an earlier Convention on Reciprocal Recognition of Judgments, the Convention goes very much further than merely providing for reciprocal recognition, and does necessitate some substantial changes in the domestic bankruptcy and insolvency laws of each member country. Faced with so many different systems of law with their widely differing concepts, the ideal solution would doubtless have been to draw up a common bankruptcy law which would become the bankruptcy law of each individual member state. The Council recognises the practical impossibility of this at the moment, and considers that the general approach adopted by the Convention, building as it does on existing national systems of law, is the correct one.

3. Scope of Convention.

The Council considers that it is essential that the English Language version of the Convention should specify the bodies to which, and the persons to whom, the Convention is to apply and endorses the view expressed in paragraph 2.6 of the consultative paper.

4. In principle, the Council considers that the insolvent estates of deceased persons should come within the ambit of the Convention. The points made in paragraph 2.2 of the consultative paper are taken; it should however be added that an additional problem exists in Northern Ireland which does not exist in other parts of the United Kingdom, namely that it is not uncommon, near the land border with the Republic of Ireland, for persons to be domiciled and / or habitually resident in Northern Ireland, but have their business and thus their centre of administration in the Republic of Ireland.

bearing in mind that the insolvent estate of a deceased person is only administered by the Court if the Court is petitioned to do so, it would be strange if administration by the Court gave one legal system jurisdiction whilst administration out of Court gave jurisdiction to another legal system. On the other hand, it seems to the Council to be wrong for a creditor in the country in which the centre of administration is situated to lose the right to have the trader's property dealt with as in a bankruptcy in that jurisdiction just because he has died. The Council is of the view that in any conflict about choice of law the interests of creditors are more important than the interests of those entitled in succession, and accordingly for this reason and for reasons of uniformity, the Council considers that the test of centre of administration should be the criterion for jurisdiction in the case of the insolvent estate of a deceased person being administered by the Court.

5. The Council notes the points made in paragraph 2.3 of the consultative paper. This does not present a problem in Northern Ireland, because the system of arrangements under the control of the Court has been retained here, and the use of Deeds of Arrangement under the 1887 Act is so rare as not to warrant separate consideration. However as far as voluntary liquidations of companies are concerned, the Council notes the points made in paragraph 2.4 of the consultative paper. The Council suggests that a liquidator in a voluntary liquidation should be able to obtain an Order of the Court merely by a formal application in order that he could more easily and speedily obtain control of foreign assets. This could be of particular importance to Northern Ireland as many companies having their main centre of operation here have extensive interests in the Republic of Ireland and vice versa.

6. The Council is concerned about the proposal to extend the application of the Convention to overseas territories of both the United Kingdom and of other Convention countries. Although in practice the effect of this will probably be minimal, it is considered that this is a considerable change of principle. At the moment, the Courts of Northern Ireland have the power, when acting in aid of, at any rate, a non-British Court, to exercise a discretion as to whether to assist that Court, and if so, how to assist. In exercising such a discretion, the state of the legal system in that country is considered. Although it is considered permissible to give up that discretion in dealing with other member countries of the E.E.C., the Council is not happy about extending this principle to numberous overseas territory.

7. Jurisdiction of Convention.

The Council has considered very carefully the primary jurisdictional concept of " centre of administration". As appears from the Report on the Convention prepared by Messrs. Noel & Lemontey ("the Report"), this is n new concept as far as the law of the original six member states is concerned. The concepts of "centre of control" and "central management and control" of a company are well known to the revenue lawyer in the United Kingdom, and the council wonders just how analogous these concepts are to the "centre of administration" of a company . It is noted from the Report that the word "administration" rather than the word "direction" (meaning "management") was used as being more appropriate when dealing with both natural and juristic persons. It may be that "administration" means "management" in relation to companies and if so, there may be little difference between the "centre of control" and the "centre of administration". The Council would appreciate further clarification on this point.

8. The presumption with regard to the registered office of a company in paragraph 3.10 of the consultative paper is noted. It may be that there will be a fundamental political objection to a United Kingdom Company being wound up by a non-United Kingdom Court. The Council feels in fact that the advantage lies the other way in that control over the liquidation of a company which has its centre of administration in a country (not necessarily the case at present) is probably more important to that country than control over the liquidation of a company just because it has its registered office there. The Council sees a danger in making the presumption with regard to the registered office irrebuttable in that this may encourage companies to be set up in the member state with the most favourable insolvency laws, (e.g. a country which has opted out of the Uniform Law as to bankruptcy of directors and managers of a company).

9. The unsatisfactory position is noted whereby some member countries do not recognise the bankruptcy of individuals. The provisions enabling the bankruptcy to the declared in the country of a foreign establishment in such circumstances are inadequate because that bankruptcy is not recognised in the country of the centre of administration. However, short of compelling the countries concerned to make a fundamental change in their law of bankruptcy and insolvency, the Council can see no solution to this problem. The Council does feel, however, that in circumstances in which the country of the centre of administration does not recognise the bankruptcy of an individual, and that individual has no foreign establishments and therefore cannot be made bankrupt under the Convention, the United Kingdom should reserve to itself the right to make such persons bankrupt in the United Kingdom if they commit acts of bankruptcy under the law of any part of the United Kingdom. It would clearly be advantageous if such a bankruptcy was recognised as a Community Bankruptcy (in countries other than the country of the centre of administration).

? Equivalent Juris.

10. It is considered that Articles 11 and 12 of the Convention are of particular importance to Northern Ireland. For a variety of reasons, Northern Ireland has a large number of companies which are wholly owned subsidiaries of companies in other parts of the United Kingdom and elsewhere. Whilst not in any may wishing to dilute the concept of limited laibility where a subsidiary company fails for ordinary commercial reasons outside the matters set out in Articles 1 and 2 of Annex 1 of the Convention, the Council feels that it is important for creditors in the situations set out in Articles 1 and 2 of Annex 1 to be able to pursue the parent company of a subsidiary for their debts on the basis that the parent company effectively controls the subsidiary, appoints its directors and managers, and should be vicariously liable for them. The Council feels that Articles 1 and 2 should be altered to make this vicarious liability clear. It appears from the Report that the work "person" in those Articles includes a juristic person, and these appear to be liable under Articles 1 and 2 of Annex 1 if they "intervene in company management". The Council feels that if the principle of vicarious liability is specifically included in Articles 1 and 2 of Annex 1, the onus of proof should be on the parent company to show that it was not responsible for the acts of the directors and managers appointed by it to the subsiduary company.

11. The Council considers that, once jurisdiction has been ceded to a foreign Court, that Court must be allowed to decide the choice of law by reference to its own rules of Private International Law, subject to the exceptions specifically reserved to other jurisdictions (e.g. fiscal and Social Security debts). The Council agrees that the fact that ordinary choice of law rules should apply should be made clear in the Convention as pointed out in paragraph 3.28 of the Consultative paper.

12. Finally, with regard to Jurisdiction, the Council does feel that serious consideration should be given to the conferring upon the European Court of Justice or some other suitable body of a supervisory or appellate rôle in questions of jurisdiction.

13. Choice of Law.

Apart from the choice of law with regard to contract, the Council has little to say about the choice of law provisions in the Convention. It is, however clearly important to provide expressly that property held by a bankrupt in a fiduciary capacity is not an asset in the bankruptcy, and also to ensure that policies taken out under the Law Reform (Husband and Wife) Act (Northern Ireland) 1964 and similar provisions in the rest of the United Kingdom do not lose the protection afforded by those Acts by reason of the Convention.

14. The Council is concerned about the proposal to apply a different set of rules to, in particular, contracts of sale where one of the parties becomes bankrupt to the set of rules which might otherwise apply. The Council considers that, once one has conceded jurisdiction to the Court of the country where the centre of administration or establishment is situated, the rules of Private International Law in that country as to choice of law (the proper law of the contract) should apply. To provide otherwise must introduce a wholly undesirable element of uncertainty into commercial transactions.

15. Preferential debts.

The Council considers that, if the proposals to allow taxes and other analogous debts to be proved for by the relevant authorities as ordinary creditors in a foreign bankruptcy are accepted, then as a quid pro quo the preferential treatment of such authorities in their own jurisdictions should be abolished. The Council considers that the self-help provisions which exist in some member countries should be abolished by those countries if they are to be allowed to participate in United Kingdom bankruptcies for fiscal and other debts. The Council appreciates that the revenue authorities can be considered either as representatives of all the citizens of a country and thus most worthy to be given preferential treatment in a bankruptcy, or alternatively the body most easily able to bear the loss caused by the bankruptcy of a debtor and thus not in need of preferential treatment. The Council feels that which-ever view is taken, it would be wrong simply to increase the preferential treatment of the revenue authorities, without some quid pro quo.

16. The point with regard to subrogated creditors in paragraphs 5.14 and 5.15 of the consultative paper is taken. The Council considers that it is essential that subrogated creditors should be given this protection to encourage socially useful facilities of this kind to continue to be provided by banks and other institutions.

17. The Uniform Law.

Comments on Articles 1 and 2 of Annex I have already been made. The Council considers that a good deal of the point of the Uniform Law is removed by the ability of states to opt out of certain provisions. The Council feels that the power to make the persons envisaged in Article 1 bankrupt should only arise if they have failed to pay claims established against them. This is not clear from Annex 1 but does seem to be the case in France on whose law on this subject, one gathers from the Report, these provisions are based.

18. The provisions with regard to the so-called Paulian actions appear to the Council to be extremely wide-ranging. It is not clear just what their effect is going to be, and the Council would welcome detailed clarification on this point.

19. General.

A final general point, which has also been made in the consultative paper, is the question of translation of the Convention into English. It is felt that it is essential that suitable definitions of key words in the Convention be agreed before the English version is finalised. The Council has experienced difficulty previously, when considering the Directive on Freedom of Establishment, in understanding the exact meaning and nuances behind the French text. In that document, it became apparent that the provisions with regard to the legal professional were framed in such a way in the original French as effectively to exclude non-French lawyers from the highest Courts in France. This was not apparent from the English translation, presumably because the translators had no reason to suspect such an interpretation. The Council is concerned about the meanings of such very broad expressions as " les avantages matrimoniaux " in the Convention, and the expression "moral obligation" in the Uniform Law. It is clearly essential that the United Kingdom is aware exactly what their effect is likely to be.

20. The Council has derived considerable help not only from the consultative paper but also from the Report. It is the view of the Council that serious consideration should be given by the United Kingdom Parliament to providing expressly for the status of the final Report as an aid tothe construction of the Convention in the Courts of the United Kingdom.

J.K. Pringle Q.C.,

C.W. Dickson.

Scotland c/24 12

Dundee & Tayside Chamber of Commerce & Industry

Chamber of Commerce Buildings
Panmure Street
Dundee DD1 1ED

Telephone 0382 22122
Telex 76243

our ref L2/WM/PM

your ref

19th February, 1975

T. H. Traylor, Esq.,
Department of Trade and Industry,
Insolvency Service,
2-14 Bunhill Row,
LONDON EC1Y 8LL.

Dear Mr. Traylor,

Draft EEC Bankruptcy Convention

Thank you for your letter of 19th December, 1974 and enclosures.

I enclose herewith copy of observations from the Convener of our Legal, Parliamentary & Taxation Committee to whom the matter was referred and trust these may prove helpful.

Yours sincerely,

Secretary.

c.c. Matthew Neil, Esq.,

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Established 1835 Incorporated by Royal Charter 1864

HENDERSON & LOGGIE
CHARTERED ACCOUNTANTS

D. G. Slidders, C.A.
D. C. McIntosh, C.A.
P. McGovern, C.A.

Associate
J. O. Scott, A.C.C.A.

11 PANMURE STREET
DUNDEE

Post Code DD1 2BQ
Telephone 0382 22555

14th February, 1975.

W.M.R. Monair, Esq.,
Secretary,
Dundee & Tayside Chamber of Commerce & Industry,
Panmure Street,
Dundee.

Dear Mr. Monair,

Draft EEC Bankruptcy Convention.

I refer to your letter of 23rd December past together with the enclosures which are returned.

You will appreciate that it has been possible only to do a preliminary survey of this matter since it would take very many hours of concentrated study to deal with the problem properly. My observations are as follows:

On the draft Convention.
Page 3 - Jurisdiction.

It says that in the case of firms, companies or legal persons the centre of administration is to be their registered office. Since only companies have registered offices in this country, does this mean that every person is to register his office.

Page 5 Seemingly it is to be provided that the Convention requires the law of the Member States to be altered to allow that a director or manager may be declared bankrupt if he has wrongfully dealt with its property. Does this indicate that it may become common practice or even perhaps automatic practice for creditors of a company to seek to have directors and managers declared bankrupt in order to keep open the possibility of wrongful acts having been done.

Page 12 Article 26 provides that bankruptcies shall take effect in the other contracting States as against third parties from the eighth day following the advertisement in the official journal. Presumably possibly ten to fourteen days after the bankruptcy has taken place in the main State. Does this not open the door to the settlement of outstanding accounts or the obtaining of security provided it is done within this period. Whyshould there be any delay whatsoever?

Page 14 Why should creditors who reside in another contracting State have the right to dispute claims? Surely this is a matter for the

liquidator/

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HENDERSON & LOGGIE
CHARTERED ACCOUNTANTS

D G Slidders, C.A.
D C McIntosh, C.A.
P McGovern, C.A.

Associate
J O Scott A.C.C.A

11 PANMURE STREET
DUNDEE

Post Code DD1 2BQ
Telephone 0382 22555

 14th February, 1975.

able to exercise the powers vested in each contracting State where the property happens to be.

Page 13. I cannot understand the sentence "an exception is made for the consequences of the registration of assets subject to registration".

Page 18. As to the question asked in paragraph 2.2 I consider that the bankruptcy Convention should extend to the winding up of the estates of insolvent deceased debtors; and as to paragraph 2.3 it is my opinion that the U.K. should seek to secure the inclusion within the Bankruptcy Convention of other contractual arrangements for the administration of the affairs of an insolvent.

Page 19. Paragraph 2.4. My opinion is that (a) creditors voluntary liquidation should be included in the Bankruptcy Convention and as to (b) could it not more easily be determined that all liquidations be included in the Bankruptcy Convention excepting those which the Court has determined as being members' voluntary liquidations - automatically these being where a declaration of solvency has been properly lodged and not withdrawn. Withdrawal would occur where, during a members' voluntary liquidation, the liquidator has found that the creditors are not all to be paid in full and then the liquidator would notify the court. In Scotland it would be the Accountant of Court.

Page 27 Paragraph 3.5 I view with some alarm the possiblity of a Court in another State declaring a U.K. debtor bankrupt, that bankruptcy to be recognised in all other Member States. For example, if AB holidays abroad and leaves an unpaid account (possibly intentionally and with good reason) the foreign creditor might declare the U.K. resident bankrupt and thus he would be automatically bankrupt in all other States.

Page 33 Paragraph 3.15 I suggest that there should be opposition to the acceptance that bankruptcy of a firm automatically entails that of its members. It is perfectly competent in Scots Law particularly for a firm to be made bankrupt though one or more of the partners may well be solvent.

It will be appreciated that I have not had time to go any further into these matters and through pressure of business will not indeed find the time even by the end of March, but I have thought it wise to give such points as I have made rather than refrain from giving any response at all.

Yours faithfully,

DGS/HSG.

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EQUIPMENT LEASING ASSOCIATION

Limited by Guarantee

14 Queen Anne's Gate London SW1H 9AG Telephone: 01-930 3393

27th March, 1975.

Commander T.H. Traylor, M.B.E., C de G.,
Secretary,
E.E.C. Bankruptcy Convention Advisory Committee,
Gavrelle House,
2-14, Bunhill Row,
London, EC1Y 8LL.

Dear Sir,

The Consultative Paper circulated by the Advisory Committee has been considered by this Association.

We feel that we should confine our comments to those questions with some relevance to the leasing of plant and equipment and have the following comments on the consultative paper:-

Paragraph 3.24

(i) It is felt that the effects of the exception created by Article 21(4) will require amplification - for example, if an appeal is to be made against the order of "the court first seised" presumably that appeal will be heard in the courts of that country, however, the choice of law at that stage does appear to present some difficulty in view of Article 19(2). On balance it would seem that the law of the country in which the bankruptcy had been opened should apply at that stage.

(ii) Difficulty is also envisaged in regard to such matters as the differing effects of the law of conversion between member states, particularly when coupled with "ostensible ownership" doctrines.

If the correct law to be applied cannot be decided at that stage the complexities facing a lessor wishing to recover goods leased by it, and which may have been converted are enormous.

Paragraph 4.41

Most leasing contracts stipulate the proper law of the contract, usually that of the lessors country.

Cont'd...

Director-Secretary JB Damer

It is felt that Articles 37(2) and (3) present a number of complexities and that they should be deleted so that in the event of bankruptcy the law of the state of the bankruptcy would apply to the winding up proceedings, including its rules of private international law.

We are also concerned that the effect of the Article will be to over-ride terms in existing leasing agreement stipulating the proper law of the contract and thereby frustrating the intention of the parties. We therefore feel that Article 37 should not apply to contracts of leasing and hiring entered into prior to the coming into effect of the Article.

Paragraph 4.45

We agree with you that the rule as proposed is unsatisfactory.

We feel that the effect of the reservation of title should be governed by the proper law of the contract in which title is reserved and not by the law of the state in which the bankruptcy has been opened.

Yours sincerely,

A H Macdonald

A. H. MACDONALD,
DEPUTY SECRETARY.

AHM:mj

16 0/221 HPTA

THE
HIRE PURCHASE TRADE ASSOCIATION

3, BERNERS STREET, LONDON, W1E 4JZ.
GENERAL SECRETARY: C. McNEIL GREIG, O.B.E., M.C.
TELEPHONE: 01-636 7564

19th March 1975.

Commander T.H. Traylor, R.N. Retd.,
EEC Bankruptcy Convention Advisory Committee,
Gavrelle House,
2-14 Bunhill Row,
London, EC1Y 8LL.

Dear Commander Traylor,

EEC Bankruptcy Convention

The Association has now considered the EEC draft Convention together with the very interesting comments and questions contained in the Paper which accompanied that draft.

In seeking to assist the Committee in its work, the Association is conscious that its comments fall into two categories, the first dealing with those matters directly within the scope of the Association's own expertise as being problems relating to instalment credit as such, the second traversing those matters of more general application, as to which our views can only be regarded as those of the reasonably informed layman.

Consumer Credit

In opening our comments we would wish to refer first to the phrase "sale with reservation of title" which appears in Article 39 of the draft. It appears to the Association to be essential that the definition of this phrase should be drafted to include not only conditional sale agreements but also hire purchase, since the ultimate purpose underlying a hire purchase contract is for the hirer to become the owner. It would clearly be inappropriate to draw a major distinction in European bankruptcy law between two kinds of transactions which are governed by nearly identical rules in English law. Having regard to the provisions of the present Hire Purchase Acts and of the virtually identical provisions of the Consumer Credit Act 1974 (S. 90), it might be desirable moreover to

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make it clear that statutory restrictions on the seller's right to exercise his reservation of title do not affect the existence of that right as far as this section is concerned.

The Association entirely shares the anxiety of the Committee as to the rule in Article 38 concerning the law that would govern a contract of sale. The proposed rule would result in contracts for the sale of goods being made subject to a law other than the proper law of the contract, and this could only have effects that were unexpected, untoward and uncertain in their mode of operation. It is unlikely that many persons will seriously consider the consequences of an international bankruptcy when entering into a contract for the sale of goods, and those who do will need to seek expert and expensive legal advice to ensure that their interests are protected.

Although at first sight the stipulations in Article 39(1) concerning documentary evidence of sale with reservation of title are attractive, the Association shares the doubts expressed by the Committee in para 4.45 of the Paper when they referred to the effect of the "complex requirements" of the Consumer Credit Act 1974.

It is to be noted, however, that very similar requirements are likely to be imposed throughout the EEC as a result of the EEC Directive on Consumer Credit, a first preliminary draft of which reached the Association last April. Although this draft does not appear to be making much progress at present, it is based closely on the new British legislation and in the present "consumerist" atmosphere it would appear as almost certain of enactment sooner or later.

In these circumstances the most sensible view would seem to be that whilst "simple writing" should suffice for the purposes of the Article, this should be without prejudice to any further requirements that might be imposed on a particular contract because, for example, it was a consumer credit agreement for the purposes of the legislation affecting the country in which the contract was made. This would appear to be another reason why the present proposals of Article 38 are unacceptable, since it seems to the Association entirely wrong that the law affecting a contract should be other than the law under which that contract was made.

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In short, whilst the Association would be prepared to accept and indeed entirely supports the concept of Article 39, it feels firstly that hire purchase must be brought firmly within its scope, and is secondly of the view that provision must be made to take account of any special requirements that may be involved in particular circumstances.

So far as Article 6 of Annex 1 is concerned, the Association's view would be that the bankruptcy of the seller should not affect the rights of the buyer who should retain for example the ability to claim in damages for a lack of merchantibility, although his claim should be no better than any other creditor in respect of payment out on the claim. On the face it it indeed the present wording of the Article we believe does not alter this situation.

We are not entirely certain as to whether it would be desirable for this Article to override a prior agreement (i.e., presumably, that the agreement should terminate on the bankruptcy of the seller). On balance, however, we see no reason why such an agreement should not be permitted, although in that event we are in no doubt but that the buyer's rights to the return of any monies, if that were to be involved under the contract, should be no better than that of creditors generally.

The Association would wish to ensure that the position of an assignee of the rights of a seller in a contract of sale whether with or without a reservation of title will be protected in the event of the bankruptcy of the buyer or of the assignor (c.f. Blakey v. Trustees of Pendlebury (1931) 2 ch 255).

This aspect is of particular relevance in the case of finance houses who take an assignment under, e.g., a block discounting arrangement.

Scope of the Convention

The Association is aware of the difficulties that could arise if attempts were made to impose a greater amount of Uniform Law than member states were prepared to accept. Nevertheless, it is thought that in certain fields the acceptance of differences between the laws of member states may result in loopholes and

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inequities. In particular, it is thought that the inapplicability of bankruptcy proceedings to certain categories of persons in certain states could give rise to anomalies as suggested in para 4.3 of the Consultative Paper. We would think it desirable (if this is possible) that bankruptcy proceedings should apply to the same category of persons in all states, and support the view in para 2.6 of the Consultative Paper that the Convention should explicitly indicate the classes of persons and entities to which it applies.

The Association has always held the view that there should be no exemptions from the general law for institutions simply because they can claim a particular status (as was the case where an organisation holding a Section 123 Certificate could claim exemption from the Moneylenders Acts.). For this reason we strongly oppose the exemptions from the Convention listed in Article 1 (3).

Another field in which insufficient uniformity between member states could cause problems is in the field of relation back, and it would clearly be desirable that a standard period of relation back should apply throughout the Community. What would clearly not be acceptable is the situation described in the side-lined passage at the bottom of para 7.15 of the Consultative Paper, as to which we entirely endorse the views of the Committee.

Although the initial view of the Association was against inclusion of creditors' voluntary windings-up in the Convention, it is accepted that their inclusion would be desirable if greater overall unity in other matters can thereby be facilitated. We presume that a member's voluntary winding-up would not be affected by the Convention unless or until it were subsequently shown that the company was insolvent.

The Association would support a provision in the Convention allowing for the inclusion by declaration of the Channel Islands and/or British overseas territories.

Persons responsible for the management of companies

The Association shares the misgivings mentioned in the Consultative Paper (in para 7.7 et seq.) concerning Article 1 of the proposed Uniform Law. In particular it is considered that before a person described in Article 1 should be declared bankrupt,

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the amount of the company's claim should have been established against him by due process of law, and he should have been afforded an opportunity to meet this claim. We would also agree that a precise specification of the requirements governing onus of proof and the criteria of knowledge and intent is essential, since the issue involved is in practice whether or not a person is guilty of what is in truth a criminal offence.

If these points are not satisfactorily resolved, the Association would support the making of a reservation along the lines of that made by the Federal Republic of Germany.

Set Off in Respect of Contingent Liabilities

Recent legislation in the United Kingdom (in particular the Consumer Credit Act and the Supply of Goods (Implied Terms) Act) has greatly increased the number of cirucmstances in which a contingent liability can arise. These liabilities can be substantial (e.g. damages for defective goods) and we would therefore welcome a broadening of the rules of set-off to include contingent as well as actual liabilities. (Article 5 para 3 of the Convention and para 4.48 of the Paper refer.)

Other Matters

The Association shares the Advisory Committee's anxieties regarding Articles 17 (3) and 17 (6) discussed on pages 37 and 38 of the Consultative Paper.

It is agreed that some re-wording of Article 20 appears necessary to cover the legal position of a liquidation under UK law.

The Association agrees with the Committee's views expressed in Section 4.36 of the Consultative Paper.

The Association strongly supports the view put forward in Section 4.19 of the Consultative Paper that the Convention should state explicitly that a foreign liquidator's authority does not extend to assets held by the debtor in trust.

We agree with the comment made to the Committee and referred to in para 4.41 that difficulties could arise under the present draft of Article 37, and we support the proposal that paragraphs 2 and 3 of the Article should be deleted.

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The Association hopes that the foregoing comments will be of assistance to the Committee, but if there is any particular matter on which it is felt that the Association can be of further help, we shall of course be very happy to assist.

Yours sincerely,

P. J. Patrick

P.J. Patrick.
Secretary.

Institute of Directors

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INSTITUTE OF DIRECTORS
10 BELGRAVE SQUARE · LONDON · SW1
01-235 3601 (BELGRAVIA 3601)
TELEGRAMS BOARDROOMS LONDON SW1

19th February, 1975

T.H. Traylor, Esq., M.B.E., C. de G.,
Room 124 Insolvency Service,
Department of Trade,
2-14 Bunhill Row,
LONDON. EC1Y 8LL

Dear Sir,

The Institute of Directors has considered the E.E.C. Bankruptcy Convention ("the Convention") and, in particular, the Consultative Paper ("the Paper") dated November, 1974 of the Department of Trade Advisory Committee on that Draft Convention. It has noted on page 3 that comments should be addressed to you and accordingly there are set out below the comments of the Institute on certain matters.

1. The Members of the Institute who reviewed both the Convention and the Paper feel that the Paper sets out in very clear terms the principal points in the Convention which relate to present practice in the U.K., and in particular, highlights the differences in the areas where comment is invited. It is to be hoped that the Departments of Trade and Industry might follow this procedure and set up similar Advisory Committees to review other aspects of E.E.C. legislation with the expertise and authority that was evident in this particular Paper.

The Institute notes that there is a certain amount of confusion between the terms "bankruptcy" and "liquidation" and would hope that this could be clarified in any new Convention to be issued, ensuring that the differences between the liquidation of legal entities and the bankruptcy of persons is clearly understood.

2. Para. 1.12, Page 16 of the Paper

Reference is made to the fact that the English version of the Convention is a translation of the French text and the Committee state "We are not satisfied that the present English text invariably carries the same sense as the French text".

This appears to be such a fundamental point and one that could affect the legal responsibility of so many aspects of business (including directors') that the Institute wishes to echo the Committee's concern.

It is hoped that the Departments of Trade and Industry recognise such concern and will produce an authoritative translation of other E.E.C. legislation which would not allow for such differences in interpretation.

3. Para. 2.4, Page 19

The Committee ask whether creditors' voluntary liquidations should be included in, or excluded from the Convention and it is the Institute's view that as the ultimate purpose is the same, creditors' voluntary liquidations should be included. There would appear to be problems if they are excluded, as a voluntary liquidation can turn into a compulsory liquidation following insolvency. It is presumed that if such voluntary liquidations were to be included, there would be consequential amendments to the Convention to cover such matters as ratification by court order.

4. Para. 4.16, Pages 49 & 50

The Institute agrees with the comment of the Committee that the terms of Article 20 require reconsideration and that it should be drafted in such a way as to convey the present legal position in the U.K. on the appointment of a liquidator, viz: that the liquidator assumes the functions of the directors of the company and in that respect has power to deal with the company's property to the temporary exclusion of the directors. It is essential that the precise position be known to directors, as it could affect their legal responsibility as to their course of action in dealing with assets about the time the liquidator is appointed.

5. Para. 4.22, Pages 53 & 54

The Institute takes the view that as a quid pro quo for the freedom for individuals to move within the E.E.C., there should be a willing acceptance of restrictions within the E.E.C. This might entail disqualification from acting in certain capacities, including that of a director, in one country because the individual has been made bankrupt in another country. The Convention at the moment leaves it to the law of each Contracting State to determine the extent of such disqualifications, but if the above philosophy is accepted it would seem more suitable that this be transferred to the Uniform law and stated in Annex 1 of the Convention.

6. Para. 4.24, Page 55

The Committee invite comments as to the date from which bankruptcy should be made effective and note in their Report that representation has already been made by the Institute of Directors. The Institute has reconsidered this and thinks it important that the precise time at which power is given to the trustee or liquidator should be clearly understood and that there should be no confusion as to the respective powers and responsibilities of directors on the one hand and the liquidator on the other. It is important that there should be consistency between the effective date of

bankruptcy referred to in this paragraph (4.24) and the ability to act (which is referred to in paragraph 4.60). The Institute notes that another view has been put forward that bankruptcies should take effect immediately and would accept this alternative suggestion. With it should be the ability to deal with the assets, which is the question raised in paragraph 4.60 of the Report.

7. Para. 4.54, Pages 71 & 72

The Institute endorses the suggestion made to the Committee that a similar qualification is required to ensure that the laws of the country which govern the actions available to individuals should not be inconsistent or unqualified by the powers given under the E.E.C. Convention. The Institute would, however, prefer that the countries concerned should harmonise their laws in such respects so that the problems of inconsistency would no longer remain and the difficulties of having local restrictions would consequently disappear. It is accepted that this must be a long term objective and that in the short term such difficulties will remain, but it is to be hoped that there could be a general move made towards such harmonisation.

8. Para. 4.60, Page 74

This matter has been dealt with as part of paragraph 4.24 in note 6 above.

9. Para. 6.5, Pages 91 & 92

The Institute endorses the concern that individuals, including directors, could have difficulty in having knowledge of the relevant law; it does not lie within our brief to suggest ways in which these problems might be overcome but the Institute accepts the point made as valid.

10. Para. 6.10, Page 94

The Institute accepts the Committee's view that Article 58 (2) as presently drafted is acceptable, as three months is considered to give directors adequate notice within which to take action.

11. Para. 6.13, Pages 95 & 96

The Institute accepts the requirement embodied in Article 62.

12. Para. 7.1 et seq, Pages 100 onwards

The Institute notes that in certain circumstances a deficiency in assets in bankrupt limited companies can be recovered from the persons who have conducted the affairs of that company, such persons to include directors. It is noted that there is similar legislation included in the U.K. under Sections 332 and 333 of the Companies Act, 1948 and accepts that such legislation should remain in the E.E.C. Convention. It is considered that this is a proper course for the good conduct of industry and commerce generally.

Dealing with the specific points, therefore, it is considered that the definition set out in paragraph 7.6 (1) and (2) should be limited to include "and knowingly". It is accepted that this is an imprecise definition and as difficult to determine as the present U.K. wording of "with intent to defraud", as one would have to know the state of mind of the individual at the time that action or inaction took

place. That decision, however, could be left to the courts and it is important that the present definition should not remain as widely drafted as at present.

Paragraph 7.7 deals with Article 1 and the Institute is concerned at the implications that the extension of bankruptcy to the individual could occur whether or not the company has met all claims or otherwise. It is important that this course of action i.e. to extend a claim against the directors, should only be available where the assets of the company have proved to be insufficient to meet all liabilities.

Paragraph 7.9 has been dealt with above and the Institute agrees with the Committee's suggestion that Article 1 appears to be unacceptably vague.

The Institute agrees with the contention in paragraph 7.10 that some date for the commencement of bankruptcy must be determined and capable of being established by the courts.

Paragraph 7.11 refers to the fact that the Federal Republic of Germany has expressed reservations in respect of the Uniform law and queries whether the U.K. should follow suit. The Institute does not consider it advisable that the U.K. should opt out of the Uniform law, or express major reservations in respect of Annex 1 unless it is absolutely necessary. It is important for businessmen generally (including directors) to know the laws under which business is governed and that there should be harmonisation wherever possible.

Paragraph 7.12 agrees with the present proposal in Article 2. The Institute considers it necessary and important that the powers and responsibilities of directors should extend throughout the E.E.C. and that similar safeguards should be built in.

Yours faithfully,

J.F. Staddon,
Secretary

9 Chartered Accountants of Ireland

THE INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND

SUBMISSION TO

THE DEPARTMENT OF TRADE

E.E.C. BANKRUPTCY CONVENTION ADVISORY COMMITTEE

on

E.E.C. PRELIMINARY DRAFT OF A CONVENTION ON BANKRUPTCY, WINDING-UP, ARRANGEMENTS, COMPOSITIONS AND SIMILAR PROCEEDINGS

CONSULTATIVE PAPER

INTRODUCTION

1. This submission is made on behalf of our members in Northern Ireland and according to the provisions of the Companies Act (Northern Ireland) 1960 and Companies (Amendment) Act (Northern Ireland) 1963.

There are many matters in the Consultative Paper which are exclusively matters of law on which we do not feel competent to make observations. These include such matters as interpretation and translation.

Our Submissions are limited to companies and in certain areas where we consider comment is appropriate.

It is recognised that the long term aim is for harmonisation of law but this will take time to achieve and in the short term practical means of recognising variations within the laws of the various states must be found.

The following comments are put forward on that basis.

SCOPE OF THE CONVENTION

PROCEDURES TO WHICH THE CONVENTION APPLIES

2.3 It is noted that the Convention as at present drafted presents problems on how to deal with non-judicial proceedings. It appears to us that it would be better to legislate for these in the Convention itself rather than rely upon such powers as may be contained in the Judgements Convention. On the basis that the Convention is designed to achieve reciprocity it would appear to be unfortunate if non-judicial legal procedures operated in a member country were not enabled to be recognised in other member countries. In Northern Ireland, as far as companies are concerned, this heading would include creditors' voluntary liquidations, receiverships particularly created under a floating charge and perhaps members' voluntary liquidations.

The present procedures within the United Kingdom relating to voluntary winding-up, receiverships, particularly under a floating charge, have many advantages in terms of resolving the financial position of the companies concerned. If such procedures are not recognised it would appear that from thetime of the appointment of a liquidator or receiver he would not be entitled to trade within any E.E.C. country outside the United Kingdom.

At least two possibilities appear to exist.

(a) The recognition of a Receivership and/or Voluntary Winding-Up within all E.E.C. Countries by means of the granting of some form of a certificate from a Court or other form of appropriate authority

or

(b) (i) E.E.C. Countries could agree to recognise that a Receiver has power to realise debts created from the time of his appointment

(ii) The Court should be given powers to resort to asset pools, after the preferential creditors within each member state have been satisfied in full. It is recognised that this effectively creates another category of preference which would rank before unsecured creditors.

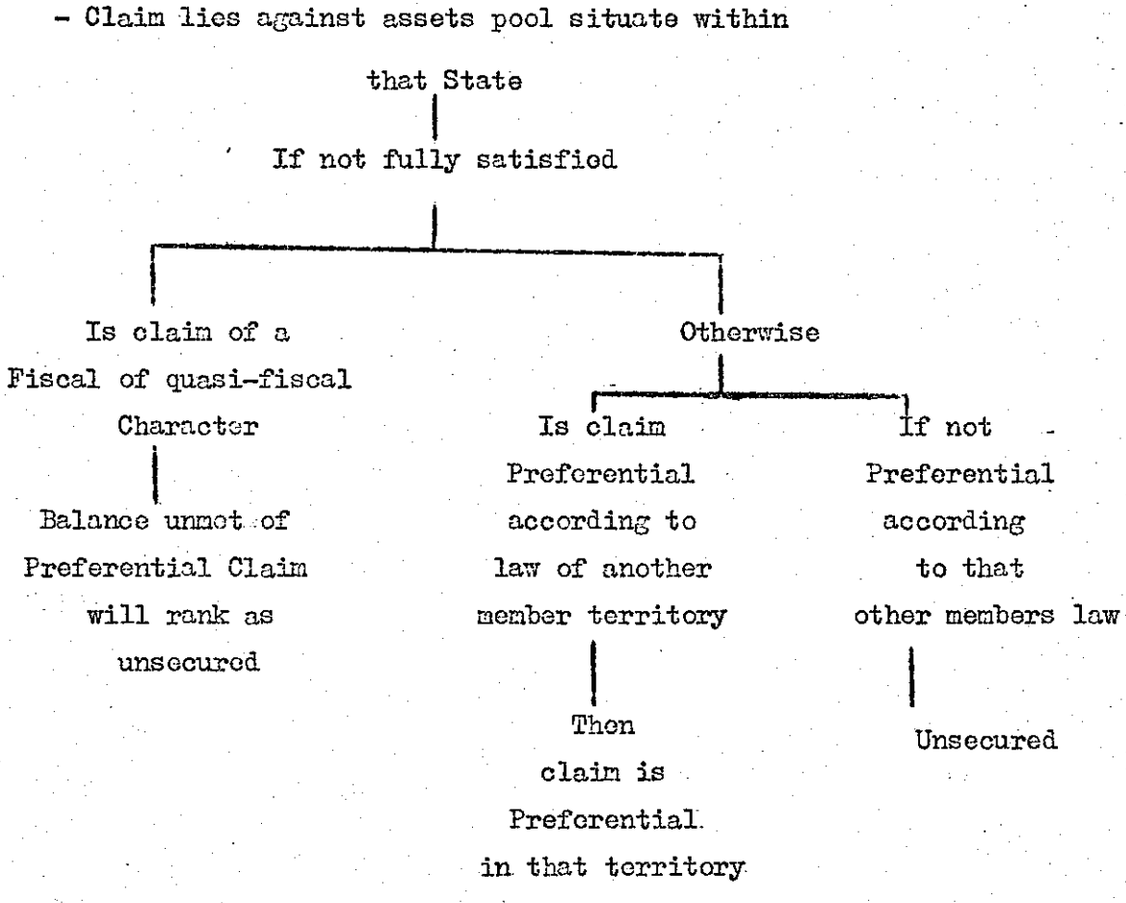
PREFERENTIAL DEBTS

5. The provisions of the Consultative Paper relating to Preferential Claims as we understand them are shown on Chart A below -

CHART A

PREFERENTIAL CLAIMS IN A MEMBER STATE

(ACCORDING TO LAW OF THAT STATE)



It is suggested that the procedure as outlined in Chart B may have some merit as an alternative -

CHART B

PREFERENTIAL CLAIMS IN A MEMBER STATE

(ACCORDING TO LAW OF THAT STATE)

Claim lies against assets pool situate within that State - subject to each assets pool being in excess of preferential claims

If not fully satisfied in all territories then

Make transfer from other asset pools to enable all preferential claims to be satisfied according to preferential laws of each member (But not beyond i.e. preferential creditor in territory X cannot establish preferential claim in territory Y or of different amount)

If that is not possible i.e. if all asset pools are less than total preferential creditors then total preferential pools/territory established and allocation made pro rata with transfers within asset pools.

Above is imperfect but could work in short term

Long term - intention to harmonise preferential rules in all territories of members

The principal alterations incorporated in Chart B are

(i) The Preferential Claims are established according to the law of the state in which they arise only

(ii) All Preferential Creditors receive settlement either in full or pro rata.

THE UNIFORM LAW

7.7 We agree with the principle contained in Article 1 of the Uniform Law that a person may, in certain circumstances, due to his particular association with a company, be declared bankrupt. We feel that this action should not take place until such time as the company's claim has been established against him. Any reference back period should be the same as that for the company.

7.16 It would be necessary to reach agreement with all member states on the definition of "cessation of payments". The definition should be part of the Uniform Law and should be universally defined.

7.37 We are not aware of any evidence which would indicate that the provisions of the Section 93 Companies Act (Northern Ireland) 1960 are too harsh and accordingly we feel that the legislation should be similar to Section 93.

7 . 41

We appreciate the importance of floating charges in the insolvency proceedings relating to companies in the United Kingdom and would strongly support your committee's view that it is undesirable if the Convention in any way prejudiced their validity.

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(20 Eng)

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND
(Incorporated by Royal Charter in 1854)

Draft EEC Convention on Bankruptcy

Memorandum of Comments by a Committee of the Institute on the Consultative Paper issued by the Department of Trade Advisory Committee.

Part II - Sections 5 - 7 of the Consultative Document

4. Detailed Observations on the Consultative Paper (contd)

5. Preferential and Secured Debts

5.10 The Committee does not consider that the acceptance by the Convention of the continuance of the rights of preference in respect of fiscal and quasi-fiscal debts in an individual state against assets in that state is consistent with the basic philosophy of the Convention, but is of the view that it is the only practicable approach, certainly in the initial period of the operation of the Convention. The Committee was not, however, clear why Article 42 excludes from unsecured ranking in another state civil or commercial debts due to a government.

5.12 From practical experience as liquidators, the Committee considers that the facility for governments to rank as unsecured creditors in other member states will have little effect in practical terms because in the majority of cases, certainly in the United Kingdom, there is normally little left of an insolvent estate after the claims of secured and preferred creditors have been satisfied.

5.15 The Committee regards the question as to whether a debt claimed by a subrogated creditor for wages advanced would be construed as a debt arising out of a contract of employment as a strictly legal matter upon which it is not competent to express a view. The Committee finds it difficult/

difficult to express a firm opinion as to the desirability of the right of subrogation in respect of advances for wages. With the present trend towards a proliferation of statutory preferences it seems likely that in the absence of a right of subrogation banks would be much less likely to make advances for the payment of wages and this would lead to a general tendency for firms to become insolvent at an earlier stage than they do at present and render rehabilitation less feasible. Conversely, the Committee recognises that there is a substantial body of opinion which considers that under the existing United Kingdom laws the banks, taking into account rights of subrogation and fixed and floating charges secured on assets, obtain an undue degree of preference leaving little, in most cases, for ordinary creditors.

5.17 The Committee is inclined to agree with the Consultative Committee that the Convention favours preferential creditors unduly and it supports the compromise solution suggested by the Consultative Committee. While it feels that the existing provisions governing distribution set out in Article 41 would be acceptable, it is of the view that detailed guidance as to their implementation would need to be provided, particularly as regards how relief is to be given where more than 100p in the £ is ingathered.

5.18 The Committee feels strongly that the existing system in the United Kingdom of adjudication of claims by the liquidator, with a right of appeal by the creditor to the courts, has many practical advantages. It sees no reason for changing this and would be very much against any change which would result in claims being adjudicated by the courts.

5.19 Unless the right of appeal to the courts is absent from the legal system of any of the member states the Committee feels that the principle of mutual/

mutual respect between courts of Member States must be accepted.

5.20 The Committee considers that whether it is desirable or not the approach adopted in the Convention for giving effect to preferential claims represents the only practicable approach. It would certainly not wish to see any extension of Government preferences beyond the present territorial and quantitative limits but it does not, however, appear that the provisions of the Convention have this effect. It would hope that in the longer term the preferences in the Member States will become uniform.

6. Recognition and Enforcement of Judgments and Challenges to them.

6.5 The Committee recognises the problems of authentication, recognition and enforcement of judgments and orders of foreign courts but feels that this is very much a legal problem to which it is not competent to suggest a solution.

6.8 The Committee considers that for Scotland the Sheriff Courts should be added to the list of courts as well as the Court of Session as it does not consider it should be necessary to go to the Court of Session for decisions on what could be minor matters.

6.9 The Committee can see no disadvantage in including a specified public official and, indeed, feels this inclusion might be advantageous.

6.10 The Committee agrees that Article 58(2) is acceptable but points out that the time limit of three months for impeachment of bankruptcy is inconsistent with the provisions of the Companies Acts which provide no such limit.

6.12 While the matter is primarily a legal one, the Committee can see no practical reason why enforcement could not be effected through local courts and accordingly suggests that the Court of Session and Sheriff Courts/

Courts be added in respect of Scotland to the list of authorities specified in Article XI of the protocol. It is of the opinion that a liquidator would in any case seek legal advice in a foreign state.

6.13 The Committee finds the general principle of Article 62 acceptable.

6.14 The Committee considers that there is nothing unreasonable in requiring the liquidator to provide an address for service of process: in another Member State this would in practice be the address of the liquidator's local legal agent. While it is not conversant with Article 46 of the Judgment Convention it agrees with the need for consistency.

7. The Uniform Law.

7.4 The Committee agrees that it would not be appropriate to apply to proceedings such as judicially supervised schemes of arrangement and compositions the provisions of Articles 3 to 6 of the Uniform Law and that the remedy for creditors desiring their application is to institute formal bankruptcy proceedings.

The Committee assumes that the purpose of sub-paragraph 3 is to ensure that France and Italy incorporate the provisions of the Uniform Law in their own laws relating to the proceedings specified in Artcile XIII of the Protocol but feels that the wording of the sub-paragraph is somewhat ambiguous.

7.7 Comment on this matter has already been made in 4:3.16 of Part I of this memorandum.

7.8&9 The Committee would not presume to express a view on whether the criteria for personal liability are a matter for bankruptcy law but feels most strongly that the existing provisions in U K law extending to an individual liability for a company's debts are too imprecise and difficult to enforce. It therefore welcomes the provisions of Article 1. Not having/

having expert legal knowledge it does not feel that it is competent to comment as to the precise form of the criteria which should be specified.

7.10&11 It seems to the Committee that Article 1 will enable associated persons to be rendered bankrupt more expeditiously than is presently possible under Scots law. This, it considers, would be a desirable change as the result of the delay which can occur under the present system is that the debtor has time in which to dispose of his assets. In its comments on para. 3.16 the Committee suggested that associated persons should only be liable to be declared bankrupt if they have failed to make payments due to the bankrupt firm. Provided this protection for the individual is incorporated in the Convention, the Committee considers it reasonable that the date of cessation of payments for the individual should be imputed from that of the firm and that in general the United Kingdom should not, certainly so far as Scots law is concerned, make any reservation in respect of Article 1.

7.12 The Committee agrees that Article 2 is acceptable.

7.14&15 Under the Convention the transactions referred to in Paragraph A of Article 4 may only be challenged if they have taken place within one year from the declaration of bankruptcy in contrast to the present position in Scotland where there is no such fixed time limit. The Committee would have preferred that no change be made to the position in Scotland and a reservation to exclude application of the time limit in Scotland added in Annex II. It, however, recognises the force of the arguments in para. 7.15 and considers that no reservations as to the application and the length of the period of relation-back should be permitted. On the footing that United Kingdom acceptance of this would involve some sacrifice by the UK it feels that it is reasonable to expect some sacrifice on the part of other/

other member states. As regards the length of the period it feels that one year is too short and would accept the period of two years proposed by the Brussels Working Group.

7.16-23 The Committee does not consider that the definition of 'cessation of payments' suggested by the Consultative Committee is satisfactory as it is too imprecise and too protective of the debtor. It feels that such a definition must be related to specific legal occurrences and would prefer the present Scots definition of notour bankruptcy upon which the proposed definition does not seem to be any improvement. The Committee agrees that a single definition of cessation of payments is necessary and that no reservations to its application can be accepted. Dependent on what is eventually decided as regards the definition of 'cessation of payments' the Committee considers that in the interests of clarity there would be merit in adding to Annex II a proviso that in Scotland notour bankruptcy should be equivalent to cessation of payments. As regards the evident curtailment of the rights of creditors implied by Article 4F of the Uniform Law the Committee is not unduly concerned as, from the practical point of view, it is not a consideration which arises to any material extent in its experience.

Comment has been made on the concept of cessation of payments as requested by the Advisory Committee. It will be noted, however, that in paragraphs 7.30-32, 7.34 and 7.37 below, it is suggested that the condition relating to cessation of payments be deleted from paragraphs B, C and D of Article 4 of the Uniform Law.

7.29 The Committee agrees that Article 4 A is acceptable provided the exceptions presently existing in Scots law are incorporated. These are th limitation of one year in relation to donations between spouses and gifts in/

in consideration of marriage where there is consideration and no knowledge of the debtors bankruptcy. It does, however, consider that the phrase in sub-paragraph 2 'in fulfilment of a moral obligation' will lead to considerable difficulties in interpretation and that it would be better replaced by words such as 'with just cause' and that the explanatory phrase in sub-paragraph 2 "not involving contingency or risk" should be deleted because it unnecessarily weakens the sub-paragraph and tends to introduce an element of confusion between measurement and substance.

7.30-32 The Committee considers that the provision in sub-paragraph 1(a), 1(b), 1(c) and 2 of Article 4B that the invalidity of the transactions referred to is conditional on their being carried out after the cessation of payments unduly restricts the powers of a liquidator and should be deleted. The Committee noted that under United Kingdom insolvency law the period within which the transactions referred to in paragraphs 1(a), 1(b), 1(c) and 2 of the Article 4B could be challenged was 6 months which corresponded with that proposed in paragraph 1(a). In the case of paragraphs 1(b), 1(c) and 2 the Convention proposes an increase to one year. The Committee has no objection to this increase. The Committee noted that sub-paragraph 2 contained no exclusion for charges executed in fulfilment of prior obligations as presently existed under Scots law. This represents a fundamental change in the law to which careful consideration will have to be given. The phrase "statutory charges securing sums due to public authorities and institutions" will require to be clearly defined.

7.34 The Committee does not agree that Article 4C(1) has no analogue in the bankrutpcy system of the United Kingdom in that to challenge the actions of the debtor in making a gratuitous alienation one has to prove collusion. The/

The position is certainly not materially ~~difficult~~ different from that presently existing in Scotland. For the same reasons as given in the comment on Paragraph B, the Committee considers the condition relating to the cessation of payments should be deleted also from Paragraph 4 C.

7.37 The Committee noted that the effect of paragraph 4D would be to require the introduction into Scots law of provision for the registration of any charges created by an individual over moveable property. The present position is that the law provides for the registration by companies of charges on property, whether heritable or moveable, but in the case of individuals only over heritable property. It has no strong feelings about this proposed change. It did however note that the time limit of 15 days was not consistent with Section 106A of the Companies Act 1948 which permits 21 days for registration of a charge and that there was not at present any limit on the time in which an individual had to register a charge on heritable property. The Committee again feels that, for the same reasons as given in the comment on Paragraph 4 B, the condition relating to the date of cessation of payments should be deleted from this paragraph. The Committee thinks it is appropriate to confer a discretion on the courts to declare a security void. If, however, it is felt that a less general discretion would be preferable a provision similar to Section 106G of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 could be written into the Uniform Law.

7.39 The Committee considers that the provisions of the Scots Act of 1621 closely correspond with the Paulian Action and that it should therefore be retained in operation. So far as it is possible for the Committee to judge it does not appear that any modification of that statute is required.

7.41 The Committee agrees that it is important that receiverships and in particular floating charges are brought within the scope of the Convention so that floating charges cannot be attached as fraudulent preferences.

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7.14&15 Under the Convention the transactions referred to in Paragraph A of Article 4 may only be challenged if they have taken place within one year from the declaration of bankruptcy in contrast to the present position in Scotland where there is no such fixed time limit. The Committee would have preferred that no change be made to the position in Scotland and a reservation to exclude application of the time limit in Scotland added in Annex II. It, however, recognises the force of the arguments in para. 7.15 and considers that no reservations as to the application and the length of the period of relation-back should be permitted. On the footing that United Kingdom acceptance of this would involve some sacrifice by the UK it feels that it is reasonable to expect some sacrifice on the part of other/

other member states. As regards the length of the period it feels that one year is too short and would accept the period of two years proposed by the Brussels Working Group.

7.16-23 The Committee does not consider that the definition of 'cessation of payments' suggested by the Consultative Committee is satisfactory as it is too imprecise and too protective of the debtor. It feels that such a definition must be related to specific legal occurrences and would prefer the present Scots definition of notour bankruptcy upon which the proposed definition does not seem to be any improvement. The Committee agrees that a single definition of cessation of payments is necessary and that no reservations to its application can be accepted. Dependent on what is eventually decided as regards the definition of 'cessation of payments' the Committee considers that in the interests of clarity there would be merit in adding to Annex II a proviso that in Scotland notour bankruptcy should be equivalent to cessation of payments. As regards the evident curtailment of the rights of creditors implied by Article 4F of the Uniform Law the Committee is not unduly concerned as, from the practical point of view, it is not a consideration which arises to any material extent in its experience.

Comment has been made on the concept of cessation of payments as requested by the Advisory Committee. It will be noted, however, that in paragraphs 7.30-32, 7.34 and 7.37 below, it is suggested that the condition relating to cessation of payments be deleted from paragraphs B, C and D of Article 4 of the Uniform Law.

7.29 The Committee agrees that Article 4 A is acceptable provided the exceptions presently existing in Scots law are incorporated. These are th limitation of one year in relation to donations between spouses and gifts in/

in consideration of marriage where there is consideration and no knowledge of the debtors bankruptcy. It does, however, consider that the phrase in sub-paragraph 2 'in fulfilment of a moral obligation' will lead to considerable difficulties in interpretation and that it would be better replaced by words such as 'with just cause' and that the explanatory phrase in sub-paragraph 2 "not involving contingency or risk" should be deleted because it unnecessarily weakens the sub-paragraph and tends to introduce an element of confusion between measurement and substance.

7.30-32 The Committee considers that the provision in sub-paragraph 1(a), 1(b), 1(c) and 2 of Article 4B that the invalidity of the transactions referred to is conditional on their being carried out after the cessation of payments unduly restricts the powers of a liquidator and should be deleted. The Committee noted that under United Kingdom insolvency law the period within which the transactions referred to in paragraphs 1(a), 1(b), 1(c) and 2 of the Article 4B could be challenged was 6 months which corresponded with that proposed in paragraph 1(a). In the case of paragraphs 1(b), 1(c) and 2 the Convention proposes an increase to one year. The Committee has no objection to this increase. The Committee noted that sub-paragraph 2 contained no exclusion for charges executed in fulfilment of prior obligations as presently existed under Scots law. This represents a fundamental change in the law to which careful consideration will have to be given. The phrase "statutory charges securing sums due to public authorities and institutions" will require to be clearly defined.

7.34 The Committee does not agree that Article 4C(1) has no analogue in the bankrutpcy system of the United Kingdom in that to challenge the actions of the debtor in making a gratuitous alienation one has to prove collusion. The/

The position is certainly not materially ~~difficult~~ different from that presently existing in Scotland. For the same reasons as given in the comment on Paragraph B, the Committee considers the condition relating to the cessation of payments should be deleted also from Paragraph 4 C.

7.37 The Committee noted that the effect of paragraph 4D would be to require the introduction into Scots law of provision for the registration of any charges created by an individual over moveable property. The present position is that the law provides for the registration by companies of charges on property, whether heritable or moveable, but in the case of individuals only over heritable property. It has no strong feelings about this proposed change. It did however note that the time limit of 15 days was not consistent with Section 106A of the Companies Act 1948 which permits 21 days for registration of a charge and that there was not at present any limit on the time in which an individual had to register a charge on heritable property. The Committee again feels that, for the same reasons as given in the comment on Paragraph 4 B, the condition relating to the date of cessation of payments should be deleted from this paragraph. The Committee thinks it is appropriate to confer a discretion on the courts to declare a security void. If, however, it is felt that a less general discretion would be preferable a provision similar to Section 106G of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 could be written into the Uniform Law.

7.39 The Committee considers that the provisions of the Scots Act of 1621 closely correspond with the Paulian Action and that it should therefore be retained in operation. So far as it is possible for the Committee to judge it does not appear that any modification of that statute is required.

7.41 The Committee agrees that it is important that receiverships and in particular floating charges are brought within the scope of the Convention so that floating charges cannot be attached as fraudulent preferences.

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FINAL DRAFT

Chartered Accountants of Scotland

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND
(Incorporated by Royal Charter in 1854)

Draft EEC Convention on Bankruptcy

Memorandum of Comments by a Committee of the Institute on the Consultative Paper issued by the Department of Trade Advisory Committee.

Part I - Sections 1 to 4 of the Consultative Document

Scope of the Memorandum.

1. The Committee has already submitted, in October 1974, a memorandum of comments on the draft EEC Bankruptcy Convention. It is now reconsidering its original memorandum in the light of the consultative document and the particular points on which observations are sought. This memorandum repeats, where appropriate, observations made on the original memorandum so that reference to the latter document is not necessary. The memorandum is being submitted in two parts as it is understood early submission of comments on the earlier paragraphs of the consultative document will be helpful to the Advisory Committee. The comments in the main follow the order adopted in the consultative document and references are given to its paragraphs. Where no comment is made on a specific paragraph the Committee has no views to offer.

Scope of the Committee's Consideration.

2. (a) The Convention is of necessity a document which deals with legal matters of some complexity. As practising chartered accountants the experience of the members of the Committee is largely in the practical aspects of the administration of insolvencies of all kinds and the memorandum does not therefore attempt to deal with all the complex legal issues which arise. It may be that some aspects of the Convention which appear to be workable from the practical point of view of the accountant are impractical from a legal standpoint.

(b)/

(b) It is emphasised that the Committee has considered the application of the Convention in Scotland in that where differences exist between English and Scots law comments and suggestions for modification are made in the light of present Scottish practice. The Committee did, however, consult with its equivalent in the Institute of Chartered Accountants in England and Wales prior to submitting its original memorandum so as to avoid so far as possible the expression of conflicting views on matters of common interest such as the application of the Convention to the insolvency of companies. The time factor has not permitted further consultation between the two Institutes but it is considered that unless the English Institute has substantially altered its views no conflict of opinion is likely to exist.

(c) Having regard to the views expressed in 1.7 the comments of the Committee have been made on the basis that the broad framework of the Convention must remain largely unaltered and that amendments will be made to it only so far as these are essential to the three member states who joined the community in 1972.

3. General Observations.

(a) (para 1.10) Within the United Kingdom at the present time there exist three largely separate and differing legal systems, in England and Wales, in Scotland and in Northern Ireland. While in principle the Committee feels that the provisions of the Convention can be operated in Scotland it feels that the technical aspects of providing for its application to three individual systems of law within the one member state will be complex. It wishes to urge on the Advisory Committee the need for close consideration of these problems, which are fundamental. It is perturbed that so far this aspect has not been given sufficient attention. It feels that there are dangers in considering the Convention mainly in terms of/

of English law. The Committee does not consider that the insolvency law of Scotland, built up over many years, can, or should be, swept away merely for the sake of uniformity within the United Kingdom.

(b) Following on the remarks in the preceding paragraph the Committee feels that it would be helpful to comment upon some of the more significant differences between Scottish and English insolvency law and procedures. For companies the law as set out in the Companies Acts is broadly similar with the exceptions that (i) there is no equivalent in Scotland to the Official Receiver, (ii) the law relating to receiverships is contained in a separate enactment, The Companies (Floating Charges and Receivers) (Scotland) Act, 1972, and (iii) there are separate rules under the laws of Scotland as regards voting, ranking of claims and such matters as fraudulent preferences and gratuitous alienations. With regard to the actual conduct of voluntary liquidations, there is little overall difference in practice in the two countries. In cases of winding up by the court or subject to the supervision of the court, however, there is a material difference in that in England the Official Reciver is usually appointed as provisional liquidator. In Scotland, there is no Official Receiver but if the winding up petition so requests a professional man, usually an accountant, may at the discretion of the Court be appointed provisional liquidator immediately the petition for liquidation is lodged. Subject to the right of the company or creditors to object to his appointment the provisional liquidator is normally confirmed in office as official liquidator and completes the liquidation. There also appear to be significant differences in the ways in which the courts of the two countries exercise/

exercise their role. The Scottish courts in general are prepared to leave the administration of the liquidation largely in the hands of the liquidator acting in consultation with the Committee of Inspection, it being left to him to seek guidance or decisions from the court, where this is stipulated by Statute or where he considers this necessary. The Committee understands from its counterpart in England that there is much greater intervention there by the courts and the Official Receiver and the procedures involved often entail lengthy delays. The Committee is in general satisfied with the existing arrangements in Scotland and does not consider that any closer degree of involvement, other than is necessary to secure recognition of the process under the terms of the Convention, would b advantageous. It does not wish to comment on the position as regards receiverships as experience of working under the new legislation has been very limite In relation to the bankruptcy of individuals there are separate Bankruptcy Acts for England and Scotland and there are several differences in the bankruptcy procedures, one of these (again) arising from the existence of the Official Receiver in England. In Scotland, the Court, on making an award of Sequestration, orders the convening of a Statutory Meeting of Creditors for the purpose of appointing a trustee, but it is then left to the Trustee appointed, or the petitioner to initiate any further necessary Court procedure. The Scottish courts to a large extent follow the same policy of minimum intervention in sequestration as they follow for voluntary liquidation although all sequestrations are subject to general supervision by the Accountant of Court. The system does suffer from the shortcoming that in cases where the assets of the bankrupt estate ar minimal no person may be willing to accept appointment as trustee because the assets are insufficient to pay the expenses of sequestration; in that event/

event the whole process can and does come to a complete halt, leaving the bankrupt free from further prosecution but, of course, subject to the statutory restrictions applicable to all undischarged bankrupts. The Scottish Law Commission has under consideration at the present time a modification to the system designed to deal with this defect. Apart from this aspect the Committee is of the view that the present system functions reasonably well in securing the efficient and equitable winding up of bankrupt estates. It does not consider that any closer degree of involvement of the courts, other than is necessary to secure recognition of the process under the terms of the Convention, would be beneficial or desirable.

(c) The existence of the different systems of law in the United Kingdom may well give rise to considerable practical difficulties in the operation of the provisions of the Convention in the United Kingdom due to lack of knowledge in other member states of the position. This will be particularly relevant where bankruptcy judgments by foreign courts have to be enforced through United Kingdom courts.

(d) The Committee is of the opinion that the United Kingdom should reserve its position as regards the exceptions it would wish to make in the application of the provisions of the Convention to the three different parts of the United Kingdom until it becomes clear what amendments are likely to be made to the basic provisions of the Convention.

4. Detailed Observations on the Consultative Paper.

2. The Scope of the Convention - paras 2.1 - 2.9

In considering which liquidation and bankruptcy procedures should be brought within the scope of the Convention the Committee had in mind two basic factors:-

(a)/

(a) that under the provisions of the Convention such proceedings were only recognised if they were commenced by some form of court order;

(b) the existence of a state of practical insolvency should be a pre-requisite before such proceedings were brought within the scope of the Convention.

2.2 The Committee is of the opinion that the Convention should extend to the winding up by sequestration, deed of arrangement or composition of the estate of insolvent deceased debtors. Questions of succession will only be relevant in the few cases where a surplus emerges on the insolvent estate and it considers that international complications are just as likely to arise with the insolvent estates of the dead as of the living.

2.3 The Committee considers that deeds of arrangement and compositions should be brought within the scope of the Convention because statutory provision is made for these procedures but that trust deeds for behoof of creditors should not be included because they are normally of a local nature. A trust deed can be converted to a sequestration if it emerges there are assets abroad. Similarly sequestration can be applied for where the estate administered by a judicial factor proves to be insolvent.

The experience of the Committee in relation to receiverships is somewhat limited due to the comparatively recent introduction of this procedure in Scotland. Nevertheless it is of the opinion that they should be brought within the scope of the Convention for the following reasons:

(a) Receivership is part of normal commercial practice in the United Kingdom.

(b) Receivership appears to possess definite advantages for creditors in that it can be instituted and put into effect quickly with the result that more can be salvaged from the company concerned.

(c)/

(c) There is almost always a position of practical insolvency and it is a more effective procedure than the appointment of a provisional liquidator.

(d) The receiver is often carrying out part of the function of a liquidator and has to have regard to rights of preference. He should therefore have powers comparable to those which will be afforded to liquidators under the Convention otherwise there are likely to be very different results in comparable cases due only to the choice of procedure adopted.

(e) Failure to bring receivership within the Convention would tend to compel the use of liquidation proceedings where there were branches of a company in other EEC states and prevent the use of the receivership procedure even though it might be prefereable in the circumstances.

The Committee considers that provision will be necessary for the confirmation by the court of the appointment of receivers in order to bring this procedure within the scope of the Convention. It does, however, feel that such an appointment must not be taken to imply the absolute insolvency of the company and that it might therefore be necessary to include a special provision in the Protocol to deal with receiverships. It wishes to emphasise that the proposal for court confirmation is intended only to secure recognition of the process under the terms of the Convention and does not imply that the courts should otherwise become more closely involved in the supervision of receiverships.

2.4 The Committee considers that as a state of practical insolvency exists in creditors voluntary liquidations they should be brought within the scope of/

of the Convention in order to be consistent. It further considers that for the same reasons the following procedures should also be included:

Winding up by the court under Section 222(e) of the Companies Act 1948;

Winding up by the court under Section 222(a)-(d) and (f) only where insolvency exists;

Winding up subject to the supervision of the court only where insolvency exists.

The Committee considers that the adoption of these proposals would require:-

(a) court confirmation of the appointment of the liquidator in a creditors voluntary winding up. This would necessitate a procedure similar to that obtaining at present for the court to confirm the appointment of the trustee in sequestration or the granting of probate or confirmation in executries.

(b) that, for winding up under Section 222(a)-(d) and (f) and subject to the supervision of the court provision might need to be made for the court to make enquiry as to the solvency of the company: provided the company was solvent the proceedings would not come within the scope of the Convention.

It, however, again wishes to emphasise that its proposals for court confirmation of the appointment of the liquidator in these cases is intended only to secure recognition of these processes under the terms of the Convention and do not imply that the courts should otherwise become more closely involved in the supervision of them.

2.6 The Committee agrees with the Advisory Committee that the Convention should explicitly indicate to which persons and entities it applies. It further feels/

that

feels that its application should be as wide as possible to cover all forms of entity. It also wishes to draw attention to the position of a partnership as a separate entity under Scots law. It considers that they should be brought within the scope of the Convention.

2.7&2.8 The Committee can see no good reason for the exclusion of insurance companies from the scope of the Convention. It also noted that some of the other member states specifically provided in Acticle II of the Protocol for the exclusion of insolvency proceedings for bodies similar to building societies, friendly, industrial and provident societies and trustee savings banks. These categories of concern may all be wound up under the basic provisions of the Companies Acts although these provisions are modified to a certain extent by the special legislation governing these types of organisation. The Committee considers that the protection afforded by the Convention should extend to proceedings for the winding up of insolvent insurance companies, building, friendly, industrial and provident societies and trustee savings banks unless special provision is to be made in other EEC directives or conventions for their liquidation.

2.9 The Committee can see no objection to the United Kingdom securing power to allow inclusion of the Channel Islands and the Isle of Man within the scope of the Convention.

3. Jurisdiction to Declare the Debtor Bankrupt - paras 3.1 - 3.30.

3.6 With regard to the provisions of Articles 7 and 8 relating to the transfer of the principal place of business or an establishment the Committee considers that the period of six months within which the courts of a Contracting State must become aware of the transfer of the principal place o business in order to retain jurisdiction is too short. The period of one year/

year allowed in Scotland has proved to be barely adequate.

3.7 The Committee does not consider itself qualified to comment on the technical problems of Acticles 15 and 16 but considers them reasonable from the practical point of view of the liquidator.

3.9 The Committee agrees with the Advisory Committee that the definition of "centre of administration " will lead to practical difficulties in determining the location but is unable to offer any suggestion which might be an improvement.

3.10 The Committee recognises that in a minority of cases there could be an advantage in permitting rebuttal of the presumption that the centre of administration is the registered office but admits that legal problems may exist. From the point of view of a liquidator it would be prepared to leave a decision to the discretion of the courts in exceptional cases. It does not feel sufficiently strongly about the matter to propose that the right of challenge should be excluded.

3.12 The Committee does not consider satisfactory the situation whereby a bankrupt declared in a contracting state other than that in which the centre of administration is located, is not effective in the state of the centre of administration. It is, however, unable to suggest any practical solution to this problem.

3.13 The Committee has no knowledge of the conduct of bankruptcy proceedings in the EEC states and is therefore not in a position to comment on the speed with which such proceedings are concluded. It does, however, make the observation that in the United Kingdom it is possible for the petitioning for the appointment of a liquidator to be prolonged to the possible detriment of creditors. Delay can also arise where a provisional liquidator is appointed but the petitioning creditor delays in applying for a winding/

winding up order. If this can occur in the United Kingdom it would seem likely that it can occur in other EEC states and is accordingly a factor which should not be ignored.

3.16 The Committee does not feel that the justification given in the Lemontey Report warrants extending the jurisdiction of the court, which declared the firm or company bankrupt, to the bankruptcy of a director or partner of the firm whose own centre of administration is in another member state. It considers that only the courts of the member state in which the individual debtor has his centre of administration should have power to render such debtors bankrupt. This would not prevent the liquidator from taking proceedings against the debtor in the courts of the state in which the debtor has his centre of administration. The Committee further considers that the directors or managers of a bankrupt company or firm should only be liable to be declared bankrupt by virtue of Articles 1 and 2 of Annex 1 if they have failed to make payments due to the company or firm.

3.20 The Committee considers that the exception in sub-paragraph 9 relating to leases of immovable property should be extended so as to cover all contracts relating to immovable property. This is necessary to take into account the special features attaching to freehold in Scotland. The Committee assumes that the term 'immovable property' is equivalent to the term 'heritable property' under Scots law and on this basis feels that the provisions of this Article are otherwise reasonable.

3.22 The Committee recognises the force of the objection but considers that from a practical point of view the principle of applying, so far as practicable, one system of law to any one bankruptcy should be adhered to.

3.25 The Committee was somewhat concerned about the implications of Article 17(6) pointed out by the Advisory Committee but nevertheless, having regard to the view/

view expressed above on 3.22, it feels Article 17(6) should be accepted. The exception in Article 17(9) will have the merit of protecting the family home. It is felt that, given acceptance of the concept of a European Community citizens of one member state who trade in another must b prepared to accept the disadvantages along with the advantages which accrue from being in the community. This general comment is applicable to a number of the provisions commented on below.

3.27 The Committee recognises that the provisions of sub-paragraph 8 relating to preferred debts due to the state are probably as good as can be achieved in the short term but is of the view that in the long term such preferences should be uniform in the member states.

4. Choice of Law Provisions 4.1 - 4.60.

4.8 The Committee considers that the period of 31 days prescribed in Article 24(1 is reasonable.

4.9 The Committee is not clear whether the term "liquidator" in Article 25 is intended to include all persons administering bankrupt estates or whether it is only where the appointment is specifically that of liquidator that advertisement is required. It feels that this Article should be clarified in this respect.

4.10 Having regard to Article 25(4) there is attached to this memorandum an Appendix listing the 'judgments' which the Committee considers will require to be added to Article IV of the Protocol in respect of Scotland.

4.12 The Committee considers that in the United Kingdom it will be necessary (in order to accord with Scots law) for the gazetting of 'judgments', as provided for in sub-paragraph 3 of Article 25, to be effected in both the Edinburgh and London Gazettes.

4.13 The Committee considers that a standard form of bankruptcy claim, which must be recognisable as such, should be introduced and a specimen included as an Appendix/

Appendix to the Convention. The specimen form of certificate of the appointment of the liquidator in the Annex to the Protocol illustrates the sort of document which might be prescribed.

4.14 The Committee considers it will be necessary for the appointments of liquidator, receiver and trustee or judicial factor in sequestration to be included for Scotland in the list of authorities specified in Article IX of the Protocol.

4.16 The Committee agrees with the criticism of Article 20 made by the Advisory Committee and feels that it should be made clear in the Convention that on the award of a winding up order the power to intromit with the property of the company vests in the liquidator.

4.17 The Committee has some doubts as to the desirability of an authority in one member state having powers to authorise a debtor to continue in business in another member state with no reference to the courts of that other state. It does not consider that Article 31 is otherwise objectionable and would be prepared to accept it provided that it is made clear that the term 'competent authority' includes a liquidator or trustee in bankruptcy.

4.19 The Committee considers that the Convention should state explicitly that the authority of a foreign liquidator shall not extend to assets held in trust by the debtor.

4.20 The Committee accepts that there are dangers in accepting Article 34 as drafted, particularly in the light of the likelihood of revision of English and Scots law on this matter. It, however, feels that it will only be in very isolated cases that foreign law will be applicable to a wife resident in the UK and accordingly that from a practical point of view the provisions of the Article should be accepted.

4.21 The Committee considers that as the situation will only arise in isolated cases/

cases, it is satisfactory, in the case of a Community bankruptcy involving a debtor resident in the UK., to leave questions of the debtor's right to retain personal earnings to the law of the State of bankruptcy.

4.24 From the point of view of the liquidator it would be desirable that a Community bankruptcy should take effect in all states as from the date of its pronouncement but the Committee recognises that from a practical aspect it would be unreasonable to provide that it should take effect in relation to persons other than the debtor earlier than 8 days after advertisement in the Official Journal. It did, however, assume that for parties affected by the bankruptcy in the State of bankruptcy the date of pronouncement would remain the effective date. The only alternative approach would be for all bankruptcies to be advertised in the Official Journal which would clearly not be a practicable approach.

4.26 The Committee agrees that it would be impracticable to have to apply, in relation to rights in assets subject to registration, any law other than that of the state of registration. It suggests that the classes of assets to which Article 27 should apply include heritable property, ships, copyrights, patents, trademarks and similar assets.

4.28 From a practical point of view the Committee welcomes the provisions of Article 21 and can see no fundamental objection to them. It also makes the following observations:

Sub-paragraph 3 - The Committee considers that the expression 'debts recoverable in like manner' is too imprecise and should be extended to be more specific because the implications arising from foreign law will not be generally known.

Sub/

Sub-paragraph 4 - The Committee is of the view that the application of this sub-paragraph will inevitably give rise to practical difficulties because of differences in definition between heritable and moveable property in the member states.

4.29 The Committee agrees that the purpose of Article 21 would be much better achieved by allowing a Community bankruptcy to invalidate action by the court or creditors retrospectively.

4.30 The Committee welcomes the underlying aim of Article 22 and agrees with the Advisory Committee that it could be implemented more satisfactorily by allowing a Community bankruptcy to cut down measures of enforcement effected within a specified period before the date of bankruptcy. It wishes to point out, however, that in relation to costs of frustrated measures of enforcement the costs of obtaining a decree in Scotland are not a preferred debt. This has the beneficial effect of discouraging vexatious claims.

4.31 The Committee considers the provisions of Article 23 are reasonable.

4.35&36 The Committee is in agreement with the views of the Advisory Committee that protection of property passing in consideration of marriage and policies effected for the benefit of spouses and children should be continued.

4.38 The Committee agrees that the Convention should specifically provide that reference to the law of the State of bankruptcy includes that State's own rules of bankruptcy.

4.39 The Committee feels that the exception to the general application of the law of the State of bankruptcy for contracts of employment in Article 36 should remain in the Convention. From a practical point of view its inclusion will be of assistance to the professional liquidator in that he will not require to refer to another branch of the law to ascertain which law is applicable in the case of contracts of employment.

4.40/

4.40 The Committee does not consider that it would be desirable to extend the provisions of Article 37(1) beyond heritable property but that they should, as previously suggested in the comment on 3.20, be extended to cover all form of contract relating to heritable property. Its reason for taking this view is that it does not consider that it is advisable from a practical point of view to increase the number of exceptions to the general principle of application of the law of the State of bankruptcy any more than is absolutely necessary.

4.41 The Committee considers that as is suggested in the Consultative Paper Articles 37(2) and 37(3) should be deleted. This accords with the view expressed in the comment on 4.40 that the only exception made should be for heritable property.

4.43 The Committee considers that in the case of bankruptcy of the vendor or purchaser in a contract of sale the law of the State of bankruptcy should also apply. This is in line with the view expressed in the immediately preceding comments and accordingly it feels that the exceptions to this general rule in Article 39 should be deleted.

4.45 As will have been noted the Committee has taken the view that, subject to a limited number of exceptions, the law of the State of bankruptcy should apply and from the point of view of the liquidator it considers Article 39 to be reasonable. The members of the Committee do not feel that as Chartered Accountants they are qualified to express views on the legal aspects relating to the Consumer Credit Act and other relevant UK legislation raised in the Consultative Paper.

With regard to Article 6 of Annex 1 the Committee was in some doubt as to whether this provision would require the liquidator to adopt a bankrupt seller's contract and be liable to incur personal liability for claims brought against the seller and thus deprive the liquidator of the right which presently/

presently exists in Scotland to revoke a contract where this would be in the best interests of the creditors. It felt it would be a most undesirable development if the trustee was put in the position of having to accept personal liability in this way and the removal of the right of revocation would constitute a fundamental departure from Scots law and could place the liquidator in an intolerable position. If these are the effects of this provision the Committee considers acceptance of it would be most undesirable.

4.48 The provisions of Article 5 of Annex 1 do not seem to the Committee to be inconsistent with the rules of set-off in Scotland and it does not take any exception to them. It does not feel competent to comment on the question of whether the rules of set-off should be mandatory or not as this requires expert legal knowledge.

4.49 The provisions of Article 5 in so far as they relate to set-off of contingent debts appeared to the Committee to be consistent with the rules for such debts under Scots law and it has no objection to them.

4.54 The Committee supports the suggestion that Article 28 be qualified so that the liquidator can, in another member state, only exercise the powers conferred upon him by the law of the State of bankruptcy to the extent that these are not inconsistent with the law of that other member state.

4.55 The Committee does not consider that the provisions of Article 28(3) are adequate as they stand and that all member states should be required to include in their laws provision for the appointment of local liquidators in other member states.

4.56 The Committee considers that the provisions of Article 32(3) relating to the powers of local courts to stay measures of execution are adequate.

4.58 The Committee agrees with the Advisory Committee that powers of redirection of mail, which in prinicple it welcomes, should be vested in the courts of the/

the State in which the bankrupt is resident and should be limited to a period of 3 months which may be extended for further 3 month periods on fresh application being made on each occasion.

4.60 The Committee considers that the provisions of Article 32 are acceptable except in so far as they relate to heritable property for which, in conformity with its previous suggestions, it considers lex situs should apply.