27 Sept

Organisations already approached for their views on the draft Convention

✓ The Law Society (Cttee Co. Law Cee into half)
The Law Society of Scotland
✓ Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants of Scotland
Association of Certified Accountants
Institute of Chartered Secretaries and Administrators
✓ Institute of Bankers
British Bankers Association
Law Commission
Scottish Law Commission
Northern Ireland

Suggested List of other organisations to be approached

Association of British Chambers of Commerce
National Association of Trade Protection Societies
[National Chamber of Trade] Retail Consortium
Institute of Cost and Management Accountants
Institute of Directors
Confederation of British Industries
Association of International Accountants Ltd.
British Insurance Association
Council of Scottish Chambers of Commerce
Committee of Scottish Bank General Managers
Trades Union Congress
General Council of the Bar
Stock Exchange Council (London)
Individual Banks ? —
Institute of Credit Management
Insolvency Group of Accts.

10(2)

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MEMORANDUM NO 2 - SUMMARY OF RECOMMENDATIONS

Would Members kindly signify 'Agree' or 'Disagree' alongside each recommendation and return one copy to the Secretary.

1.	The administration of deceased insolvents' estates should be included in the Convention.	Yes
2.	Deeds of Arrangement should be excluded.	Should be protected by Uniform Law
3.	Non-judicial compositions should be excluded.	yes
4.	Private trust deeds for creditors should be excluded.	
5.	It is accepted that receiverships for debenture-holders be excluded. the payment of preferential debts should be protected	
6.	Creditors' voluntary winding-up must be included.	Yes
7.	A criminal bankruptcy order falls to be enforced under the Judgments Convention.	~~Yes, not~~ in B.C.
8.	A bankruptcy receiving order and adjudication made on a petition which cites a criminal bankruptcy order as the act of bankruptcy will come within the Bankruptcy Convention.	Only if included. Wd. exclude
9.	The Convention should explicitly indicate to which persons and entities it applies.	yes.
10.	It is acceptable that certain insurance companies are excluded from the Convention, but only those which are covered by the Directive.	yes. new Bill
11.	The undertakings listed in Article II of the Protocol as being excluded from the Convention in the country designated are acceptable.	Yes ? Give Denmark
12.	There are no classes of undertakings which the UK should list as being excluded, within the UK, from the Convention.	Yes

unapplicable.

13. The UK should secure power to allow the Channel Islands and the Isle of Man to be included by declaration.

Yes

14. Like the Netherlands, the UK should have optional power to extend the Convention to its non-European overseas territories

Yes

15. The Convention should not, for the time being, apply to the overseas territories of Member States.

Yes

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10(3-4) Chamber of Commerce

ASSOCIATION OF BRITISH CHAMBERS OF COMMERCE

COMMENTS ON THE EEC Preliminary Draft CONVENTION ON BANKRUPTCY etc.

It is clear that acceptance of the Convention will call for radical changes in the Laws of Member States; that will apply to the United Kingdom as it does to other States. The need for these changes is an opportunity to consider what other changes should be made at the same time. The recent Report of the Justice Committee on Bankruptcy was published at an opportune moment. Radical changes at short intervals are most undesirable, and it is hoped that the Advisory Committee, when putting forward its final views, will consider the matter not only from the point of view of the draft Convention, but also from the general point of view of reform, as exemplified by the Justice Report.

Members of the Chamber of Commerce movement are vitally concerned with any laws affecting the prompt settlement of accounts. The greater the economic difficulties, the greater the importance of cash flow. Over the year, the threat of bankruptcy proceedings has been used more and more widely as an aid to efficient debt-collecting; the need for such an aid reflects badly on the administration of justice, and may mean that the bankruptcy system becomes clogged with cares for which it was not intended. Continental systems tend to emphasise the protection of creditors, whereas the English bankruptcy system (at least in theory) exists for the protection of the debtor. We would welcome a change in emphasis here and would welcome changes in the law which would achieve a significant reduction in the number of debtors forced into bankruptcy and preferring a greater use of administration order proceedings in suitable cases.

The Advisory Committee has asked for views on a number of matters. Some of these are dealt with below.

SCOPE OF THE CONVENTION

Para. 2.2 On balance it seems logical and right that the Convention should extend to the winding-up of the estates of insolvent deceased debtors where there is judicial supervision. If so, it is desirable that the Convention should make provision for these cases where the habitual residence is not the same as the centre of administration.

Para. 2.3 The Convention should be restricted to judicial and judicially supervised proceedings (see para. 8.9).

Para. 2.4 It is submitted that creditors' voluntary liquidations should be excluded from the Convention. In few cases should there be need to seek assets abroad. Those cases can be commenced by petition.

Para. 2.5 Criminal bankruptcy proceedings should be included in Article 1 of the Protocol - again on the principle that the Convention should apply to all (but only to) judicial and judicially supervised insolvency proceedings.

Para. 2.6 It is most desirable that the Convention should indicate explicably the persons and entities to which it applies.

JURISDICTION TO DECLARE THE DEBTOR BANKRUPT

Para. 3.9 The draft Convention is the product of a Working Party which started to meet 12 years ago. To put forward any alternative concept

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would be to strike at the whole basis of the Convention. To find an unobjectionable alternative concept would seem impossible.

Para. 3.10 Presumably strong and cogent evidence would be needed to rebut the presumption that the centre of administration is the place of the registered office - in such cases it is preferable that jurisdiction should lie with the Court at the place where main interests are administered.

Para. 3.11 It is suggested that the Convention ought to include a definition of 'establishment'. But if that is not done, the Courts should have no great difficulty in determining actual cases.

Para. 3.12 The situation is not satisfactory. Harmonisation is desirable but may be unobtainable. At the least the rights of the creditors to attach should pass to and be exercisable by the liquidator, or alternatively the benefit of attachments should be held in trust for the liquidator on behalf of the creditors generally. It is most undesirable that there should be a scramble by creditors.

Para. 3.13 The problem of successive bankruptcies is a real one. In practice the problem would be minimised by the adoption of laws granting an automatic discharge in most cases on the lines suggested in the Justice Report.

Para. 3.14 The original Court should satisfy itself as to the jurisdicational basis of the action before it; but may have to rely on ex parte averments. At least the evidence should be given on oath, and should carry the risk of perjury proceedings.

Para. 3 16 This is a fundamental problem and must remain so unless (if ever) there were to be harmonisation of laws generally. The justification given in the Report is appreciated, but does not warrant this departure from jurisdictional principles. On the other hand the powers contained in Article 10 to 12 and Article 2 of the Uniform Law would afford creditors better protection from the activities of unscrupulous people - the evidence of mismanagement must be heard in the original proceedings. It is suggested that a compromise might be possible, namely that the original Court should have power to declare the bankrputcy, but that the laws of the bankrupt centre of administration should be applied as if he could have been and had been made, bankrupt there. Could, for example, a small trader with an Italian centre of administration, be a director of and mismanage (within Article I and II of the Uniform Law) a German company ?

Para. 3.20 Efforts should be made to amend the Convention so that the Courts of the situs should have exclusive jurisdiction in matters relating to immovable property.

Para. 3.22 The objection is well founded. The Convention should be restricted to bankruptcy law.

Para. 3.25 See 3.16 above.

CHOICE OF LAW PROVISIONS

Para. 4.8 The prescribed period is too short.

Para. 4.12 It is suggested that the requirement of Article 25 (4) should be mandatory and that in addition to advertisements in the Official Journal the liquidator should be bound to advertise in the Official Gazettes of the Member States having a connection with the bankruptcy.

Para. 4.13 A formalised procedure for claims would be preferable.

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Para. 4.16 If the Convention does not apply to creditors voluntary winding-ups there would seem to be few problems, and those should be capable of easy solution.

Para. 4.17 The duty of the liquidator must be to the creditors.

Para. 4.19 It is desirable but not essential.

Para. 4.22 The policy bases of these qualifications should be accepted. So far as the UK is concerned, bankruptcy in another Member State should lead to these disqualifications.

Para. 4.24 Bankruptcies should take general effect immediately on their pronouncement.

Para. 4.26 See 3.20 above.

Para. 4.29 and 4.30 The Committee's proposals are preferable. Amendments to the draft should be sought.

Para. 4.35 See 3.20 above.

Para. 4.36 M.W.P.A. Policies should be protected.

Para. 4.40 The clear distinction between movable and immovable property should be maintained.

Para. 4.41 Articles 37 (2) and (3) should be deleted.

Para. 4.43 The establishment of special choice of law rules is undesirable. The proper law should apply.

Paras. 4.48 and 4.49 Set-off should be mandatory, but should not be allowed in respect of contingent debts.

Paras. 4.55 and 4.86 The provisions appear adequate.

Para. 4.58 The preliminary view of the Committee is supported.

Para. 4.60 The requirements of the lex situs should prevail.

Preferential and secured debts

Para. 5.12 An object of insolvency law is to procure the distribution of assets amongst creditors. Whilst any extension by individual States of their rights is to be deplored, it seems wrong in principle that the right of revenue authorities claiming as ordinary creditors should be rejected merely because they are revenue authorities. As is pointed out, that is at the expense of the general body of creditors. An acceptance of this point may, however, be a bargaining point in resisting the international extension of preferences.

Paras. 5.15 and 5.16 It is vital that bankers here should not be deterred from advancing moneys on a special account for the payment of wages and if their preferential rights here were to be taken away that would be a matter of great concern. It is thought that these rights will still exist here, but if not it may be that amendments to the draft Convention can be negotiated. It must be accepted that many anomalies will exist as complete harmonisation of bankruptcy laws is unattainable, and those who do business with international debtors will have to accept the swings and roundabouts. The system proposed in the Convention is complicated, to meet a difficult position, but there seems little chance of reaching any agreement which would substantially disturb internal State provisions in relation to preferential debts.

Para. 5.18 It is suggested that disputes relating to fiscal debts should be dealt with in the first instance by the Special Commissioners or VAT Tribunal or other similar authority, and those relating to contracts of employment

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in the first instance by Industrial Tribunals, with the normal rights of appeal. The liquidator must be entitled to be heard here and(para.5.19) in other States.

Para. 5.20 Are the reasons for accepting the Convention sufficiently compelling to outweigh the disadvantages ? On balance, it is thought they are.

Recognition and enforcement of judgment

Para. 6.4 Protection should be extended to other persons.

Para. 6.5 Those laymen in doubt may be well advised to do nothing unless and until an order is made. Then the main difficulty passes, temporarily at least, to the officers of the courts, who will clearly require additional training. Research may be required. Without detailed knowledge of the likely terms of such judgments or instruments it is difficult to judge the validity of the objections, but one would assume that such judgment or instrument (and its translation) would be clear and unambiguous. The Advisory Committee may have had the benefit of research into these matters, but if not could perhaps consider instituting research.

Paras.6.8: 6.9: 6.10: 6.12: and 6.14 The Committee's views are agreed.

Para. 6.13 It is thought that Article 62 should be accepted.

Para. 6.15 Article 63 applies where a judgment given in one State is to be enforced in another. Except in cases relating to immovable property, it is thought that any general challenge should be made in the original Court under the laws and rules of that Court.

Para. 6.16 The time limits should be the same as in Article 36 of the European Judgments Convention (see para. 6.14)

Paras. 6.17: 6.18: and 6.19 The views of the Committee are agreed.

The Uniform Law

Para. 7.14 The rules of relation-back should be restricted to formal bankruptcy proceedings.

Para. 7.7: 7.9: and 7.11 On balance, there is need to strengthen the law, and to deter potential misfeasors. For such a deterrent to be at once fair and effective it seems essential that the criteria should be fixed and precisely stated. The use of the words "wrongfully" and "surreptitiously" impart mens rea.

Para. 7.10 An artificial date is inevitable and should be accepted.

Para. 7.12 Agreed.

Para. 7.14 One year is too short. Two years would be better.

Paras. 7.15: and 7.16 The views of the Committee are strongly supported. Reservations should not be accepted.

Para. 7.17 The remedies should be concentrated in the hands of the Liquidator. It is for consideration whether and to what extent any of the draft EEC Company Directives require modification. This view is given on the basis that the draft Convention applies only to judicially supervised proceedings. If creditors' voluntary winding-ups are to be included, then the view would change and it would be submitted that s.332 rights should be retained despite what is said about para. 3.12 above. Fundamental to this view is the proposition that only a limited number of insolvencies should come within the Convention, and that those responsible for the liquidations should have

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adequate time, staff and funds to make and follow-up proper investigations. No one wishes to penalise an unlucky person. Incompetence and commercial recklessness are facts of life. But responsible members of the trading community would welcome responsible attempts to bring to justice those who are guilty of fraud.

Para. 7.23 The Committee might consider that the restriction in clause 1 should relate to paragraph (a) only and that the words "rather than permanent" be deleted so that clause would read:-

> "1. Cessation of payments shall be constituted:
> (a) by any failure on the part of a debtor to pay his debts in the ordinary course of business or as they fall due unless it be proved that such failure to pay was temporary; or
>
> (b) by a debtor committing or suffering an act or acts demonstrating his insolvency."

In clause 2 express reference should be made to the less archaic parts of section 1 (1) of the Bankruptcy Act 1914. In particular it is important to provide for some system of Bankruptcy Notices, not only in the case of individuals but for all legal entities. The financial limit should not be too low (see Justice Report).

Para. 7.29 The tentative conclusion of the Committee is supported.

Para. 7.30 The Article is acceptable in its present form.

Para. 7.31 It is respectfully suggested that the Committee may have misconstrued this Article. The payment of a debt for any money amount (of whatever size) can be made (inter-alia) in cash or by cheque, which are usual means of payment within Article 4(B) (1) (b) - it is suggested that Article 4(C) (1) (c) refers to the performance of contractual obligations other than the payment of debts expressed to be payable in terms of money. If so, the Article is not basically objectionable.

Para. 7.32: and 7.34 The Committee's provisional conclusions are agreed.

Para. 7.37 It is desirable that the registration period should be extended for at least 21 days (with automatic extentions for foreign contracts and for postal difficulties due to industrial action, whether on the part of postal officials or of other workers). There is power for the Court to extend the time limit under section 95 of the Companies Act 1948 (where the security is avoided under mandatory provisions). It is preferable to give courts a discretionary power as is proposed, and not to fetter that discretion.

Paras. 7.39: and 7.41 Clearly harmonisation must be sought on these matters, and it is suggested that every effort must be made to ensure the general validity of floating charges (subject to section 322 of the 1948 Act), and as a quid pro quo to import more generally into UK Law a Paulian action.

Concluding observations

Paras. 8.9 Agreed wholeheartedly.

Generally these views are put forward with diffidence and often without explicit reasons in the hope that they may help the Committee as giving views from the point of view of creditors and/or potential insolvents, rather than from the point of view of liquidators.

March 1975.

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President Robin Brook, C.M.G., O.B.E.

ASSOCIATION OF BRITISH CHAMBERS OF COMMERCE

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12 March 1974

T H Traylor Esq
Secretary to the EEC Bankruptcy Convention
Advisory Committee
Department of Trade and Industry
Insolvency Service
2-14 Bunhill Row
EC1Y 8LL

Dear Sir

EEC Bankruptcy Convention

I must apologise for this rather belated reply to your letter dated 2 November 1973. Consultation with our 90 affiliated Chambers of Commerce in the UK and examination by our Commercial Law Committee have inevitably taken a considerable time.

In general the Association welcomes the broad concepts of the Bankruptcy Convention namely -

(a) Unity of Bankruptcy and Insolvent Liquidations (a.2) ie one Court having sole jurisdiction throughout the Common Market and

(b) Universality of the Bankruptcy etc (a.33) ie that that one Court's administration should have its effects over property and persons throughout the Common Market. It is recognised that these principles entail the gazetting of all art.25 bankruptcies in the Official Journal of the E C but the mechanics of publishing, distributing and reading this quantity of information are difficult to conceive and further information on practical solutions to this problem would be welcomed.

To adopt wording from s.122 of the Bankruptcy Act 1914 it is desirable that Courts and their Officers throughout the Community should act in aid of and be auxiliary to each other.

There is a general feeling amongst British Chambers of Commerce that H M Government should take all possible steps to ensure that the rights of creditors are expanded rather than prejudiced, but that the proposals whereby directors and those managing firms should have personal liability are too wide and should be modified. So far as limited companies are concerned, the provisions of (for example) sections 188 and 332 of the Companies Act 1948 form the basis of a reasonable balance between freedom of the individual and protection of creditors.

Whilst capitalism may have its unacceptable face, it would be wrong to subject to general legal attack businessmen who act reasonably and in good faith. The Association would retain, and if necessary strengthen, the existing powers and duties of properly authorised and qualified persons such as liquidators and trustees in bankruptcy. Bankruptcy should remain a last resort in the cases to be covered by Article 1 of the proposed Uniform Law, namely for failure to meet a judgment obtained by a liquidator, trustee or other duly qualified person. The Association would in general oppose anything going further than our present concepts of looking through limited liability. The criminal and 'quasi-criminal' should be penalised, but the honest incompetent should not be prejudiced.

It is hoped that nothing will be allowed to prejudice our system of floating charges, or the rights of the holders of such charges.

There are a number of points of detail where the Association would appreciate the opportunity to make submissions later if it should so desire, but at this stage it would welcome :-

(a) reassurances on the points made above;

(b) clarification on the following points:-

(1) Does Article 2 mean by implication that a person who has bankruptcy proceedings started against him in Germany is assured of freedom from similar proceedings against him in the UK and can continue trading in the UK until such time as he is actually declared bankrupt in Germany? Clearly it is the ability to continue trading which is important.

(2) In Article 11 and the relevant provisions of Annex 1 the crux is the definition of "manage". Is a participator a manager in this sense? It does not appear to be defined anywhere. Similarly it is desirable to know the exact meaning of such words as "debtor", "bankrupt", and "bankruptcy".

(3) In Article 25(2) the reference to "the trade registers in which the Bankrupt is registered" infers the acceptance by the United Kingdom of a new type of Registration Authority, presumably at the time when each business is commenced. Whilst there is already numerical registration for bodies corporate, and businesses are registered under the Registration of Business Names Act, formal registration is not presently required for other types of businesses, eg sole traders or partnerships formed under the legal names of the partners. How, when and by whom is the proposed initial registration to be effected?

The Convention seems to be much influenced by French concepts of bankruptcy and liquidation in taking the view that these processes could be applied only to a corporate body or to an individual carrying on a commercial activity and hence probably registered under a system having a commercial code separate from the civil code. From a

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British point of view it must be made clear either that the Convention applies to non-commercial (and non-registered) individuals and/or firms as well, or that it is limited to individuals or firms carrying on commercial activity. In either count the reference to "trade registers" in relation to Great Britain is inappropriate and should be dropped.

Yours faithfully

E G S Apedaile
Director, Law and Taxation

9(23) Marked Copy F.H.T. Certified Accountants

27 Mar 75

THE ASSOCIATION OF CERTIFIED ACCOUNTANTS

E.E.C. BANKRUPTCY CONVENTION

Memorandum of Comments submitted by a Working Party of the Association to the E.E.C. Bankruptcy Convention Advisory Committee of the Department of Trade; March, 1975

In October, 1973, the Working Party submitted a memorandum of comments on the Draft Convention to the Advisory Committee. The following comments are submitted in response to the Advisory Committee's invitation to consider their Consultative Paper on the Draft Convention and specific questions raised therein. Paragraphs are referenced in accordance with the section of the Consultative Paper to which they relate.

PART I

Miscellaneous

1.11 It is desirable that the final text of the Convention be drafted in such a form as to minimise (or better remove) the need to refer to external sources for interpretation. To the extent, however, that it remains necessary to interpret the final text in the light of the Noel and Lemontey Report, the Convention should expressly allow reference to that report.

1.12 Subject to the comments in 1.11 above concerning external aids to interpretation (which applies equally to reference to the French text) the Working Party consider the arrangement and drafting of the text a matter best left to the lawyers.

Scope of the Convention

2.2 The Convention should extend to the winding up of the estates of insolvent deceased debtors.

2.3 The Working Party sees no reason why the Convention should not apply to extra judicial and contractual arrangements and to receivers in order that the powers under the Convention in respect of the collection of foreign assets should be available to the trustees and receivers in such cases. This comment was made by the Working Party in its memorandum of comments of October, 1973.

2.4 (a) The Convention should apply to any liquidations which are consequential to practical insolvency, and should therefore apply to creditors' voluntary liquidations.

(b) A creditors' voluntary winding up should be subject to an order or declaration by the Court.

Both of these recommendations were made by the Working Party in its memorandum of comments of October, 1973.

2.5 Criminal Bankruptcy proceedings should in the opinion of the Working Party be included in Article I of the Protocol.

2.6 The Working Party agrees that the Protocol should explicitly indicate to which persons and entities the Convention applies.

2.7 The Working Party agrees with the exclusion of insurance companies from the Convention in view of the intention to introduce separate measures to cover them, but cannot see the justification for any of the other exclusions listed in Article II of the Protocol.

2.8 It is not considered necessary to exlude any other bodies from the Convention.

2.9 It is desirable that the Channel Islands and the Isle of Man be included.

2.10 In principle, the Working Party consider it desirable that the Convention should apply to the overseas territories of Contracting States. In cases, however, where inclusion will present difficulties which are likely to delay the adoption of the Convention, those cases should for the time being be excluded with the intention of including them at some later date as soon as is practical.

2.11 The Working Party is not aware that the United Kingdom has any overseas territories that could practically be included in the Convention.

Jurisdiction

3.7 Consideration of the provisions of Article 16 is best left to the lawyers.

3.9 The Working Party is unable to suggest an alternative concept to that of "centre of administration" that is likely to be any more acceptable, and at any rate considers that this concept is unlikely in practice to present any real difficulties.

3.10 The rules of estoppel will prevent the debtor from attempting to rebut the presumption that his centre of administration is the place of his registered office merely to delay or avoid proceedings. The Working Party consider that it is unnecessary to transform this presumption into an absolute rule as this is unlikely to create any practical difficulty and this element of flexibility may be to the advantage of creditors in cases where the facts and the presumption are at obvious variance.

3.11 The Working Party sees no reason to object to the concept of "establishment".

3.12 The circumstances in which problems could arise by virtue of the provisions of Article 9 are very limited and the Working Party offers no comment.

3.13 The Working Party considers that the impression that bankruptcy administration is conducted less quickly in the U.K. than in other Member States is erroneous but nevertheless feels that the problem discussed in Paragraph 3.13 is not a real one.

3.14 The Working Party would welcome the advice of lawyers on the procedural problem outlined in Paragraph 3.14.

3.16 The submission that the power referred to in Articles 10-12 "should be exercisable only after there has been a failure to pay on the part of the person liable" seems obviously correct.

3.20 The Working Party considers that the courts of the Situs should have exclusive jurisdiction in matters relating to immoveable property. This has been found to work quite satisfactorily as between England and Scotland.

3.22 Uniformity of substantive law is essential in respect of "Paulian" actions and the national laws of all Contracting States should be revised to provide for such actions.

3.24 The Working Party accepts the Advisory Committee's preliminary view in respect of the provisions of Article 17(5).

3.25 The Working Party does not take exception to the provisions of Article 17(6) provided that transactions which take place prior to the adoption of the Convention are protected.

3.30 The Court that has jurisdiction in bankruptcy should have jurisdiction to hear applications from the liquidator or trustee for directions.

JKW/GH
27/3/75

Marked copy.

THE ASSOCIATION OF CERTIFIED ACCOUNTANTS

E.E.C. BANKRUPTCY CONVENTION

PART II

Choice of Law Provisions

4.3 The Working Party accepts that the provisions of Article 18 are in accordance with the general principles of private international law. Whilst this is bound to create certain anomalies we are of the opinion that this is inevitable so long as there exists a basic disparity between the substantive laws of member states. The long-term objective must be the complete uniformity of substantive law.

4.8 We accept that the period of 31 days is suitable for any application which challenges the effectiveness of bankruptcy proceedings, i.e. an appeal against a receiving order. We consider, however, that there should be no time limit on an application proposing a scheme of arrangement.

4.12 We consider that the form and extent of advertising is a matter appropriately left to the Court of the Bankruptcy to determine.

4.13 The Working Party is of the opinion that the simple procedure for the lodging of claims is preferable, provided that the "authorities" are entitled to require the production of further evidence. We fell however that a standard form would be appropriate, as this will minimise the problem of translation.

4.14 Subject to our suggestion in 4.13 above, regarding the problem of translation, we agree that the provision in the Convention for the lodging and disputing of claims presents no special problems for the U.K.

4.16 We agree that the terms of Article 20 are confusing and will require reconsideration.

4.17 We consider that the duties of the trustee or the liquidator to his creditors is absolute, and should not be compromised by other considerations such as the needs of local communities. It is proper that the discretion of the trustee or liquidator should be subject only to the authority of the Court

of the Bankruptcy.

4.19 The Working Party considers that it is desirable that the Convention state explicitly that the foreign liquidator's authority does not extend to assets held by the debtor in trust whether or not those assets are situated within the U.K.

4.20 We consider that the provisions of Article 34 (i) are satisfactory, provided that a situation cannot arise where the property rights of married women under the Convention are inferior to those existing under U.K. law.

4.21 We consider it satisfactory that this matter be left to the law of the state of the bankruptcy. As stated above, however, we consider that uniformity of substantive law is in the long run the only solution to such anomalies. Pressure should be put on Germany to amend her law so as to provide for the inclusion of after-acquired assets. We consider that the U.K. for its own part should abolish Section 51 (i) of the Bankruptcy Act, 1914.

4.22 The Working Party is of the opinion that a bankruptcy in another member state should lead to the same disqualification upon a bankrupt as would a U.K. bankruptcy, and conversely.

4.24 We consider that the period of 8 days provided for in Article 26 is satisfactory. It is a matter for consideration, however, whether or not the existing U.K. provisions for a court order to stay advertisement should continue, and if so whether or not the provisions of Article 26 should apply in such cases. It might be appropriate to provide that in such cases the Court making the order to stay the advertisement shall have the authority to specify a shorter period than that provided for by Article 26.

4.26 We accept the arguments made in the report, and consider that Article 27 is satisfactory.

4.28 We accept the approach adopted in the Convention. All actions should be stayed in accordance with Section 231 of the Companies Act, 1948.

4.29 We consider that Article 21 should allow for a period of 8 days to ellapse before actions are stayed.

4.30 We agree that this principle should be extended to community bankruptcies, and be extended also to cover the period until the bankruptcy takes general effect against the creditors under Article 26.

4.31 The Working Party considers that the provisions of Article 23 should be extended to include third parties situated in the state of the bankruptcy.

4.34-36 We support the Advisory Committee's opinion that the protection afforded to married women under existing U.K. legislation should not be eroded by the application of foreign law. In particular transactions entered into before the date on which the Convention takes effect should be protected, and special provisions should be made for transactions designed to defraud creditors.

4.38 We agree that the reference in Article 19 (ii) of the Convention to the law of the state of the bankruptcy should include its own rules of private international law, and that there should be a specific provision to this effect.

4.39 We consider that the provisions of Article 36 are unnecessary, and that it is undesirable that within a community bankruptcy there could be different rights between different groups of employee creditors.

4.40 The Working Party is of the opinion that the rules of Article 37 (i) should be extended to include contracts for the sale or purchase of immoveable property, but that they should not be extended to contracts for the lease or hire of moveable property

4.41 We agree that paragraphs 2 and 3 of Article 37 should be deleted.

4.43 We consider that the effect of the bankruptcy on a contract of sale should be governed by the law of the state of the bankruptcy, and not by the law that would otherwise govern the contract.

4.45 The Working Party does not see why a uniform law relating to the validity of clauses containing a reservation of title cannot be confined in its operation to bankruptcy situations. Under existing U.K. legislation separate rules do apply in bankruptcy situations to goods in the possession, order or disposition

of the bankrupt and this has created no real problem.

4.48 The Working Party accepts that mandatory rules of set-off may prove an impediment to the rescue of concerns in financial difficulties, but is of the opinion that other arrangements can be made in such circumstances. On balance we feel that the advantages of a uniform mandatory rule outweigh the disadvantages.

4.49 We consider it acceptable to allow set-off or compensation in respect of contingent debts, provided as always that rules are laid down for the protection of the general body of creditors to exclude liabilities incurred within knowedge of the act of bankruptcy.

4.54 The Working Party considers that the powers of the trustee or liquidator under the law of the state of the bankruptcy should not be qualified.

4.56 We feel that a distinction should be drawn between mail sent to the debtor's home address and mail sent to his business address. In the former case the power of redirection should be vested in the Court of the state where the bankrupt is resident, and in the latter case in the Courts of the state of the bankruptcy. We accept that an appropriate time limit should apply, provided that the Court order is renewable.

4.60 The Working Party accepts the provisions of Article 32.

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THE ASSOCIATION OF CERTIFIED ACCOUNTANTS

E.E.C. BANKRUPTCY CONVENTION

PART III

Preferential and Secured Debts

5.2 As mortgagees will presumably be aware of respective rights of preference affecting their security, no problem appears to arise.

5.10 The continuance of self-help in fiscal and quasi-fiscal matters to give effect to rights of preference appears to be consistent with the basic philosophy of the Convention insofar as the latter endeavours to maintain for various States systems, rules and practices they already enjoy. As no such right is enjoyed currently in the United Kingdom, it seems unlikely that it could be said to be acceptable to United Kingdom interests. In fact, it is worthy of note that frequently Companies are hastily placed in voluntary liquidation, or pressure brought on individuals to file their own Petitions in bankruptcy, for the sole purpose of protecting, for the general body of creditors, assets which are threatened with Distress by the Inland Revenue. The nature or usual attitudes of those actually executing the rights of self-help in other States are, of course, not known, but it would be hoped that in practice they are always ready to co-operate with Trustees and Liquidators in securing orderly and, where appropriate, wholesale realisation of assets so that available realisable values of assets as a whole are not damaged by enforced piecemeal realisation.

5.12 (1) While it would seem unlikely that other Member States would give up such rights as already exist, careful thought should be given as to whether the United Kingdom should seek to establish such rights itself. Possibly the obtaining of credit by United Kingdom businesses could, in the short-term at least, be inhibited by any such change. Indeed, it could be that the absence of such rights in the United Kingdom could facilitate a greater flow of credit in trading with other Member States.

5.12 (2) As the basis of the Community is to secure closer ties between the Member States, it must be inevitable that Revenue debts incurred in one State should be enforceable in another.

5.15 The preferential right of subrogated creditors for wage advances is an extremely practical provision of the Companies Acts. In comparison with the number of Companies which enter liquidation, having been supported by Banks, there must be numerous occasions when such actions by Banks have saved Companies from untimely failure. Equally, it is probable that such support would not have been given had the Banks not been subrogated to the rights of the employees, who would otherwise not have been paid.

5.16 If the provisions of Section 319(4) of the Companies Act, 1948 are retained by the United Kingdom and not taken by any other Member State then, of course, this situation must arise. It is felt, however, that the advantages of Section 319(4) in the United Kingdom should not be lost.

5.17 It is agreed that the draft Convention appears to be excessively weighted in favour of preferential creditors. The possible solution quoted would appear to do little to mitigate this and, indeed, in certain circumstances could give even further advantage to preferential creditors. The merit of the possible solution, however, is that it lends a degree of simplification and probably reflects existing current practice in the United Kingdom.

5.18 Perhaps the most appropriate authority normally having jurisdiction which could be quoted is the Redundancy Payment Act Tribunal. This Tribunal is concerned indetermining the existence and amounts of debts, both by interpretation of law and determination of facts, upon which there could be wide dispute. A Liquidator or Trustee has a full right of hearing and the various Tribunals under this Act appear to operate effectively, a similar form of authority should be acceptable in this context. A situation in which there could be dispute as to preferential ranking is not easy to visualise, as in U.K. law such rights are very clearly defined. If, however, the Redundancy Payments Tribunals, which they do not, had also to decide upon an issue of this nature, it is felt that they would do it effectively.

5.19 Obviously of prime importance is the right of representation of the Trustee or Liquidator and every endeavour should be made to secure that this is as wide as possible.

5.20 The proliferation of preferential claims is unavoidably always the subject of adverse comment by creditors who do not enjoy such rights. Indeed, even

between United Kingdom preferential creditors themselves such feelings exist, vide, employee preferential creditors, who find that their preferential expectati has been whittled away by the increasing Governmental imposts which benefit by preferential rights. Basically, unsecured creditors generally accept that employees equitably should have prior rights. It is felt, in this respect, that unsecured creditors would agree that the limit of £200 upon the preferential claim for arrears of wages or salary by employees, originally fixed as long ago as 1914, is in relation to the current level of wages and salaries, completely unrelated to the time limit of four months. Possibly the time limit has not been increased because over the years Social Security benefits have been such that employees have not suffered too greatly, particularly as the circumstances in which they would permit themselves to remain unpaid for four months would be very few. It is felt, however, that there is no reason why these latter facts should be taken into consideration in comparing the lesser preferential rights enjoyed by U.K. employees in relation to those of employees in other Member States. It should be, therefore, for consideration whether the current preferential rights of the employees of U.K. companies should be increased before the Convention is entered into, unless it is felt that this point is already covered by the Employment Protection Bill.

Recognition and Enforcement of Judgements

6.4 Article 53 should be extended to protect the validity of acts performed by other persons apart from the liquidator in pursuance of a judgement rendered ineffective in terms of Articles 51 or 52.

6.5 Article 62 should be extended to provide for the translation and authentication of all judgements and orders in bankruptcy proveedings.

6.7 We agree with the comments made by the Advisory Committee and consider that the right of challenge on the grounds that the court of origin lacked jurisdiction should not be excluded.

6.8 We agree with the Advisory Committee's assumptions as regards the courts that should be listed for the United Kingdom in Article X of the Protocol and that it should be left to the Rules of Court to specify the appropriate form of procedure.

6.9 We approve of the expression "the appropriate government official" in place of "public prosecutor".

6.10 We agree that Article 58(2) is acceptable.

6.12 We agree that it would be advantageous to channel such applications through the central courts of first instance.

6.13 We consider that the general principle embodied in Article 62 may be accepted since Article 63 extends the provisions of 56(1) to allow the debtor to challenge the order for enforcement where he has had insufficient time "to prepare his defence or to avail himself of any legal remedy against the judgement opening the bankruptcy".

6.14 We agree with the Advisory Committee's comments as regards the alignment of the enforcement provisions of the Bankruptcy Convention with those of the Judgements Convention.

6.15 We consider that the grounds of challenge provided in Article 56 are too restrictive and should be extended.

6.16 We agree that administrative detail should be a matter for prescription by the law of the State concerned.

6.17 We agree that a challenge to an order for enforcement should be made in the same court that heard the application for the order.
We do not think that the criterion of "domicile" in the European sense is appropriate due to the ambiguity of the term and its differing meaning in the United Kingdom from other Member States.

6.18 We agree with the Advisory Committee's suggestions on this matter.

6.19 We consider that Articles 65 and 67 are quite satisfactory.

The Uniform Law

7.4 We agree with the preliminary view of the Committee.

7.7 The provision for bankruptcy of the individual concerned should be within the jurisdiction of the Court which considers the offences, but we agree with the proposal, that bankruptcy should only follow after a claim has been established and then only if the party or parties fail to pay.

7.8 We feel that in principle Article of Annex 1, or similar provisions, should be included.

7.9 We agree that the Article requires clearer definitions.

7.10 We consider that as far as the United Kingdom is concerned, the concept of an "act of bankruptcy" should be preserved.

7.11 We consider that all Member States should introduce Article, Annex 1 into their own legislation without reservation.

7.12 We agree that this Article is acceptable.

7.13 We observe that whereas relation back in this context envisages recovery of a transaction, it does not seem to have the same significance as our law in that the event commencing the period of relation back is grounds for bankruptcy.

7.14 These are transactions relating to gifts similar to voluntary settlements, (Section 42, Bankruptcy Act) and should be capable of being set aside by a Trustee. We accept that a period of two years is reasonable except in situations covered by Section 172, Law of Property Act, 1925.

7.15 We consider that there should be reciprocity in the rules concerning relation back and recoverable transfers.

7.16 In view of the differing concepts prevailing in different Member States it is essential that a reciprocal agreement is reached.

7.17 We consider that provisions similar to those contained in Section 332, Companies Act, 1948 (fraudulent trading) should be preserved, giving the Creditors a right to apply to the Court.

7.23 Express reference should be made to those circumstances, now operative in England which have stood the test of time and which have become universally accepted in our business relationships: including
Section 1 Bankruptcy Act, 1914
Section 148 County Courts Act, 1959
Section 107(4) and 130(8) Bankruptcy Act, 1914
Section 223 Companies Act, 1948
Section 293 Companies Act, 1948

7.27 We consider that the Scottish Law should be brought into line with the Uniform Law.

7.29 The comments set out in 7.29 are reasonable. No further exceptions appear to us to be necessary.

7.30 The weakness of the English system is that the law relating to "fraudulent preference" is generally unenforceable since it is necessary to prove that the dominant motive was fraudulent. The level of proof required to sustain such an action and the cost thereof renders this in practice almost impossible. In view of this we consider that the article is acceptable.

7.31 In as much as this provision is less wide-ranging and certain in its incidence than English Law, we do not consider it acceptable.

7.32 We agree that this provision is acceptable, subject to the condition suggested by the Committee.

7.34 We do not share the Committee's doubts on this section which is clearly intended to apply only where a) the cessation of payments was known and b) where the transaction was prejudicial to the general body of creditors. Obviously, it is acceptable that if a person has dealings with anyone who has "ceased payments" within whatever definition he must be more than careful. It is true that what at the time may seem to be for the benefit of creditors may, in the light of "hindsight" turn out to be prejudicial, but this places on the person concerned all that greater need for care.

7.37 We do not find the discretionary nature of this provision unacceptable.

7.39 The existing United Kingdom rules do not adequately deal with preferences of the type envisaged by the "Paulian action". From the brief details given in paragraph 7.38 it would appear that Article 1167 of the French Civil Code provides a much better basis for dealing with such situations and we suggest that it would be advantageous to adopt a similar provision into United Kingdom Law.

7.41 Whilst it is important that the English sytem of floating charges is preserved, it may be that we would have some difficulty in persuading other Member States that this was fair and reasonable. They might consider the floating charge situation more acceptable if it applied only to new money specifically advanced in consideration of the charge, so that in the case of a continuing account such as a bank account only the excess of advances over credits in the new period is treated as new advances - in other words, the rule in Clayton's case is excluded.

Conclusions

The Convention poses many complex problems of private international law on which we have not attempted to comment, since the Advisory Committee has no doubt received the detailed comments of the legal profession on these matters. We have reluctantly come to the conclusion that the convention falls short of fulfilling the basic object of Article 220 of the Treaty of Rome to "secure ... the simplification of formalities governing the reciprocal recognition of judgements", bearing in mind that insolvency practitioners are not generally experts in private international law.

Whilst we have stressed the importance of preserving certain important provisions of United Kingdom law, such as our relatively enlightened rules relating to married women's property rights, and our concept of 'acts of bankruptcy', we have nevertheless emphasised repeatedly the need for greater unification of substantive law within the Community. We of course recognise that relations between the various Member States have not yet developed to the point that any of those States would accept a substantial compromise in its national law, but it remains a fact that until this is achieved, the Convention will do little to simplify the work of the insolvency practitioner in Community bankruptcies.

In view of the time that members of our Association have devoted to these consultations, we would be grateful if in due course we could see the Advisory Committee's report to the Department of Trade, setting out its final recommendations. We would also like to put on record our disappointment that once again a Government Department has not seen fit to invite a representative of this Association to serve on its Advisory Committee, bearing in mind that the Association represents a significant proportion of the Accountancy profession and of insolvency practitioners.

JKW/GH
16.5.75.

17 Marked Copy Bankers

THE BRITISH BANKERS' ASSOCIATION

10, Lombard Street, London, EC3V 9AP

MEMORANDUM TO THE DOT ADVISORY COMMITTEE

E.E.C. DRAFT BANKRUPTCY CONVENTION

Further to its first memorandum sent to the Advisory Committee in May, 1974, the British Bankers' Association has now examined the draft Convention in greater depth, with particular reference to the points highlighted in the Department of Trade Advisory Committee's Consultative Paper. We have concentrated exclusively on questions of particular concern to us as bankers, and the following comments are offered in the hope that they will be helpful to the Department in its evaluation of the Commission's proposals. References are to the Consultative Paper except where otherwise stated.

1. Jurisdiction (Pages 6 and 7)

The main difficulty here is exemplified in the hypothetical case of an American corporation with smaller branches in the U.K. and France. In the event of the initiation of bankruptcy proceedings against this corporation in France, any assets held in safe custody - not as a lien - by a U.K. bank on behalf of the British branch of the company would have to be surrendered to the French liquidator, even though it would be to the bank's benefit to prove in American liquidation, the U.S.A. being the location of the greater part of the company's assets. This situation arises because Article 15.2 provides that a bankruptcy order in one contracting state precludes a bankruptcy order in any other contracting states. Further, under these circumstances, Article 4 allows the courts of any contracting state in which the debtor has a business establishment to declare him bankrupt; the net effect of these two articles in conjunction is to create a situation where, in the absence of clear rules, there could be an undisciplined scramble between the member states concerned to initiate bankruptcy proceedings.

2. Insolvent Deceased Debtors (Page 19, paragraph 2.2.)

The application of the Convention to the winding-up of the estates of insolvent deceased debtors is broadly acceptable.

3. Creditors' Voluntary Liquidations (Page 19, paragraph 2.4)

Although it would still be possible, even if such liquidations were not covered by the Convention, for creditors to petition for a compulsory winding up, in our view such a procedure would entail considerable extra expense and labour, and for this reason we should prefer that the present U.K. system of creditors' voluntary liquidations should be retained.

4. Criminal Prosecutions (Page 20, paragraph 2.5. and Page 43, paragraph 4.3.)

It is considered desirable to retain the U.K. practice of criminal bankruptcy and criminal prosecution, or at least that there should be a provision enabling the United Kingdom to enact criminal provisions that override the foreign bankruptcy legislation.

5. Suspect Period (Pages 35 and 36, paragraphs 3.19 and 20)

The net result of Article 17(1) in the context of conveyancing is likely to be to the disadvantage of the customer. Whilst presumably it may relate to bankruptcy registrations as well as to the voidability of gifts, it would be helpful if the implications envisaged were examined, and explained, in more detail.

6. European Judgment Convention (Page 41)

The European Judgment Convention is already in force in the original Six, whereas the United Kingdom is not expected to sign it before 1980. Since this is likely to be after the coming into force of the Bankruptcy Convention, serious anomalies could arise meanwhile as a result of obligations incurred under the latter. If, for instance, there is as a result of the Judgment Convention a judgment enforceable in Germany, but because of the Bankruptcy Convention there are fortuitous opportunities of bankrupting a judgment debtor elsewhere, then the results anticipated from the concurrent operation of the two Conventions will be lost. The reverse would apply. Creditors will seek bankruptcy rather than judgments if it is to their advantage having regard to the whereabouts of assets and the circumstances generally.

7. Effects in relation to the Debtor (Page 49, paragraph 4.16)

Article 20 as at present drafted takes no account of the role of the liquidator or receiver in the United Kingdom; we suggest it should be amended accordingly.

8. Notice (Pages 55 and 56, paragraph 4.24)

The primary concern is that the mechanics by which such notice, which is intended to be binding, reaches those concerned should be as nearly infallible as possible. Articles 25 and 26 appear to bestow a discretion rather than an obligation on a foreign liquidator or trustee to advertise in countries other than those where the debtor has a place of business; in our view this should be made mandatory where there is evidence of assets or obligations, as distinct from a place of business, in any given country.

Difficulty also arises in connection with the delay involved in making any information available, firstly because of the delays in receipt of the Official Journal, secondly because we doubt whether the entry of notice on a trade register would in practice constitute an effective means of notification. On the first point above, the British Bankers' Association supports the proposal already made by the Scottish Clearing Banks that the period of notice should be extended to fifteen days.

9. Assets subject to Registration (Page 56, paragraph 4.26)

The concept of registration should be more closely defined: in the absence of such definition it could be taken to apply merely to the registration of title (land, and cars and movable goods in general in certain countries), or it could be given much wider scope to cover registration giving rights of priority e.g. to mortgagees (class F land charges and Section 95 of the Companies Act). This is equally important from both standpoints and the terms may affect registrations other than those indicated above. Clarification is essential.

10. Reservation of Title (Pages 66 and 67, paragraph 4.45)

We agree with the view of the Advisory Committee that a uniform law relating to the validity of clauses containing a reservation of title must be general in its effect. There also exist at present differences between the United Kingdom and other countries in the reservation of title.

11. Preferential Rights (Page 76, paragraph 5.3)

It seems likely that the Convention would entail the loss of equitable rights enjoyed in the U.K. relating to assets outside the jurisdiction, although local assets would be subject to local law. For example, in

the past there have been instances where there have been three separate bankruptcy administrations of the one company and creditors who have been wise enough have been able to prove in all three bankruptcies because their claims, although claims arising outside the jurisdiction, could not be rejected.

On balance the proposed creation of a pool for creditors in each jurisdiction would be beneficial in that it would introduce some order into the existing anarchic situation.

12. Subrogatory Rights (Page 86, paragraph 5.15)

The British Bankers' Association is not unduly worried at the prospect of the loss of subrogatory rights. Such a loss would be to the disadvantage of the client companies rather than of the banks.

13. Directors' Delinquency (Page 110, paragraph 7.17)

It is noted that the Convention may deprive individual creditors of the right to sue a bankrupt, but this possibility is not a matter of concern for banks so long as directors remain civilly liable and the rights of the liquidator are unimpaired.

14. Collections (Article 4 of draft Uniform Law)

It is not clear whether collections are covered under Article 4A of the draft Uniform Law. Furthermore, the time limit of one year as specified in Article 4C(2) is potentially unrealistic in that the bankruptcy of a director could take place more than a year after his company has been declared bankrupt: in this event, under the present terms of the Convention no action could be taken against him.

One major difficulty is that overdrafts are virtually unknown to continental banking and the Convention therefore makes no allowance for this common British practice. Articles 4B and C would have the effect of overriding the traditional provisions of English law, as read together they imply that although banks cannot be placed in a preferential position by payments made into an account after the announcement of suspension of payments, neither can they be placed at risk by payments made out of the account. This situation could have implications for the overdraft system as it is known in this country.

15. Valuable Consideration (Page 115, paragraph 7.28)

The provisions of Article 4A(2) of the draft Uniform Law would deprive banks of flexibility and would thus be

to the disadvantage of the customer. Consider the hypothetical case of a customer who has an unsecured loan of £6,000 from a bank and then asks for a further £1,000: the bank agrees, but takes a charge on the deeds of his house, which is worth £20,000. This procedure is possible under present U.K. law, but the relevant article of the draft Uniform Law expressly forbids such "transactions effected for valuable consideration..... whereunder the obligations of the bankrupt substantially exceed in value those of the other contracting party". If this ban were to be applied as it stands, banks would simply reconsider their lending policy, again losing an element of flexibility which serves customers' interests well.

16. Cessation of Payments (Page 119, paragraph 7.35)

We would refer to previous correspondence with the Department on this matter. Article 4C(2) of the draft Uniform Law appears to remove the vulnerability of banks in all cases, including payments made with notice of events connoting impending insolvency. Any comment by banks would therefore in present circumstances be academic; nonetheless it is felt that the definition of "cessation de paiements" proposed in the Consultative Paper is too vague and indefinite for a situation in which absolute certainty and clarity are essential.

17. Floating Charges (Pages 122 and 123, paragraph 7.41)

Although the rights existing in the United Kingdom under floating charges appear generally to be preserved under Article 43 of the Convention, we note the fear expressed by the Advisory Committee that a floating charge against the U.K. assets of a company whose centre of administration is adjudged to be in another E.E.C. state could be held to be invalid. We would strongly oppose any restriction of the validity of floating charges, and this possibility could force banks to reconsider their lending policies to the U.K. offshoots of overseas companies which are also represented in another E.E.C. state, to the detriment of these customers. The rights at present available to United Kingdom receivers against assets abroad could also be jeopardised under the Convention.

It is our understanding that a new Convention on Movables is in prospect; if this is the case, the whole question of floating charges may have to be reconsidered in the light of its provisions.

18. Set-Off (Article 5.3 of the draft Uniform Law)

The provisions of this article are disadvantageous to banks. Contingent liabilities, particularly in the form of guarantees, are part of the commercial scene, and to make them ineligible for set-off would have serious implications and remove the flexibility beneficial to the customer.

April, 1975

1063.3 Insurers BIEC

THE BRITISH INSURERS' EUROPEAN COMMITTEE

E.E.C. DRAFT CONVENTION ON BANKRUPTCY AND WINDING-UP

COMMENTS ON D.O.T. CONSULTATIVE PAPER

A. INTRODUCTION

It is noted that the proposed Convention excludes from its ambit insurance undertakings of all kinds irrespective of their legal form (except those which engage only in reinsurance) because of the special regulations which exist in Member States relating to their operation and possible liquidation and also the intended harmonisation at Community level of the law relating to insurance companies. However, the proposals will affect insurance companies as creditors and it is upon this basis that we have commented under Item B below.

So far as reinsurance is concerned, it is noted that the Consultative Paper takes no account of the memorandum on the position of specialist reinsurers which was submitted through the British Insurers' European Committee to the DTI in January 1974 (copy attached). We would draw the attention of the Advisory Committee to this memorandum and hope that the views expressed will be taken into account.

B. COMMENTS

The consultative paper is split into four main categories:-

1. The scope of the Convention.
2. Jurisdiction to declare a debtor bankrupt.
3. Choice of law provisions.
4. Recognition and enforcement

Each main category contains a number of particular points, many of which ask for comments or advice. Some observations which occur at this stage are set out below. The same numerical sub-division has been used.

1. Scope

The Convention applies to bankruptcy, winding up, arrangements and compositions and similar proceedings founded upon the absolute or practical insolvency of a debtor.

2.2 Should the Convention apply to deceased insolvent debtors?. One of the main arguments against its application is that different jurisdictional criteria and choice of law provisions would apply. In particular, jurisdiction under the terms of the Convention is based on the debtor's "centre of administration", whereas jurisdiction in respect of a deceased insolvent debtor is in many legal systems (including the U.K) based upon his place of death. However, since the Hague Convention proposes that the "habitual residence of the deceased" should afford jurisdiction and since this will in most cases coincide with the centre of administration, there would appear to be no real problem here, especially since the U.K. will almost certainly ratify the Hague Convention The advantages of including deceased insolvent debtors within the scope of the Convention relate particularly to priority amongst creditors in U.K. law, that is, that preferred debts and ordinary debts have priority over deferred debts If, for example, a personal representative pays a deferred debt having notice of a preferred or ordinary debt, he will be personally liable if the deceased's assets are insufficient to pay all his debts. Therefore, a system of notice and enforcement could be devised so that if a debtor died in a member State in which he was habitually resident such as to give that State jurisdiction, creditors in other member States of the EEC could give notice of their preferred or ordinary debts and such notices could be published in the Official Journal of the European Communities. At present under U.K. law no Court Order or judgment is obtained in respect of a deceased insolvent's estate, but rather a duty

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is placed on personal representatives to properly administer the estate. Creditors would need to have an opportunity to give notice of their interests and also obtain enforcement of their rights in the State having jurisdiction It would seem to be necessary also for some form of notice that the death has occurred to be published.

2.3 and 2.4 It would seem that extra-judicial arrangements, for example, in the U.K Deeds of Arrangement and private Trust Deeds for the benefit of some creditors, should also be within the scope of the Convention. It may be that some procedure for ratification of the arrangements by Court Order will be required, but the inclusion of such arrangements would help to afford rights to those creditors who were not parties to such arrangements A further advantage would be the possibility of effective attachment of assets anywhere in the Community. It is suggested also that similar arguments favour the inclusion of voluntary liquidations within the scope of the Convention.

2.6 The Convention should apply to partnerships and other similar business associations which do not have separate legal entity in the same way that it applies to individuals. In the interests of certainty, the Convention should set out the persons and entities to which it applies.

2.8 Whilst the exclusion of mutual savings institutions and Building Societies can be understood, care would need to be taken to ensure that other bodies did not seek to come within the protection of an excluded category On balance, exclusions ought not to be allowed.

2. Jurisdiction

3.9 The concept of "centre of administration" seems sensible. Obviously technical difficulties can arise in the case of small traders and individuals, but with the spread of the concept of "habitual residence" difficulties should not be too great. In any event, it is difficult to imagine an alternative system which did not involve similar technical difficulties.

3.10 In the case of a company, it is thought that a presumption that the registered office is the centre of administration should apply rather than that this should be fixed rule. In this way there should be more flexibility and perhaps the establishment of artificial locations for registered offices will be avoided; the proposed Statute for European Companies allows more than one registered office.

3.20 It would appear to be desirable for the Court of theState of jurisdiction also to have jurisdiction for questions relating to immovable property, the obvious example being land, in other member States. This is not in line with U K law which prefers the "lex situs" to apply, but creditors might lose rights to a substantial asset if the U.K. system were followed generally and the "relation back" rules were frustrated.

4. Choice of Law

This category seems broadly acceptable, but:

4.2 This could cause problems if a broker were made insolvent in one member State, for example, the U.K when identical circumstances would not involve a similar broker in insolvency proceedings in another member State. Some harmonisation of private law does seem to be essential here, although it does appear that in the chapter on "The Uniform Law" on page 100 this is recognised to some extent.

4.8 31 days does seem rather a short period of time for applications to set aside a judgment where such applications derive from persons in member States other than the State of the bankruptcy

4.13 A formal claim by creditors would be preferable, otherwise all manner of informal claims could cause administrative difficulties. A formal claim may involve notarial certification.

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4.20, 4.34 - 4.36 & 7.29 The present facility whereby the capital sum assured under a policy of Life Assurance written on a husband's life under the provisions of Section 11, Married Women's Property Act 1882 for the benefit of his wife, and in this way being unattachable on the husband's bankruptcy, would seem to be in jeopardy.

Clarification should be sought as to the concept implied by "benefits under marriage property agreements" (paragraph 4.34).

While it is agreed that it is not a simple matter to choose between the law of the State of the bankruptcy and the law governing the matrimonial regime as the appropriate law to govern the benefits arising under antenuptial marriage contracts and matrimonial regimes, it is felt that the latter should prevail. It is agreed that, in relation at least to immoveable property, the lex situs should be applied (paragraph 4.35).

It is agreed that the protection afforded by the Married Women's Property Act 1882, the Married Women's Policies of Assurance (Scotland) Act 1880 and the Law Reform (Husband and Wife) (Northern Ireland) Act 1964 must not be eroded by the application of Article 34(2) (paragraph 4.36) and the inclusion in the Convention of any matters which might reduce the protection currently given to Married Women's Property Act policies in English law should be resisted.

4.24 On balance it would seem that Community bankruptcies should not take effect immediately. If, for example, a broker were declared insolvent in a member State, it would be helpful to insurance companies for there to be some period of time before the bankruptcy takes effect, so as to protect dealings between such a broker and an insurance company without notice. We support the Scottish bankers' view that the effective date of the bankruptcy should be 15 days after advertisement in the Official Journal.

4.38 The law which might be applicable in the bankruptcy of an agent may vary according to the private international law of the State of bankruptcy. It is suggested that the law applicable in such a case should be determined in a uniform manner throughout the Member States.

4. Recognition and Enforcement

There would not seem to be anything which we need to raise in this area.

The Uniform Law

It seems obviously to be desirable that there should be some uniformity in the private law of each member State in bankruptcy and insolvency matters. A particular example where lack of uniformity could cause problems appears in paragraphs 3.15 and 3.16 on pages 32 and 33 of the Consultative Paper, that is, where a person has directed or managed the insolvent legal entity for his own benefit, that when the legal entity is declared insolvent the individual, too, should be made bankrupt or made to pay all or part of the entity's debts. An ability to hide behind the principle of separate legal entity in U.K. law subject to the provisions of fraudulent trading in the Companies Acts might give too much protection to individuals in the U.K. as opposed to other member States. It is suggested, therefore, that:-

(a) the bankruptcy of the associated person should not take place until that person is himself shown to be insolvent, and

(b) the circumstances of such associated bankruptcy should be more closely defined.

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7.31 The Convention widens the scope of those pre-bankruptcy transactions which will or may be avoided. The nature of the additional transactions which may be avoided should be defined more closely, with particular reference to those which are termed as being "performed in an unusual manner". It is suggested that the phrase "outside the normal course of business" might be used instead of the latter phrase.

7.38 et seq. Under the proposed rules of the "Paulian Action" there could be some erosion of the current protection afforded to floating charges. The inclusion of any matters in the Convention which might lead to such erosion should be resisted.

7.41 The Convention provides for the discretionary avoidance of charges which are required to be registered but which are not registered. How this discretion is to be exercised should be defined.

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ALL COMMUNICATIONS TO BE ADDRESSED TO THE SECRETARY

THE BRITISH INSURERS' EUROPEAN COMMITTEE

ALDERMARY HOUSE, QUEEN STREET, LONDON, EC4P 4JD

Your Ref. .....

Our Ref. .....

18th March, 1974.

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

Dear Mr. Traylor,

E.E.C. Draft Convention on Bankruptcy

I refer to your letter dated the 8th February asking for views on the effects of Article 19 (2) of the draft Convention. I understand that in particular you would like to have the views of the Motor Insurers' Bureau and you also asked whether subrogated rights exist in other E.E.C. countries.

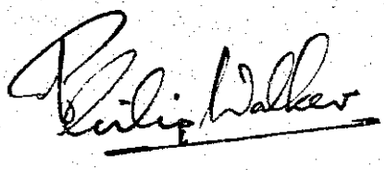
To take the last point first, direct rights against insurers exist in connection with motorists' liabilities which must be compulsorily insured in all other E.E.C. countries except the Republic of Ireland. In the Republic of Ireland it is our understanding that a procedure exists whereby an injured third party may apply to the Court for permission to proceed directly against the insurer concerned, for example, in the case of bankruptcy of the insured.

The provisions of the Third Parties (Rights Against Insurers) Act, 1930 are very rarely called into use in connection with motor insurance cases. Bankrupt motorists are comparatively rare and even more rare when they come from other countries. The existence of the Motor Insurers' Bureau Agreement makes all motor insurers responsible for all Road Traffic Act claims where it is possible to obtain a judgment against a negligent motorist and it is most unusual for difficulties of jurisdiction or in the service of legal proceedings to be so great as to create the situation that no judgment can be obtained. Where difficulties of jurisdiction or problems of serving of legal proceedings do occur it is usually because the motorist has disappeared out of the jurisdiction or is otherwise untraceable. In such circumstances the victim has the alternative of asking for his case to be dealt with by M.I.B. as an "untraced motorist case" in accordance with its agreement with the Department of the Environment dated 22nd November 1972. In addition, under the E.E.C. Directive on Motor Insurance the financial responsibility for Road Traffic Act claims made against, for example, French motorists, will in future rest on the French equivalent of M.I.B. but, of course, U.K. law will normally be used in the settlement of a claim.

.../2..

What has been said above relates to liabilities which are required by the Road Traffic Act to be insured but this does not, of course, apply to non-R.T.A. liabilities, for instance, damage to property or to liabilities which do not arise out of traffic accidents. However, third party liabilities arising out of traffic accidents are the most common liabilities incurred by individuals which involve personal injury and the cases in which the Third Parties (Rights Against Insurers) Act is called into question in connection with these other liabilities must be very rare indeed.

Yours sincerely,



P.G.T. Walker,
Secretary.

8(27)

MEMORANDUM FROM THE COMMITTEE OF SCOTTISH CLEARING BANKERS TO THE DEPARTMENT OF TRADE'S ADVISORY COMMITTEE ON THEIR CONSULTATIVE PAPER ON THE E.E.C. DRAFT CONVENTION ON BANKRUPTCY.

The following comments should be read in conjunction with those already submitted by The British Bankers' Association. With regard to paragraph 5.1 of the Consultative Paper, it will be noted that this Committee express a different view from that of The British Bankers' Association.

Paragraphs 2.3 and 2.4.

The position of a Receiver appointed in respect of a company incorporate in the United Kingdom would require to be clarified in order that his appointment be recognised by the Courts of the Member States.

Paragraph 3.16.

It should be noted that, unless it is a partnership under the Limited Partnership Act, 1907, the private estates of the individual partners of a Scottish firm are jointly and severally liable for all the debts and obligations of the firm.

Paragraph 4.20.

It is felt that, on the question of whether or not a spouse's property should be included in bankruptcy assets, consideration should be given to devising a practical method of ensuring that creditors are not prejudiced by transfer of property to a spouse.

Paragraph 4.48.

It is considered that rules of set-off or compensation in bankruptcy, as specified in Article 5 of Annex 1 (the Uniform Law) of the Convention, should be mandatory in all Member States.

Paragraph 4.49.

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Paragraph 4.49.

The Scottish Banks have already expressed their views on the question of the desirability or otherwise of allowing set-off or compensation in respect of contingent debts. For ease of reference, these views were:

> "The Scottish Banks would recommend that the United Kingdom reserves the right to retain in her own law, in respect of bankruptcies declared in her own territory and to such extent as she shall decide, the right of set-off in the case of the contingent debts referred to in Uniform Article 5(3) of Annex 1."

Paragraph 5.15.

This paragraph concerns the subject of Wages Preference and here the views of the Scottish Banks differ from those submitted by The British Bankers' Association who, it is understood, are "not unduly worried at the prospect of the loss of subrogatory rights".

The Scottish Banks are of the firm opinion that the present preference enjoyed by a lender who advances money specifically for the purpose of meeting wages should be retained. The question should be viewed against the background of the enormous number of company accounts maintained by the joint stock banks; inevitably each year a number of these companies will go into liquidation and in each instance there will be a period during which the necessity of ensuring that when a liquidator takes office the labour force is still intact will lead the banks (for the benefit of creditors) to make advances for the purpose of paying wages. Elimination of the Wages Preference will deprive the banks of the flexibility at present enjoyed, but not abused, by them as to whether or not wages cheques are to be paid. In this event the banks would require to adopt a stricter attitude to any excess borrowing and also consider the provision of more security - steps which would not be in the general interest of borrowers. The payment or non-payment of wages, however, is not merely a banking problem; it is a social problem and the Scottish Banks would not wish to contribute to a situation where employees would go home at the end of a week without pay.

Paragraph 7.23.

The Scottish Banks consider that a more precise definition is required for "Cessation of Payments" than that proposed in paragraph 7.21 and it is suggested that a definition based on Section 223 of the Companies Act would be appropriate. It is feared that, under the paragraph 7.21 definition, the simple act of dishonouring a cheque might be construed as a cessation of payments.

Paragraph 7.29.

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Paragraph 7.29.

In answer to the question as to what provisions in existing U.K. legislation relating to fraudulent preferences should be excepted from the general provision of the Convention the Scottish Banks would press for the retention of existing legislation regarding:

nova debita;

cash payments of debts actually due;

transactions in the ordinary course of trade;

implementation of a prior obligation to grant a specific security.

Paragraph 7.32.

The provisions of the E.E.C. legislation would render certain securities invalid, as against the general body of creditors, if created during the year preceding the opening of the bankruptcy and after the cessation of payments. The Scottish Banks feel that this would be acceptable, provided it was made clear in the text of the Convention that the provision does not apply where the security or charge is created in terms of an antecedent obligation to that effect.

Paragraph 7.37.

The Scottish Banks note that paragraph 7.37 highlights the situation specified in the Convention which might render void, as against the general body of creditors, a security contract which has been presented for registration more than fifteen days after the date of the transaction creating the security. This possibility might arise where the transaction took place during the year preceding the bankruptcy and after the date of cessation of payments. The Scottish Banks feel that the period of registration of any security should be twenty-one, and not fifteen, days.

Paragraph 7.39.

In answer to the question as to what existing United Kingdom rules of law (again relating to fraudulent preferences) should be retained in operation as being rules coming within the spirit of the Convention, the Scottish Banks feel that the Scots Acts of 1621 (dealing with gratuitous alienations) and 1696 (dealing with fraudulent preferences) should be retained.

Paragraph 7.41.

Paragraph 7.41.

This paragraph mentions the fact that Floating Charges are unknown in other E.E.C. Member States and that under the proposed legislation it might be possible for a foreign Court to hold that a Floating Charge, even in relation to assets in the United Kingdom, is invalid. Under existing United Kingdom Law (Section 322 of the Companies Act, 1948) a Floating Charge may be challenged in certain circumstances only and it is felt that the existing United Kingdom Rule should be preserved at least so far as United Kingdom assets are concerned. With regard to Section 322(3) the Scottish Banks feel that it is essential to retain this provision otherwise the earlier provisions of Section 322 could be overridden by recourse to Scots Common Law.

June 1975

9(1-91) Chartered Accts E. & W.

Marked copy

N.B. The Institute proposes to publish this memo: T.E.T.

CONSULTATIVE PAPER OF THE DEPARTMENT OF TRADE ADVISORY COMMITTEE - EEC DRAFT CONVENTION ON BANKRUPTCY

MEMORANDUM SUBMITTED BY THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES IN APRIL 1975 TO THE DEPARTMENT OF TRADE ADVISORY COMMITTEE

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1) The Institute was invited to comment on the E. E. C. preliminary draft Convention on Bankruptcy and prepared a Memorandum on the proposed Convention. The Memorandum expressed views on particular subjects including Voluntary Liquidations, Receiverships, Jurisdiction and Universality, Attachments and Rights of Preference. Consultation with other accountancy bodies on the submission of the Memorandum to the Department of Trade Advisory Committee was proceeding when the Committee issued its Consultative Paper on the Convention.

2) The Consultative Paper asks for views on a number of questions many being concerned with legal procedure and personal bankruptcy on which the Institute can offer little helpful comment. The matters on which their views might be useful are those already covered in the Memorandum referred to in paragraph 1 above and now submitted as the Attachment that follows page 4 of this Memorandum.

3) The following paragraphs contain more direct answers to the specific questions in the later Consultative Paper.

Scope of the Convention (Paras. 2.3 and 2.4)

4) Adhering firmly to the view that Receiverships, Deeds of Arrangement and Voluntary Liquidations should be brought within the scope of the Convention, it is noted that there are feared to be practical

difficulties relating to such inclusion. There can be no doubt that the whole practice of insolvency in England and Wales is fundamentally dependent on these procedures. In the alternative that they are excluded practices under Article 1(b) it would mean that the bulk of insolvencies in England would be conducted outside the scope of the Convention; moreover the difficulties experienced by Voluntary Liquidators and Receivers in establishing title, carrying on business, enforcing judgments, resisting attachments etc. in Europe would undoubtedly be magnified by the fact of the exclusion. Whatever the practical difficulties, means must be found of harmonising the two systems, as explained in detail in the attached Memorandum.

Procedures of ratification (2.4(b))

5) The majority of voluntary liquidations and receiverships do not entail legal procedures in Europe hence it would be a tolerable burden on the liquidator/receiver if he were required to obtain an order from the Registrar in Chambers confirming his appointment and whatever other information is sought to be proved, on an ad hoc basis, perhaps with the Official Receiver acting as Respondent; the departments of these Court officials would undoubtedly need to be strengthened.

Choice of Law Provisions (Paras. 4.8, 4.26, 4.43-4.45)

6) The Accountant practising in insolvency has little help to offer in relation to questions associated with the seat of bankruptcy. The majority of cases fall clearly into one country although there are cases of property investment companies registered in England whose properties are mainly located in Europe. The insolvency of such a company should be opened in England but the liquidator would need to recognise the relevant European law in lien dealings with the properties. Legal charges on land and immovables should be subject to registration in all EEC countries, if they are to give priority over the claims of the receiver/liquidator. These comments apart, the views expressed in the Consultative Paper in the early part of Chapter 4 are supported.

7) "Effects of the bankruptcy on current contracts". These paragraphs have particular relevance in insolvencies of companies with international businesses, especially where there are distribution branches but also where long-term contracts are undertaken for supply of goods or services under the laws of the State of the purchaser. Liquidators/receivers are accustomed to recognise the laws of the other State in their dealings with those States; equally, when foreign creditors have to prove in an English liquidation little difficulty is experienced in establishing that U. K. law applies. It is thought therefore that Article 38 introduces unnecessary complications - the views expressed in para. 4. 43 are supported.

8) "Contracts of sale with reservation of title" - Recognition of such provisions in contracts runs totally contrary to the "order and disposition" concept which is fundamental to insolvency practice in England and Wales. Unsatisfactory conflict has in the past been experienced with German suppliers of insolvent English companies, where the goods (components) supplied have been incorporated into major machines which have been sold - or are ready for sale. Many other examples could be quoted. Apart from the practical difficulties of identifying the goods not paid for, the liquidator/receiver has the impossible choice of selling the complete machine, so misappropriating the component (and perhaps becoming criminally liable) or dismantling a perfectly saleable machine and returning to the supplier a component which is useless to him. It is impossible to see what purpose is served by putting certain suppliers into such a favoured position; it is inconsistent with the orderly liquidation and should be proscribed.

Preferential Debts

9) The attached Memorandum discusses certain aspects relating to preferential creditors. The Consultative Paper however raises certain other questions and in particular the facts mentioned in para. 5. 14 are confirmed, namely, that preferential rights attaching to unpaid wages are relevant in practice principally in relation to the subrogation of bankers. Especially in cases

where the fixed assets are specifically mortgaged in favour of long term debentures the bank look principally to their ability to make advances on "wages account" to provide them with security; without this the bank's ability to finance companies through temporary difficulties would be seriously diminished.

10) There are nevertheless exceptional occasions where wages are not paid. These occur particularly where a group of companies has become insolvent and as each company has to be considered on its merits one company may have a considerable payroll and absolutely no assets. In such cases the conferring of a preference (or even a pre-preference as now proposed under further legislation) will be of no assistance to the workers. Another case where workers are sometimes unpaid and which creates distress, arises in reference to the non preferential part of the workers' claims, as for example unpaid expenses or terminal emoluments in excess of redundancy pay.

11) It is for these reasons among others that the attached Memorandum recommends that the definition and extent of preferentiality needs to be mutually agreed between the Member States. There are permutations of this problem arising where an English Company has a minor branch in another Member State, but having employees with unpaid wages and overdue tax assessments, perhaps with penalties, and it is quite impossible to formulate any general answer in anticipation of the detailed negotiations which might eventually take place.

ATTACHMENT A

Preliminary Draft of a Convention on Bankruptcy, Winding-up, Arrangements, Composition and similar Proceedings (European Communities Commission Document No. 3.327/1/XIV/70)

Memorandum prepared by the Institute of Chartered Accountants in England and Wales

1) In August 1973, the Institute of Chartered Accountants in England and Wales was invited by the Department of Trade and Industry (as it was then called) to comment on the preliminary draft of a Convention on Bankruptcy, Winding-up, Arrangements, Compositions and similar Proceedings (hereinafter called 'the Convention') and the following paragraphs set out the Institute's comments on the Convention.

2) Abbreviations are used in this Memorandum as follows:

DoT — Department of Trade (formerly Board of Trade and latterly the Department of Trade and Industry) - the U.K. Government Department which has routine oversight of most insolvency matters and includes the Official Receivers' Department and the Companies Registration Office.

OR — Official Receiver - an official of the O.R.'s Department which is subdivided both functionally and geographically throughout England and Wales. The O.R. is an officer of the Court in exercising his function.

3) As a general conclusion of the review of the Convention it is considered that there are a few critically important problems in harmonising insolvency law and practice in England and Wales with those of other Contracting States, and a considerable number of smaller matters, mainly of a technical nature, which may or may not arise according to the way in which the main problems are handled. There are moreover practical limitations in exposing the many minor variations in the law and practice and this applies particularly to the bankruptcies of individuals, where the difficulties are less fundamental than in

the other branches of insolvency. Although those negotiating on behalf of the United Kingdom will need knowledge of these technical points, attention is directed primarily in this memorandum to the more fundamental aspects, which are as follows:-

A. The nature and extent of supervision by the Court of insolvency proceedings and in particular:

   (i) Creditors' voluntary liquidations (Appendix I - page 11)
   (ii) Receiverships (Appendix II - page 15)

B. Jurisdiction and Universality and in particular:

   (i) Attachments and Floating Charges
   (ii) Rights of preference

C. A selection of the more important miscellaneous matters.

A. Nature and extent of supervision by the Court of insolvency proceedings

Voluntary Liquidations and Receiverships

4) In England and Wales two-thirds of all notified insolvent liquidations are creditors' voluntary liquidations (2,355 out of 3,571 average annual notifications 1968/72). Corresponding figures for receiverships are not available, but their numbers are considerable and although they will often lead to a liquidation included in the notifications they will have been administered mainly as a receivership. It is apparent, accordingly, that most company insolvencies in England and Wales are administered on the basis of statute law (mainly in the Companies Acts) and Case Law under the passive supervision of the DoT but without supervision by, or even reference to, the Court. There are attached as Appendices I and II, outlines of the law and practice of creditors' voluntary liquidations and receiverships respectively showing briefly the method of operation and supervision and exposing the problems likely to arise in harmonising. Reference to these will show that the legal principles embodied in the statutes are well known and there is a well established practice so that liquidators and

receivers are able to act within their powers with initiative and confidence according to their judgment of the best interest of the creditors (and shareholders where relevant).

Compulsory Liquidations and Bankruptcies

5) Compulsory liquidations and bankruptcies of individuals come under the supervision of Court. Compulsory liquidations are in normal practice, however, avoided where there is any prospect of substantial recoveries for the benefit of creditors and where the public interest is not involved; indeed they are frequently the result of lack of any substantial involvement by trade creditors. This practice is due to the experience of trade creditors, and accountants practising as liquidators and receivers, that the supervision of the Court inhibits initiative, expedition and discretion; the results of compulsory procedures are generally believed to be less successful than the voluntary ones. In general terms it can be said that the essence of this inhibiting characteristic is that a liquidator in a voluntary liquidation or a receiver can be quite satisfied that he has fully assessed the factors whereas the Court requires it to be proved in accordance with Court procedure. So compulsory liquidations tend to lead to inaction or action designed to conform to Court procedures which in practice tend to precipitate the termination of the business with attendant dismissals of workers, disastrous auction sales and so on.

Applications to the Court for Directions

6) Another aspect of this characteristic arises in that, in voluntary liquidations and receiverships there is a right for interested parties to apply to the Court for directions and yet this has severe practical limitations because of the difficulty in obtaining a prompt constructive solution. Under Court procedure, application must be precise and detailed; the evidence requires detailed examination by solicitors and often by Counsel; precedents have to be studied and the solution has to be proposed. This is usually recognised as legally acceptable by all parties before it is submitted by Affidavit to the Court for formal sanction. The processes are often time-consuming and restrictive in the nature of the evidence which can be presented as well as the solutions which can be proposed. Where there are

differences of view between the parties to an insolvency, it is of course recognised that the Court should, on application, resolve them but even here there is the peculiar feature that the liquidator or receiver cannot plead or appeal against a decision even if he knows it to be inappropriate or impracticable.

Other Instances

7) Deeds of Arrangement comprise another instance of insolvency proceedings outside the control of the Court but under a statutory code. Schemes of Arrangement for companies threatened by insolvency are sometimes administered under the Court under Section 206 but more often on a voluntary basis as the same considerations as above tend to apply. Added difficulties arise from the Court practice to be reluctant, once a Winding-up petition is on the file, to sanction action designed to avoid a winding-up (i.e. a scheme to save the company) and also to be reluctant to sanction any initiative intended to improve the situation of the company by altering its status even where this may in practice be beneficial to the general body of creditors.

Harmonisation

8) In most of the other Contracting States the Court plays a central role in the administration of insolvency practices and it is believed that in most cases there are separate insolvency courts, with lawyers who are specialists in insolvency matters and act as liquidators; these together are said to be able to administer an insolvency or to effect a reconstruction with discretion and initiative but it is a matter for enquiry, before or during negotiations, whether and, if so,how the inhibiting characteristics normally associated in England with Court supervision are avoided.

9) It is not suggested that there is anything which could or should be changed about Court practice on compulsory liquidation and indeed there are many cases where this method is the more appropriate either because the inhibiting characteristics are not relevant or because they need to be accepted in the public interest. The important point is that the two Codes exist side-by-side in England and Wales and the one most suitable to individual circumstances can normally be selected.

i) Creditors' voluntary liquidations - Harmonisation

10) The Convention does not propose a common framework which is necessary to enable insolvencies to be administered without continual reference to the Courts. The aim of harmonisation must be to enable the two systems to work smoothly alongside each other and to provide for mutual understanding and recognition. The convention accordingly needs to provide for mutual recognition of the status of voluntary liquidators of insolvent companies duly appointed under Acts of Parliament of Contracting States and their authority to deal with the assets and liabilities (wherever situated) of an insolvent company coming within the jurisdiction of that Parliament. There is probably need for regulations for dealing with the authentication of Resolutions of Appointment and other Authorities which may require to be produced to Courts of other Contracting States.

11) Voluntary liquidations in England and Wales provide a quick and efficient means of solving the problems of insolvent companies for the benefit of creditors generally and it is submitted that in addition to recognising them in England and Wales other Contracting States should be given the option of introducing parallel legislation.

(ii) Receiverships - Harmonisation

12) In England and Wales the widespread use of floating charges is an essential feature of financing trade and industry, while the practice of appointing accountants as receiver and manager provides an effective means of reconstructing without actually going into liquidation or, when unavoidable, of winding-up companies in financial difficulties. It is speedy in its inception and gives considerable power and discretion to the receiver to manage the business, maintaining it as a going concern with continued employment for its workers and preserving its goodwill while exploring opportunities for a satisfactory solution of its financial problems. The practising accountant is armed with all the necessary skills and experience for this purpose while his initiative and integrity in this capacity have been a feature of insolvency practice.

Co-existence Essential

13) It is apparent that neither England and Wales nor the other Contracting States can contemplate such a major change in the basis of their industry as would be

necessary to discard one system and concentrate on the other. Nevertheless, it is submitted that, perhaps by an evolutionary process, both systems should be allowed to co-exist so as to provide maximum elasticity in practice. This would however require mutuality of recognition of the alternative processes and may be difficult to achieve initially. In any case it is submitted that modifications need to be made to the Draft Convention so that floating charges and receiver and manager can be retained in England and Wales and be recognised throughout the Community for companies registered in England and Wales: there may be the corollary of reciprocal recognition in England and Wales for approved practices in relation to companies registered in the other Contracting States.
(Attachments are separately discussed - see page 7.)

B. Jurisdiction and Universality

14) The concept in Articles 3 and 4 of the Convention is fully accepted, namely, that insolvency proceedings should be administered under the jurisdiction of the State in which the principal place of business (presumed to be the registered office of a company) is situated. Article 3.2 qualifies the reference to registered office with the phrase "until the contrary is proved"; any such challenge would need to be made in the State presumed to have jurisdiction not later than date for the appointment of the liquidator.

15) The Convention further proceeds on the concept of Universality and this also must be fundamentally right. It follows that assets of a bankrupt company situated in any Contracting State fall into the common estate and are administered under one jurisdiction for the equal benefit of all the creditors in all the Contracting States. The concept of Universality is, however, seriously undermined by preferences, priorities, set offs and attachments made under any inimical laws of other States. Attention is drawn later in this memorandum to particular aspects of these matters. Many practitioners in England and Wales have had bitter experiences of arbitrary assertions of priorities against assets in foreign countries and it is out of place here to give details but examples include: large penalties for long-past technical offences against tax laws - attachments secured by directors' relatives or friends - the offset against good debts of highly contentious claims for damages. A liquidator in one Contracting State will be under a serious handicap to contend with cases of this kind. In England and Wales also, there are priorities under property leases,

public utilities, liens and indeed set offs in addition to the statutory preferences under Section 319 of the Companies Act.

16) It is submitted accordingly that if the concept of Universality is to be effective these laws also need to be harmonised to a considerable extent or, to the extent that this is not possible, the law of the State having jurisdiction needs to be applied in all respects.

i) Attachments and Floating Charges

17) The crystallisation of the floating charge brings about, in effect, a suspension of payments to the unsecured creditors so that in receiverships as in liquidations all can be treated fairly as between each other, under the law. This is a vital ingredient in the successful preservation, reconstruction or winding-up of a business. Under the Draft Convention, however, the reciprocal enforcement of judgments may enable creditors in countries where the law sanctions priorities such as "first come - first served", to wreck an otherwise possible reconstruction. This aspect applies also where normal trading terms and conditions differ as between Contracting States; a going concern could be wrecked if a supplier-creditor could claim continued ownership of the companies' apparent assets (such as machine parts supplied by him but already assembled into complete machines) so as to undermine the receiver's power to deal with the asset in the ordinary course of administration. In several respects the position in Germany appears to be more difficult than in any other Contracting State; for example, it is believed to be only in Germany that an unsecured creditor who gets possession of a debtor's assets is not required to account in the bankruptcy for the benefit he has obtained. In addition, under German law, secret liens - in the form of a sale with reservation of title or a transfer with title as security - are valid even in the case of bankruptcy, thereby depleting the available assets.

18) It is submitted that so far as these laws and practices are inimical to the orderly and equitable administration of insolvencies, they should be proscribed under the Convention or as a minimum that they should not be enforceable in reference to insolvencies of companies registered in other Contracting States.

19) It is further submitted that so far as such practices place creditors in other States at a disadvantage as compared with creditors in the State of the insolvent company (for example because of their inability to be "first come"), such practices will discourage trade within the Community and should be proscribed in the Convention.

ii) Rights of Preference

20) Faced with the problem of reconciling the multiplicity of preferential and secured claims, the authors of the Convention have adopted the compromise solution of subjecting such claims to the law of the place where the assets are situated; this leads to provisions of great complexity where the security is situated in more than one State. Furthermore, the Revenue and similar authorities not only retain their existing rights of attachment and preferentiality over local assets, but may prove in another State as unsecured creditors for any unsatisfied balance. While the principle underlying this is recognised, it needs to be clear that it cannot apply to preferences based on attachments or other unregistered charges obtained either without prior agreement or after the date of commencement of the proceedings.

21) The practical effect upon a liquidation administered from England and Wales may well be that (a) a considerable period elapses before the liquidator can establish the extent of claims in other States, during which time the proceeds from realisation of assets in those States will be immobilised and (b) the prospect of potential unsecured claims from the Revenue authorities of other States will make it difficult for the liquidator to distribute even the U.K. realisations.

22) It must also be recognised that the present proposals will severely curtail the concept of universality of the bankruptcy. It is recommended that:-

i) the definition and extent of preferentiality of Revenue and other claims should be mutually agreed between the Contracting States and that, once defined, all preferential claims should rank pari passu;

ii) if (i) is not attainable, the Revenue authorities in other States should not possess any unsecured right of claim, or should have at best only a right restricted by reference to the laws in the State in which the company's principal place of business is situated;

iii) a liquidator should be able to call for notification of claims within a specified period, failing which any further claims may be disregarded.

It is considered that the provisions of Article 41, paragraphs 2 and 3 (rules for determining the proportion of preferentiality in several States) will be unworkable in practice. State preferences should be limited to assets wholly within their jurisdiction.

C. Miscellaneous Matters

Scope of the Convention

23) The United Kingdom addendeum to the Protocol Article I (forms of proceeding falling within the scope of the Convention) should recognise creditors' voluntary winding-up, notwithstanding the absence of an initiating Court judgment. Similar considerations apply to compromises, arrangements and reconstructions within the meaning of the Bankruptcy Acts, 1914 - 1926, the Companies Acts, 1948 - 1967 and the Deeds of Arrangement Act, 1914.

24) The position of receivers appointed under a floating charge should be recognised and protected through E.E.C. The power of authority of a receiver appointed in England and Wales over assets in other Contracting States should be not less than if he were liquidator.

The Uniform Law (Annex I)

(a) Liability of directors and managers (Articles 1 and 2)

25) The effect of these provisions would appear to be broadly similar to that of Sections 332 and 333, Companies Act 1948 without there being any significant improvement. For example, the date of suspension of payments should in England and Wales be the date of the relevant Act of Bankruptcy (a concept with a long history of legal guidance) or of the commencement of the winding-up. Moreover, the back-dating of an individual's bankruptcy to that of the company or firm will lead to complications.

(b) Periods of relation-back, etc. (Article 4)

26) The proposals are in some instances harsher, in others less harsh, than their counterparts in English law. In particular there is a marked disparity between C2 and the English codes. Again much importance is attached to the date of cessation of payments; knowledge of an Act of Bankruptcy appears to be a more appropriate criterion.

Article 28 Powers of the liquidator

27) The persons referred to in paragraph 3 as 'capable of exercising the functions of liquidator' must include for England and Wales all those at present entitled. Although liquidators and receivers are in most cases members of one of the recognised Accountancy bodies, there are exceptions and there may need to be legislation similar to that contained in Section 161 of the Companies Act 1948 providing for specific recognition of persons who have hitherto carried on practice in insolvency matters.

Article 39 Contracts of sale under which the passing of title is deferred

28) It would appear that an unpaid vendor will be able to get greater protection as against the other creditors than at present. This has far-reaching implications and any step which further erodes the assets available to the general body of creditors is to be deprecated.

Group of Companies

29) Consideration may need to be given to questions of groups of companies and international companies with subsidiary companies or branches in other Contracting States. There are deficiencies in the law and practice in this respect in England and Wales and, it is believed, throughout the Community but this should not preclude an attempt to solve some of the more glaring problems. Examples are inter-company transactions, inter-company debts (possibly making subordination obligatory), Group assets not properly identified as to ownership, double proof, universality of insolvency proceedings within a Group, minority shareholder and other possible conflicts of interest.

APPENDIX I

Creditors' Voluntary Liquidations

1) A liquidator's powers and duties are drawn principally from the Companies Acts 1948 and 1967 and in addition the Companies Winding-up Rules, 1949, the Bankruptcy Act, 1914 and general case law.

Matters to be considered prior to liquidation

2) If the directors of a company have formed the view that the business cannot be continued due to its liabilities, the Companies Act provides for the calling of a General Meeting of the members of the company for the passing of a resolution placing the company into liquidation. The company must summon a meeting of creditors for the day or the day following the date on which the Members' Winding-up Meeting is held. Notice of the meeting must be sent to all known creditors and also advertised.

3) The Companies Act states that "the directors of the company shall cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the Meeting of Creditors.....". The Statement of Affairs is a document of the directors and therefore expresses their opinion on the realisability of the assets and does not have to be in any statutory form. The report, which is purely factual, should include a brief history of the company, details of recent trading results, history of recent bank and other lending, directors' remuneration and loan accounts and the reasons for the collapse of the company. The directors must appoint a chairman for the creditors' meeting.

Formal Meeting

4) In the case of private companies the members' meeting is usually a formality and up to five members may be elected to the Committee of Inspection, but this is subject to subsequent approval by the creditors. The liquidator, who is usually a practising accountant, may be nominated by the members of the company. The Companies Act permits the appointment of more than one liquidator.

Creditors' Meeting

5) The creditors, at their meeting, may elect a person (or persons) other than the liquidator nominated by the members and, if so, he displaces the members' nominee and becomes the liquidator provided the creditors vote for his appointment on a majority in number and value. There is a right for any member or creditor to apply to the Court for an order appointing some other person but this is extremely rare. The Companies Act also provides that the creditors at their meeting may appoint members of the Committee of Inspection not exceeding five in number whose function it is to assist the liquidator and also to fix the liquidator's fee. The Committee of Inspection's powers are fairly limited, but in practice they are kept informed on the progress of the liquidation and are consulted on major matters of policy by the liquidator. No member of the Committee of Inspection is entitled to deal in assets with the liquidator and the Committee are not entitled to receive any remuneration for their work, but may be paid out of pocket expenses.

6) There are recognised difficulties relating to the lapse of time between the calling of the General Meeting and the appointment of the liquidator which are usually solved in practice but there is scope for amendment of the law in this respect (probably by permitting the appointment of provisional liquidators).

Steps following Appointment

7) The appointment of a voluntary liquidator must be published in the official Gazette and registered with the Companies Registration Office. On the appointment of a liquidator the powers of the directors cease. The property does not vest in the liquidator, but he has the power to dispose of the property and other assets of the company and to do all acts and execute documents in the name of the company including the use of its seal. He can bring and defend any action or take legal proceedings in the name of the company. He may also, so far as is necessary for the beneficial winding-up, carry on its business. It is customary for the liquidator to appoint a solicitor to assist him where appropriate in the carrying out of his duties and also to appoint Agents to advise with regard to asset values and disposals.

8) In general the liquidator has the power to do all such things as may be necessary for the winding-up of the company and the distribution of the assets. He is required to submit returns of his receipts and payments to the DoT. A liquidator is entitled to invest surplus funds with the sanction of the Committee of Inspection until such time as surplus funds have to be paid into the Companies Liquidation Account maintained by the DoT, i.e. as required by the Department, after the liquidator's accounts have been submitted.

9) In the course of the liquidation as assets are realised the liquidator will make prompt distributions to the creditors. No formal proof of debt is necessary by any class of creditor and the liquidator has the power to agree creditors' claims informally. The liquidator is required to advertise for claims but is given protection, subject to appropriate safeguards, against claims of which he is unaware, which may come in after he has distributed the assets. It is the duty of the liquidator to look into the acts and dealings of any receiver who may have preceded him but his powers are limited if the Receiver has acted in good faith (see Appendix II, paragraph 10).

10) The liquidator may, where appropriate, make an application to the Court for directions on any matter within the liquidation (see page 3, paragraph 6). He must also recover any goods or monies held under an execution (i.e. an attachment) with certain minor exceptions.

11) The liquidator must also enquire into the conduct of the directors and business together with the cause of failure and also into transactions which are upset by liquidation (e.g. fraudulent preferences). These investigations cover possible criminal or civil court proceedings. If the company has been carried on with intent to defraud the creditors or for any fraudulent purpose, the liquidator may apply to the Court and if the Court makes such a declaration it will be in a form that the directors or any other person carrying on the business shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company that the Court so directs. At such a hearing the liquidator must give evidence and call witnesses. If the Court holds that the business has been carried on with intent to defraud creditors any person who has been a party to the business carried on in such a manner is additionally liable on conviction to a term of imprisonment or a fine.

12) Creditors may apply to the Court for the removal of a liquidator where they can show it is desirable. In addition if the DoT are of the view that a liquidator is not conducting the liquidation properly, they may also apply to the Court for his removal but this is rarely done.

13) A liquidator is obliged to convene meetings of the company and of the creditors at the end of each year and at the closing of the liquidation he must prepare an account of the winding-up showing how it has been conducted and the property disposed of. A general meeting of the company and a meeting of the creditors are then convened for the purpose of presenting the account before the meetings and offering any explanations that may be necessary. In due course, thereafter, the liquidator is discharged and the company dissolved.

APPENDIX II

Receiverships

1) It is necessary first to distinguish between a receiver, who has not the power to manage a business, and a receiver and manager. Receivers in the first category may be appointed by the Court or they may be appointed under a mortgage to take possession of specified fixed assets under powers contained in mortgages etc. For present purposes it is necessary to consider only receivers who have power to manage.

Receiver and Manager

2) A receiver and manager (hereinafter called "receiver") is appointed by a creditor (usually a Banker or Trustee for Debenture Holders) holding a floating charge over substantially the whole of the assets of a company. His power to manage derives from the instrument creating the charge. In Sections 94, 319 and 366 to 376 of the Companies Act 1948 there are certain provisions which bear on particular aspects, mentioned in more detail later, but a receiver and manager's essential powers and control over the assets of the business do not derive from these or other statutes.

Floating charges

3) In English law a floating charge is an assignment by the debtor of his assets and undertaking for the benefit of a creditor which is only perfected by the crystallisation of that floating charge on the appointment of a receiver. It must be registered at the Companies Registration Office. On crystallisation it operates as a valid legal assignment of the assets then in the possession of the company to the creditor and it confers on the receiver the right to manage those assets, the power of the directors being suspended meantime. The crystallisation defeats the claim of an unsatisfied judgment creditor. Crystallisation also covers all assets at the apparent order and disposition of the company wherever situated: that is to say, it defeats a creditor seeking recovery of goods supplied, whose goods cannot be identified as remaining in his ownership.

Invalid Floating Charges

4) A floating charge may be invalid for a number of reasons including:-

1) Lack of registration within the time limit

2) The insolvency of the company at the time it was created

3) The absence of new money being advanced as consideration for the charge.

A receiver acting under an invalid floating charge is personally liable for his actions.

Receiver as Agent for the Company

5) A receiver and manger has power to carry on the business, to enter into contracts and to bring and defend legal actions, in the name of the company. When a liquidator is appointed, the Receiver ceases to have the right to be its agent and becomes (in practice) a principal in respect of his subsequent actions. Although he loses the title " - and manager" such a receiver nevertheless retains the right to manage and a right to indemnity for his proper actions out of the assets in his possession. The assets covered by the charge do not vest in the receiver; he takes possession of them on behalf of the secured creditor.

Receiver's dealings

6) In dealing with the assets, a receiver acts in accordance with his judgment as to the best interests of the secured creditor and he requires no specific authority for the actions he takes but must always be prepared to defend himself that he has acted legally and with propriety. For example, a receiver who failed to accept the highest tender might be liable to an action for negligence. He needs to be able to show that his several realisations are in excess of his relative expenditure. He is however entitled to expend money in the protection of the assets under his control, including the goodwill of the undertaking, on the basis that it is likely to benefit realisations generally. A receiver also owes a duty of care and attention that in the handling of his assets he does not prejudice the interests of other creditors whose claims come behind those of the secured creditor.

Personal Liability

7) Under Section 369(2) of the Companies Act a receiver is personally liable on any contract entered into by him in the performance of his functions except in so far as the contract otherwise provides. He is however entitled to indemnity out of the assets in his hands.

Statutory requirements

8) Under Sections 370 to 375 of the Companies Act, a receiver is required (a) to give notice of his appointment to the Companies Registration Office and the company, (b) to file an abstract (summary) of his accounts with the Companies Registration office and (c) to file the Statement of Affairs when it has been prepared by the directors. In practice, receivers usually notify creditors of their appointment, take active steps to secure the completion and circulation of the Statement of Affairs and voluntarily submit to an audit. In suitable cases he will arrange for the formation of a committee of creditors. In all these respects it is generally accepted that the Companies Act needs strengthening to bring the law into line with current best practice.

Preferential creditors

9) Under Sections 94 and 319 of the Companies Act a receiver has a duty to satisfy the preferential creditors in advance of the claims of the creditor under the floating charge.

Accounting for surplus funds

10) A receiver has to hand over the Company's books and records and any surplus funds in his hands, after paying the preferential creditors and satisfying the creditor holding the floating charge, to the liquidator if one has been appointed, or to the company otherwise. The liquidator will examine the receiver's transactions and has a legal right to challenge the receiver's remuneration but otherwise the liquidator has no power of audit over the receiver's transactions. While receivers normally give, voluntarily, any explanations the liquidator may request, any challenge of the receiver's actions would be by means of a legal action for negligence.

Standard Practice in U.K.

11) Although floating charges are widely used, particularly in England, and the appointment of a practising accountant as receiver and manager is common, there is no evidence that the lack of provision for supervision by the Court or by the O.R.'s department of the DoT is other than helpful to the efficient administration of the undertakings. It is always open to a creditor

to petition the Court for compulsory winding-up which, if granted automatically puts the O.R. into a position of some influence. Successful prosecutions for negligence are extremely rare and such cases as come before the Courts are usually in the nature of applications for directions made by the receivers themselves or test cases amicably designed to establish the extent of the powers of receivers in particular circumstances.

Improvements in English Law

12) As mentioned above there are at least three areas of English Receivership law and practice where improvements are generally considered to be necessary and which the U.K. representatives should voluntarily concede.

(a) Notification of the receiver's appointment to the general body of creditors should be made obligatory.

(b) The preparation of the Statement of Affairs is appropriately made the responsibility of the directors but there is need for improvement designed to avoid the delay which is frequent. The last Companies Bill contained provisions in this connection although these would not obviate the difficulties which derive from the lack of facilities available to the directors and the divided responsibility which results. It is not necessary to make it obligatory for the receiver to circulate the Statement of Affairs to all creditors, as the filing of the documents in Companies Registration Office is sufficient safeguard in cases where ordinary creditors have no significant interest.

(c) Provisions for the independent professional audit of the receiver's transactions are generally thought to be necessary.