INTERNATIONAL BAR ASSOCIATION

BUSINESS LAW SECTION

COMMITTEE "J"

DRAFT E.E.C. BANKRUPTCY CONVENTION

"FLOATING CHARGES" AND RECEIVERSHIPS THEREUNDER

1. Committee "J" has not yet received much material from its members, whether in the E.C.C. States or elsewhere, as to the concept and use of floating charges in their countries. The most developed system is in operation in the United Kingdom.

2. It seems possible that the U.K. system of financing business by means of floating charges, enforced by the appointment of a receiver or a receiver and manager, could be made acceptable to, and accepted by other Member States of the E.E.C. or by means of bi-lateral treaties with other States, on appropriate terms. There seems to have been a change of attitude in this field which would assist to that end.

3. The recent E.C.C. Commission's Note ("the Commission's Note") on the Recognition of Securities on Movables without Dispossession (Doc. XIV/466/73 - E, but otherwise undated) is some proof that the concept of a floating charge is no longer unknown to the Continental systems of jurisprudence, whether in commercial law or in bankruptcy. Limited forms of such charges seem already to be current in certain Member States of the E.E.C., and in other states, which confer a security right over an actually or potentially changing pool of assets; for example in Germany, the "Raumsicherungsvertrag", and the "Globalzession", and in France, the system of "nantissement de fonds de commerce", which is a limited charge over the assets of a business. Limited forms of charge appear to be current elsewhere, e.g. in Denmark and in Norway, and an elaborate system appears to exist in Japan. In

of goods which may be "caught" by the floating charge when it "crystallises". But this is a concept already firmly established in the U.K. itself, where it is represented by the requirement of compulsory registration of such charges, by the invalidation of such charges if granted within a specified period before winding-up (i.e. bankruptcy) which is now twelve months, except to the extent of fresh cash provided to the debtor, and by the superimposition of the rights of preferential creditors over the rights of the holder of the charge, whether in a winding-up or otherwise.

7. There seems therefore to be a great deal of common ground already between the U.K. system and the approach of the Continental systems and other non-European systems. The contents of the Commission's Note indicate clearly that the Federation itself visualises ~~the~~ a considerable move towards the U.K. position. What is necessary is to identify the necessary modifications or concessions which would need to be made as between Member States of the E.E.C. or with other legal systems, in order to produce a universally acceptable floating charge, which might be described as "the International Floating Charge".

8. The areas for detailed consideration may be defined as follows:

(1) the "recognition" of the floating charge as a bona fide form of security for financing trade or business; A distinction may perhaps need to be made initially (in order for example to meet the views of the Federation) between bankers' finance and finance from non-banking sources. In Canada, for example, the Bank Act (R.S.C. 1970) by section 88 confers on specified bankers alone considerable privileges in this field, as does in the U.K. the Agricultural Charges legislation (see the Agricultural Credits Act, 1928). A standard form should and could be produced and

9. The relevance of these questions, and the answers to them, will or may of course vary according to (a) where the floating charge is granted and whether it comes into conflict with a bankruptcy in the same State, and (b) whether it is granted in one State and comes into conflict with a bankruptcy in another State, whether in the E.E.C. or elsewhere.

10. As regards the foregoing questions, the Commission's Note must surely imply that objective (1) can be attained, and that the mere concept of a floating charge is no longer generally unacceptable. As regards (2), the concept (attributed to the Federation) of a central E.E.C. register for registration of all such charges seems impracticable and extravagant in labour and money. What perhaps should suffice would be the registration of the charge in some central registry in each Member State (whether created ad hoc or adapted from some existing institution, such as the "registre de commerce") as a prerequisite to the enforcement of the charge against any assets situated, or deemed to be situated, in that State. In such a register it would also be necessary to register the appointment of any receiver or receiver and manager (see above item (7), and below). The concept of notice, constructive or express, is already well established in the Convention, and also in the jurisprudence of Member States of the E.E.C.; e.g. in France, the "droit de poursuite", that is to say the right enjoyed by the French Revenue to recover arrears against the tax-payers' assets in priority to other creditors is now dependent on the registration of the existence of such arrears, so as to give creditors notice of the risk they run in dealing with the debtor. The registration provisions will have to be co-ordinated with those already included in the Convention, regarding the registration of ships, aircraft, road vehicles etc. (see Articles 27, 37(2), 43(2), 45, and contrast with these the directive Article 5 and Annex 1(2)).

well with the existing U.K. pattern and with other systems.

15. The real difficulty under (6) is, I think, to provide adequate protection for a bona fide floating charge, granted in consideration of fresh cash advances, from being generally struck down by Article 4(C)(1) of the Uniform Law. Accordingly, that paragraph, and also perhaps Article 35 of the Convention, would need to be amended in order to give express protection to such a floating charge if it were not otherwise invalid (e.g. for want of registration, etc.). Other Articles may also need amendment to conform, e.g. Articles 32, 33, 39, 43 and 45, and disputes relating to floating charges might also conveniently be expressly included in the list of proceedings set out in Article 17 in respect of which the Bankruptcy Court is to have jurisdiction. ~~Some suggested amendments are set out in the Annexure (A) to this Note.~~

16. As respects (7), the concept of receivership is dependent upon the floating charge itself which it is intended to administer. If the floating charge is recognised as valid, and as conferring rights on the holder of the charge, subject to the conditions and protections for creditors discussed above, the person to administer those assets should be "recognised", in the same manner as the charge itself. In some jurisdictions, the secured creditor is entitled to go into possession personally of the assets charged to him, and a receiver is no more than an alternative to what is called in the U.K. "the mortgagee in possession".

17. If the foregoing propositions are well-founded, it should be possible to obtain inter-E.E.C. (if not international) recognition for some form of floating charge, and for the administration

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13th March 1975.

Dear Sir,

Consultative Paper - Bankruptcy

Herewith a note of some comments.

Yours faithfully,

Enc

PARAGRAPH 4.40

1. It is not satisfactory for conveyancers that contracts for the sale and purchase of English land and leases can conveivably be governed by the legal provisions of another Contracting State.

EXAMPLE 1. A Purchaser having entered into a contract and paid his deposit for the purchase of an English property albeit from a foreign vendor is entitled to rely on the Rule in Pearce v Bastable's Trustee that if the Vendor goes bankrupt and he is still willing to pay the price he can get specific performance as the Vendor's Trustee would not disclaim the property to the Crown.

If the law of the State of the bankruptcy of the Vendor is to be applied it might not give such a purchaser such a right of specific performance

EXAMPLE 2. Parties to an English Contract rely on Section 40 Law of Property Act 1925 that there must be a sufficient memorandum in writing. The Law of the State of the Bankruptcy may allow oral contracts

2. I am not clear whether it is the lex situs or the law of the Contracting State that will govern provisions similar to that of the English Trustees right to disclaim a lease. The first paragraph of Article 37 states that the effects of the bankruptcy on leases of immovable property is governed by the lex situs. Is the right to disclaim then an effect of the bankruptcy? Or is it considered a power of the Trustee in bankruptcy to be governed by Article 19 and thus the law of the state of the bankruptcy (see paragraph 4.50)

From the Landlords point of view the law of the Contracting State would seem to be satisfactory but consider the position of a foreign trustee in whom a lease of English land vests but whose right to disclaim is governed by the law of the Contracting State which prohibits disclaimer. Is he then henceforward liable personally under that lease

as he would be in English law if he did not disclaim?

3. Finally, although the Committee hint otherwise, it seems to me that the law of the state in which the bankruptcy has opened governs contracts for leases of land. Paragraph 1 of Article 37 states that the effect of the bankruptcy on leases of immovable property shall be governed by the lex situs. It does not deal with contracts for leases. Paragraph 2 merely deals with the effect of the bankruptcy on contracts for leases of movable property. Paragraph 3 deals with the effect of thebankruptcy on contracts for leases of other property presumably including contracts for leases of immovable property and governs that by the law of the state in which the bankruptcy has been opened.

One would certainly be surprised if Contracts for leases in English law could be governed by the law of any country other than England when such contracts are often regarded virtually as the equivalent of leases themselves e.g building contracts.

PARAGRAPHS 2.2., 2.3., 2.4., and 2.5.

4. If some uniformity is to be achieved in insolvency practice in the E.E.C., it seems inconceivable that matters of insolvency practice peculiar to one state or another can inhibit a trustee or liquidator appointed in the State of the Bankruptcy from getting hold of the assets and performing his tasks in those states. If it is to be of value we, in the U.K would not wish a trustee appointed here as the State of the Bankruptcy from being barred from realisation of assets in other states. So, conversely, we must allow a trustee or liquidator appointed in another State of the Bankruptcy to gain control of assets of deceased insolvents (2.2) deeds of arrangement, non-judicial compositions etc (2.3) (~~Indeal with receiverships separately below~~) (2.4) and vitally, creditors voluntary liquidations (2.4).

Presumably a provision merely granting recognition to the appointment of a liquidator in an English voluntary liquidation is ineffective unless England is ipso facto the State of the Bankruptcy which is not necessarily so (see e.g. Paragraph 3.10 of Consultative Paper)

My recommendation is that in these cases the uniform law of the Convention must always apply and we must cede control to the foreign trustee or liquidator appointed in the State of the Bankruptcy IF HE SO ELECTS provided that until such appoint ment acts of the previous liquidator or trustee must be valid and binding on the foreign trustee if in accordance with English Law

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Preferential and Secured Creditors - Preliminary Draft

Proposed Amendments

Paragraph 5: Amend to read -

"There are, however, two matters which concern us in regard to the provisions of Article 43(1). Firstly, its possible effect in relation to floating charges. The present wording assumes that a special preference or secured right attaches to specific property. This is not necessarily true of a floating charge, which may subsist over all, or any part of, a company's assets. There is a danger, therefore, that it would be characterised by a foreign liquidator or court as conferring only a general preference, possibly, or not conferring a preference of any kind. We consider, therefore, that the Convention should specifically assimilate floating charges to preferences for the purposes of Article 43."

Paragraph 12:

(i) Delete: 'secondly' to 'ceased'; lines 10 to 13.

(ii) Add: after 'Member States' at line 18:

"The most important objective which the U.K's rules relating to preferences seek to secure is the protection of the claims of a bankrupt's employees for arrears of wages and holiday pay. Similar rules are to be found in the laws of other Member States."

Paragraph 16(1): Add -

"This links general rights of preference with the laws of particular States and with the assets in those States, rather than with the law of the State of the bankruptcy and with the general pool of assets in the hands of the liquidator."

Paragraph 16(2)(a): Amend to read

"A creditor in respect of a civil or commercial debt may claim a general preference under the law of any Member State in which assets were situated

on the day when the bankruptcy was opened (Article 41(1)). That law will govern the subject-matter, extent and ranking of general preferences."

Paragraph 25: Amend to read -

"In our view, the balance of the Convention unduly favours preferential creditors. It is essential that the principles on which the rules for preferences are based should be logical and simple to comprehend. Under the present rules in the U.K., a liquidator would allow all employees, no matter where employed or living, the preferences allowed by U.K. law. This approach links claims for preferences with the law of the State of the bankruptcy, and with the general pool of assets which the liquidator has recovered. This, it seems to us, is also the appropriate starting point in a Convention recognising the principles of unity and universality of bankruptcy. At present, however, where there are assets in a country whose law allows greater preferences, a United Kingdom liquidator can seldom prevent employees in that country from obtaining those preferences out of the assets in that country. We have asked ourselves whether this derogation from the general principle of applying exclusively the law of the State of the bankruptcy can continue to be admitted in the context of the Convention. We give an affirmative answer, because the contract of employment will normally be governed by the law of the employee's place of work: that law will embody the rules which an employee will expect to apply to his case, whatever the centre of administration of the company or of the person who employs him. Different Member States, moreover, have different standards of living and different systems of social security and our proposal takes this fact of community life into account. We recognise that this system in some cases will result in the unequal treatment of employees of a single company within the community but we have examined with care the system envisaged in the draft Convention and alternatives which have been proposed to us and have concluded that none of these systems will conduce to complete equality of treatment. All those systems, moreover, in our view, involve calculations of a complexity which would render their adoption impracticable.

Para. 28.

By way of example: suppose that in an English liquidation, there are employees in England, Italy and Belgium with claims for 12 months' arrears of wages; that realisations in England are sufficient to pay the employees in England their full preferential rights of 4 months' wages, with a maximum of £200 per person; that available assets in Italy are sufficient only to pay employees in that country 2 months of their 12 months' preferential rights, and available assets in Belgium are sufficient only to pay employees in that country 3 months' of their 6 months' preferential rights. Under rule 2, the employees in Italy and Belgium will be entitled to such additional preferential payments out of the residual, general pool of realisations, as will bring each individual's total preferential payment up to 4 months' wages (or £200). If the "general pool" is sufficient to meet these claims in full, then employees in all 3 countries will be unsecured creditors for the 8 months' balance of their full claim of 12 months' arrear of wages. On the other hand, if the "general pool" is insufficient to pay in full the preferential claims of the Italian and Belgium workers under rule 2, it will be divisible between those claimants in proportion to their individual claims.

9(22) Marked copy.

[redacted]

E.E.C. PRELIMINARY DRAFT CONVENTION ON BANKRUPTCY

R E P O R T
of the Law Reform Committee of the Bar Council on the Consultative Paper published by the Department of Trade Advisory Committee

We append the Report of a Working Party on the above which was established by the Law Reform Committee of the Bar Council. The Working Party has now merged with a similar Working Party established by the Law Society, and joint meetings are now being held. In due course, further Reports or comments may be submitted by the new joint Working Party, and it may be desired to withdraw the attached Report and substitute a Final Report of the joint Working Party. In view of the timetable which has been imposed, however, the attached Report is submitted for consideration by the Advisory Committee on this basis.

The Working Party has not attempted to answer all the questions raised in the Consultative Paper, and it has not made detailed criticism of the drafting of the Convention or the Uniform Law, though it wishes to emphasise that this leaves much to be desired. The Working Party has assumed that, once accepted, the Convention and the Uniform Law will be introduced into United Kingdom law by appropriately drafted United

Revised Agenda 20th July.

Kingdom legislation, and that this will not be required scrupulously to follow the drafting of the Convention or Uniform Law, but rather to implement their intentions in clear and unambiguous terms in accordance with the ordinary principles of legislation in the United Kingdom.

P.J. Pugh

Mikael Cogstal

Jonathan Mance.

22. 4. 75.

E.E.C. BANKRUPTCY CONVENTION

Preliminary Report of Law Reform Committee of Bar Council

II SCOPE

2.2. Application of the Convention to the administration of estates of deceased debtors.

Provision is already made by Section 130 of the 1914 Act for the estates of deceased debtors to be administered in bankruptcy within the general scheme of the Act. Accordingly, we think that, in principle, the Convention should apply. The criteria for assuming jurisdiction, however, may require some adaptation to meet these cases. Also, special provision may be required to meet the case of estates already being administered by the Court which, after the commencement of the administration, are shown to be insolvent. However, such cases are very rare in practice.

2.3. Application of the Convention to receivers for debenture holders.

It is certainly desirable that the powers of a receiver for debenture holders should be given universal recognition throughout the Community; and it is true

that such a receiver has some of the functions of a liquidator, especially in relation to preferential debts. Nevertheless, he is essentially part of the machinery for enforcing secured debts, at the suit of creditors who rely on their security, and is thus outside any liquidation. In principle, therefore, we think that the Convention should not apply. But we think that provision should be made for them in the Convention (see later).

2.4. Application of the Convention to Creditors' Voluntary Liquidations.

We unhesitatingly recommend that the Convention should apply to creditors' voluntary liquidations. It would be contrary to the whole scheme of the Convention to allow a Company, which could only be compulsorily made bankrupt in, say, Germany, to be wound up voluntarily in England.

We recognise that some procedure is required whereby the members' resolution is confirmed by Court Order. We do not think that the near-obsolete form of winding-up under supervision should be resuscitated for this purpose. The ordinary procedure, which has proved itself acceptable to the commercial community, should be retained with as little alteration as possible.

Bearing in mind that the location of the Company's registered office is prima facie evidence that the Courts of that country have jurisdiction, (as to which, see later), all that is required in our view is that the resolutions should be expressed to be subject to confirmation by the Court, and that the Liquidator should be required to apply to the Court ex parte for confirmation (a) of the resolution of winding-up and (b) of his own appointment. We would expect such an order to be a formality, although the Court would be required to refuse to make the Order unless it was satisfied that it had jurisdiction to make it.

Certain practical questions arise. To facilitate administration, the number of Courts with jurisdiction to make the order would probably have to be reduced. We also strongly recommend that the opportunity be taken to restrict the persons qualified to be appointed Liquidators to those on some officially approved list, as was the case before 1883.

III. Jurisdiction

3.9. The centre of administration.

We accept the concept, but are strongly of the view that it should be defined in the English legislation, and that appropriate presumptions should

be laid down. It is important that the test of jurisdiction should be both simple and so far as possible certain, and that the possibility of dispute should be reduced as far as possible.

3.10. The centre of administration of companies.

In our view, the presumption that a company's centre of administration is situated where its registered office is situated should be made irrebuttable. Indeed, we would go further, and prefer a substantive rule rather than merely an evidential one. We consider that the winding-up of a company can effectively proceed only in the state and under the system of law which govern its incorporation, constitution and dissolution. We do not know whether it is correct to assume that, throughout the Community as in the United Kingdom, the state of incorporation and that of the registered office are the same, and that the registered office cannot be moved from one state to another. If so, then we would prefer a rule which provided that the Courts of the state in which a company was incorporated should have exclusive jurisdiction to wind it up. We should wish such a rule to override even the jurisdiction of the Court seised of the bankruptcy of a foreign partner of the company to "extend" the bankruptcy to the company. Our only

reservation relates to the winding up of companies for fraud (as to which, see later).

There is no hardship or unfairness in such a rule. The registered office of every company in the Community must be displayed on its letterhead etc.,and can easily be ascertained by any creditor before he extends credit to the company.

If, contrary to our recommendation, English companies become liable to foreign winding-up orders, special legislation will be required to give effect to the winding up and dissolution in England.

3.11. The "establishment"

Again, we are strongly of the view that this should be defined in the English legislation, though we doubt that any presumptions are required. If it is defined, as we think it should be, as "place of business" the difficulties referred to in the Consultative Paper should not arise. There is a clear distinction, recognised in the authorities, between "having a place of business" in England, and "carrying on business" in England. A business may be carried on here without any place of business here: see Lord Advocate v. Huron (1911) S.C. 612 and Re Koscot AG (1972) (Unreported) per Megarry J.

It should be noted that, under the Convention, the jurisdiction of the English Court to wind up overseas companies will be reduced. Once the Convention is adopted, a company in another Member country which acts the part of Koscot AG will not be capable of being wound up in England. Despite our comments in 3.10 above, we feel that this would be unfortunate. It might be desirable to retain the present wide jurisdiction in the case of petitions presented by the Secretary of State.

3.14. Examination of basis of jurisdiction

We consider that the two-stage procedure of English personal bankruptcy law should enable a solution to be found to the problem that the Court must be satisfied of its jurisdiction, and yet has no means of doing so ex proprio motu. Once a receiving order is made, it should become the Official Receiver's duty to satisfy himself, as an officer of the Court, that no impediment to the jurisdiction exists.

3.15-16. Jurisdiction to declare associated persons bankrupt.

We have submitted a separate Report on this topic.

3.20. Relation-back as applied to immovable property.

We consider that this is best considered as a choice of law problem, and deal with it later.

3.22. Setting aside transactions in fraud of creditors.

We are concerned at the prospect of transactions, which were thought to be irrevocable when made, being subsequently re-opened under a different system of law. We think that it would be intolerable if a transaction entered into in England, at a time when the debtor's centre of administration was in England, and unimpeachable under English law, could subsequently be set aside under a foreign system of law merely because the debtor had subsequently transferred his centre of administration to another country.

We recognise that, if uniform rules of relation-back are adopted without reservation, the situation described above will rarely occur. It will presumably occur, if at all, because of differences between the actio Pauliana and the English equivalent, enacted in Section 172 of the Law of Property Act, 1925. Since, as we suspect, the actio Pauliana was common to all the original Member States, no problem existed when the Community had only six Members; but it should be

recognised that, with the accession of England, whose system lacks an exact equivalent to the actio Pauliana, a problem does arise. In our view, either this country should replace Section 172 with the actio Pauliana, or (and preferably) Article 17 (3) should contain a proviso that no transaction should be capable of being set aside by the Court of the Bankruptcy if it was not liable to be set aside according to the systemof law of the country where the debtor had his centre of administration at the date when it was entered into.

3.25. Claims against the spouse of the debtor.

We are concerned at the grave consequences of this provision. We think that it raises a problem similar to that referred to in 3.22 above, and should be dealt with by a similar proviso.

IV. Choice of Law

4.3. Substantive requirements of a bankruptcy order.

We would regard it as intolerable if a person who might otherwise have been made bankrupt in the United Kingdom could no longer be made bankrupt because his centre of administration was in another Member State, and there was no means of making him

bankrupt in that State. Provided, however, that (save only in the circumstances provided for by Article 9) a creditor could by some convenient process (such as obtaining a judgment or serving an internationally recognised form of bankruptcy notice or statutory demand) initiate bankruptcy proceedings in whichever of the Member States the debtor's centre of affairs is situated, we see no reason why the creditor should not be required to have recourse to the bankruptcy procedures of that State.

4.16. Effect in relation to the debtor

We agree with the observation made in the Consultative Document. We find the meaning of Article 20 far from clear.

4.19. Trust property

We agree with the observation made in the Consultative Document. We regard it as essential that the Convention should state expressly that the liquidator's authority does not extend to assets, wherever situate, held by the debtor in trust, or to the exercise of trust powers by a bankrupt trustee (for example, under the SLA 1925).

4.20. Presumptions relation to spouses.

We think that the convention as drafted raises more problems than it solves. Is it, for example, sufficient to rebut a presumption of (say) German law to prove that at the date the assets were acquired the debtor's centre of administration was not in Germany, so that no one contemplated that when the question arose for determination German law would apply, and that no similar presumption was applied under the law of the debtor's centre of administration at the relevant time? If so, the presumptions may easily be rebutted in many, though not all, cases where the debtor is made bankrupt in a State with which his spouse has little or no connection. We think that a solution might be found similar to that outlined by us in paragraph 3.22 above.

4.21. After-acquired property

We consider that this is right in principle. It would be wrong for a bankrupt to be able to alter the financial consequences of his bankruptcy simply by emigrating to another Member State.

4.22. Disqualifications

We agree that the disqualifications which attach to the bankruptcy - most of which do not arise from our law of bankruptcy - need to be reconsidered, and that wherever it is decided to retain a disqualification it should result from bankruptcy in any Member State. There is no logical alternative in view of the fact that bankruptcy proceedings in one Member State will preclude bankruptcy proceedings in others.

4.26. Registered assets

We think that it is inevitable that the requirements of registration and the consequences of any failure to register should be determined by the law of the State in which the register is maintained. We are far from clear, however what classes of assets the Article is intended to cover. Does it, for example, include gilt-edged stocks, equities, debentures and so on?

4.29. Stay of proceedings

We find the meaning of Article 21 to be extremely elusive. We agree with the Committee's suggestion, and would point out that, in any event, a

change in English law would be required in order to bring creditors' voluntary liquidations into line. Presumably it would be provided that the Order confirming the resolution should operate as a stay of all proceedings. As to such Order, see our observations ante.

4.30. Costs of abortive executions

We should point out that a number of practical problems remain to be dealt with. At present, in companies winding up, the costs are treated as a preferential debt "unless the Court orders otherwise". Which Court is to exercise the jurisdiction in future?

4.34. Gifts between spouses

Again, a similar problem arises as under paragraph 3.22.

4.36. M.W.P. Act Policies

We do not think that any problem arises here - provided that trust assets are excluded from the liquidator's powers, as we have already recommended above.

4.40-41. Contracts

We think that it is important to draw a distinction between those consequences of bankruptcy which arise from the law of bankruptcy, and those which do not. For example, the liquidator's right to disclaim an onerous lease comes within the former category; but the landlord's right to forfeit the lease in the event of bankruptcy does not, for it arises ex contractu. We think that consequences which arise from the law of bankruptcy ought to be governed by the law of the State of the bankruptcy, including its rules of private international law; but consequences which arise from contract ought to be governed by the proper law of the contract. It may not always be easy to decide whether a particular rule of law is a rule of bankruptcy law; and it may perhaps be necessary to define and classify some of the more important rules of the various Member States in the Convention. In particular, we would regard any rule which invalidated, wholly or partially, a contractual provision as against the creditors, as a rule of bankruptcy law. We return to this problem below (paragraph 4.44).

4.43. Proper law of the Contract.

We support the Committee's views on this important question.

4.44-46. Reservations of title

In England, the passing of title is governed by the law of contract. It is not affected by bankruptcy, and is not confined to bankruptcy situations. Prima facie, the title of the trustee in bankruptcy depends on the effect of the contract. In certain circumstances, however, a special provision of bankruptcy law (such as the reputed ownership clause) enables the trustee to seize assets not in fact owned by the bankrupt.

We do not know how continental provisions in relation to reservation of title are classified. We think that it is essential to classify such provisions in the uniform law. If it is decided to classify them as bankruptcy provisions, as we think they probably should be classified, then we think that the problems mentioned by the Committee disappear.

We are, however, concerned at the requirement that the reservation of title clause should be evidenced in a written memorandum made before delivery. In practice such clauses are almost always to be found in the invoice despatched after delivery, and are (in English law) imputed into the contract because of a prior course of dealing. We would regard it as most unfortunate if, in this common situation, the unpaid vendor should lose the protection he has under the present law.

4.44. Set-off

We agree that Article 5 is seriously deficient, and ought to deal with the special relationships referred to by the Committee. We also think that specific reference should be made to moneys paid for a special purpose, which under English law are not capable of set-off.

4.49. Set-off of contingent debts

We do not agree with the Committee's statement that, in English law, set-off is not permitted in respect of contingent debts. We respectfully refer the Committee to Re Daintrey (1900) 1 Q.B. 546, where set-off was allowed in respect of such a debt. The rule stated by the Committee appears to be taken from Williams on Bankruptcy (18th Edition) at p. 211, where Re Fenton, (1931) 1 Ch. 85 and Re A Debtor, (1956) 1 W.L.R. 1226 are cited in support. The true rule established by those cases is, we suggest, correctly stated in Halsbury (4th Edition) Vol. 3 at paragraph 751, viz: that the right is subject to the rule against double proof, and is not available in favour of a surety when the principal creditor's right of proof in respect of the same debt is still subsisting.

V. Preferential debts.

We have previously submitted a preliminary Report on the subject of preferential debts, in which we expressed dismay at the obscurity of the language of the relevant Articles, and our doubts whether we understood the system which they were intended to introduce. Many of our doubts have been resolved by the Consultative Paper. We confine our general remarks to the expression of our anxiety that the legislation which implements the provisions of these Articles in the United Kingdom should be clearly expressed, and our hope that further consideration may be given to the practical problems inherent in the administration of an extremely complex system. We feel strongly that preferential creditors should not have to "hop" from one mini-bankruptcy to another; and that the duty should be clearly laid upon the liquidator in the state of the bankruptcy to maintain such records as will enable him to deal with all claims to preference in other Member States. We also urge that, contrary to the scheme envisaged in the draft Convention, all questions arising out of the existence of preferential claims should be referred to the Courts of the State of the bankruptcy, even if they fall to be resolved by the law of a different Member State.

5.8. Civil and Commercial Matters.

We dislike this phrase. We suspect that what is meant is merely "debts other than debts in respect of fiscal and social security matters". We urge that the two classes of debts be clearly defined in the Convention in such a way that they are seen to be exhaustive; and would prefer to see a Schedule listing the various fiscal and social security debts individually, with power to each Member State to add new items to the list in certain circumstances.

5.10. Prerogative powers.

The continued existence of prerogative rights of self-help in some, though not all, Member States, raises questions of a political rather than legal nature on which we feel unable to express an opinion.

5.12. Ranking of fiscal debts.

Similarly, the right of the revenue authorities in each Member State to rank as unsecured creditors in bankruptcies and liquidations in other Member States, contrary to the existing rules of private international law, raises questions which are in part at least

political. However, we feel that we may properly make one point. The existing rules were established by the Courts as according with then currently accepted notions of public policy; but we think that those rules require modification in the light of membership of the European Economic Community. In our view, it is clearly arguable that membership of such a community necessarily involves the reciprocal recognition of the fiscal obligations owed to the public authorities of each Member State. In other words, we would regard it as consistent with the underlying spirit of the existing rules of private international law if the area within which recognition was accorded by the Courts of any State to fiscal debts was co-extensive with the economic community of which that State was a Member. For these reasons, we regard this innovation as acceptable.

5.15. Subrogated creditors for wages advances.

We agree that it is most desirable that it should be made clear in the Convention whether or not the debt claimed by a subrogated creditor for wages advances is to be accorded the same rights of preference as the employees whose wages have been paid out of the moneys advanced. We feel it right to add that much

disquiet is occasioned in England by the English rule in winding-up, the chief effect of which is to enable banks to convert non-preferential into preferential debts. We would not be sorry to see the English rule abrogated; but if so, it should be abrogated for domestic as well as international liquidations.

5.16-17. General

We agree that the system is calculated to produce haphazard and adventitious results, and is far from ideal. It is also extraordinarily complicated, and we suspect that insoluble problems may arise. In our view, it is acceptable only as a short-term solution, until harmonisation of preferential rights can be achieved throughout the Community. We believe that this objective should be sought without delay; but in the meantime, we think that the proposed system is probably the least objectionable that can be devised.

5.18. Jurisdiction

We are strongly opposed to the system of jurisdiction proposed by the Convention for dealing with preferential debts. Of course, many issues, such as the establishment

of the existence and amount of a fiscal debt, can be determined only in the Courts of the State where the debt arises. But the preferential status, if any, of a debt is a question which falls to be determined by bankruptcy law, since it raises issues nn which all creditors, whether preferential or not, have competing interests. We feel most strongly that such questions should wherever possible be referred to the Courts of the State of the bankruptcy, even though the law to be applied may be the law of another Member State. To take one example from the Consultative Paper: an unpaid Italian employee in an English bankruptcy could enforce, to the extent of any assets situate in Germany, such preferential rights as are conferred by the German bankruptcy law upon an unpaid German employee of the same class. His claim, however, might be opposed by unpaid German and English employees, English debenture-holders, and English, German and Italian unsecured and non-preferential creditors, including the revenue authorities of the three countries. The determination of the claim would affect the extent of the claims made by each of the competing parties to the assets in England and Italy. Many of the parties would not know how to argue their case until they knew all the facts, including the amount of the assets in each country, and the nature and extent of each competing claim. Clearly, the

claim of the Italian employees could not be dealt with in isolation; but even if it were, the issues could involve issues of fact, as well as questions of English, Italian and German law. We feel strongly that the competing claims could be effectively dealt with only by a single Court, seised of all the facts, and advised on the various systems of law; and that the only appropriate Court in the example given would be the English Court, ie. the Court of the bankruptcy.

VI. Recognition of Enforcement of Judgments

6.4. Invalid judgments.

We consider that a provision which entitles, and still more obliges, an individual to ignore or disobey an order or judgment of his own Courts is unacceptable. In our view, the Convention requires amending in order to provide a ready means to enable "invalid" judgments and orders to be set aside, while preserving their efficacy in the meantime.

6.7. Challenge to the jurisdiction.

We consider it essential to exclude any possibility of challenge on the ground that the Court

of origin lacked jurisdiction, precisely because of the imprecise nature of the concept of the centre of administration. It would in our view be deplorable if the locus of the debtor's centre of administration should be capable of being litigated in several different countries, with the possibility of inconsistent decisions being reached, after the Courts of one State have determined that it is located within their own jurisdiction. We find this proposal not only acceptable, but inevitable.

6.8.)
6.17.) Competent Courts
6.18.)

We agree that the competent court in England to hear any action challenging the bankruptcy should be the High Court. We also consider that challenges under Article 63 should be brought in the High Court. We support the Committee's views on appeals.

VII. The Uniform Law

7.4. Application of the Uniform Law.

We consider that rules of relation-back ought to be confined to formal bankruptcy and liquidation situations, and that creditors who wish to take

advantage of such rules to set aside transactions entered into by the debtor ought to take formal bankruptcy or liquidation proceedings.

7.7.-11. Extension of the bankruptcy under Article 1.

We have submitted an earlier Report on this topic and adhere to the views there expressed. We repeat our strong conviction that no person ought to be liable to be made bankrupt unless and until a claim has been established against him and he has failed to meet it.

We agree that Article 1 ought properly to be regarded as outside the scope of the Convention for the reasons stated in paragraph 7.8 of the Consultative Paper. In our view, the formulation of rules governing the liability of individuals for the debts of a legal entity are the function of the constitutional law regulating the affairs of that entity.

In practice, Article 1 of the Uniform Law covers, in less precise and far less felicitous language, much though not all of the ground already covered in England by Sections 332 and 333 of the Companies Act, 1948. Plainly, the two legislative codes could not be allowed to co-exist; and of the two, we greatly prefer the existing English code. For these reasons we strongly recommend that Article 1 should not be introduced into English law.

Many of the consequences of the Convention which we have already examined, and which we have been prepared (though with reservations) to accept, would in our view be unacceptable if applied to a bankruptcy abroad of an individual whose centre of administration was in England. We refer particularly to the provisions in regard to relation-back, gifts between spouses, etc. Moreover, it should be borne in mind that bodies corporate, no less than individuals, are capable of entering into partnerships and of directing or managing the affairs of other legal entities. Accordingly, the recognition of external declarations of bankruptcy under Article 1 could involve the external bankruptcy of companies registered in England, contrary to our own recommendations, and solvent companies at that. For these reasons we strongly urge that no recognition should be given to any external declaration of bankruptcy under Article 1 of any persons or corporate bodies having their centre of administration in England.

7.12. Article 2.

We regard this as superfluous so far as English law is concerned; provided that the person in question is liable to be made bankrupt only in the State where his own centre of administration is located.

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7.13.-7.16. Relation-back: Article 4

We agree with the view expressed by the Committee that to allow differences in the periods of relation-back between Member States would seriously diminish the value of the Convention. We also agree that it would be unacceptable that transactions entered into which were valid under U.K. law at the time they were entered into should be invalidated by subsequent bankruptcy in another Member State, where this could not have been foreseen. In our view, it is essential either to standardise both the definition of cessation of payments and the periods applicable to relation-back, without admitting any reservations, or to insist that the period of relation-back in relation to any transaction shall be governed by the law of the State where the debtor had his centre of administration at the date of the transaction. (An alternative would be the proper law of the transaction, but this may not always be easy to determine, and in any case is not the correct law in principle, for the right to set the transaction aside derives from the law of bankruptcy.)

We should add (i) that we consider that the proposed periods are too short, and that, in cases outside the Actio Pauliana, a 2-year period should be adopted; and (ii) that consideration must be given to transitional provisions.

7.17. Right of action to set aside transaction: Article 4 F.

It is suggested that the provisions of Article 4 F, which preclude any person other than the liquidator from bringing proceedings "to set aside acts done by the debtor in fraud of his creditors" might cut down the rights of creditors under Section 332 of the Companies Act, 1948, to sue delinquent directors who have been guilty of "fraudulent trading". We are unable to see how the Article could have this effect. Creditors who bring proceedings under Section 332 do not seek to set aside any transactions entered into by the Company, but on the contrary to enforce the debts arising from such transactions and render the directors liable in respect thereof.

However, Article 4 F does cut down the right of a creditor to bring proceedings under L.P.A. 1925 section 172. In practice, such proceedings are seldom if ever resorted to by creditors. Proceedings under section 42 of the Bankruptcy Act, 1914, may be brought only by the Trustee; and we would regard the restriction of section 172 to the Trustee or liquidator as acceptable. Consideration may however need to be given to the provisions of section 8 of the Bills of Sale Act 1878.

7.20.-7.23. Cessation of payments

We agree with the views of the Committee that a single standardised legislative definition of cessation of payments is desirable. Indeed, we regard it as essential. We are not, however, entirely satisfied with the definition proposed by the Committee. We should prefer a definition corresponding to a modern version of our existing "act of bankruptcy". Thus, we would prefer a definition on the following lines:-

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

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

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

We would particularly wish to see, among the acts or events to be agreed, a failure by the debtor to comply, within a specified period, with an agreed international form of "bankruptcy notice" or "statutory demand" requiring personal service on the debtor.

7.30-7.31. Fraudulent preference.

Since in practice the cessation of payments will normally be followed fairly quickly by bankruptcy, the provisions of Article 4 will be less effective than the English rules of fraudulent preference. We are not clear (1) whether Article 4 is intended to be exhaustive, or whether it is intended that it may be introduced to provide additional circumstances in which transactions may be set aside, so that the existing provisions in the United Kingdom relating to fraudulent preference may be retained; and (2) if exhaustive, whether a fraudulent preference would be recoverable by a Paulian action. In England, a "fraudulent preference" outside the statutory period cannot be challenged under section 172: (see Re Lloyd's Furniture Palace Ltd. (1925) Ch. 853). We consider that these doubts should be clearly dispelled in the Convention.

We suspect that payment in advance, or in an unusual manner, are to be regarded as evidence from which an intention to prefer may be inferred, and that it is the latter which invalidates the transaction. If so, the provisions of the Convention may be acceptable, provided that it is made clear that the inference may be rebutted. As it stands, there seems to be no

room to rebut the inference, which could plainly cause injustice in some cases.

7.32. Giving of security within one year of the bankruptcy.

We agree with the preliminary views of the Committee. While a substantial change in English law is involved, it is one which we think is acceptable, and even an improvement on the existing position. But we stress the importance of proper transitional provisions.

7.34. Discretion to avoid payments.

We agree with the preliminary views of the Committee. We find the proposed provisions unacceptable.

7.40. Retrospective setting aside of transactions.

We repeat the views set out under 7.13-16 above.

7.41. Floating charges.

These are of great importance to the commercial community in the United Kingdom, and we think that a special provision (not in the Uniform Law but in the Convention) should be included to afford them, and

the powers of receivers appointed under them, recognition throughout the Community. The provisions of the Uniform Law should then expressly include them as a security for the purposes of the Law.

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Part 2

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April 1975

THE LAW SOCIETY

CONTINUATION OF A
MEMORANDUM BY A WORKING PARTY OF
THE COUNCIL'S LAW REFORM COMMITTEE
ON THE

CONSULTATIVE PAPER ON THE E.E.C. PRELIMINARY DRAFT CONVENTION ON BANKRUPTCY, WINDING-UP, ARRANGEMENTS, COMPOSITIONS AND SIMILAR PROCEEDINGS - PART 2 (SCOPE OF THE CONVENTION)

PUBLISHED BY THE

DEPARTMENT OF TRADE ADVISORY COMMITTEE

Received Legislation 20th Feb.

SCOPE (SEE PAGE 17)

Para. 2.2. - Our view is that the Convention should apply to the winding-up of the estates of insolvent deceased debtors but only where it would also have applied had the debtor not died, in particular, under Articles 10 and 11.

Section 42 of the Bankruptcy Act 1914 does not apply to the administration of the estate of a deceased insolvent under Section 130 or possibly only applies where fraud is established. The Blagden Committee recommended that the death of the debtor should be irrelevant a view which we support. We feel that the operation of the Convention should be unaffected by the debtor's death but recognise that this may be difficult to reconcile with Section 42, though we hope that U.K. law will have been reformed before this issue arises in practice.

Para. 2.3. - We feel strongly that the institution of receivership must be preserved in the U.K. and also protected from attack in other legal systems. Either receivers and trsutess should be included in the Convention or special provision will be needed to ensure that the system is not overriden. How such provision should be made is a difficult question and one to which we have not yet been able to find a satisfactory answer though, as we observe below, they might perhaps be treated similarly to liquidators in voluntary liquidations.

Para. 2.4. - It is equally important to ensure that the voluntary liquidation procedure is unharmed by the Convention. Our view is that proposal (b) is the right method and that the courts should be given power to make an order approving the arrangement. Such approval would be a formality.

It is possible that this device might also offer a method of recognising receiverships and trusteeships under deeds of arrangement.

Para. 2.5. - We have little experience of criminal bankruptcy and our observations are tentative. However, except that the Convention appears to be directed to civil bankruptcy only, we see no particular reason why criminal bankruptcy should not be included.

Para. 2.6/7/8. - Though most of those bodies or persons affected by the Convention will be limited companies, we agree with the Advisory Committee that it should be clear who else is to come within it. This could be done by specifying those who are to, but it might be preferable to achieve this, rather, by exclusion of those to whom it does not apply. In this way, there would be less risk, we feel, of overlooking some group. For example, we note that there is no reference anywhere to trades unions and it is therefore not apparent whether the Convention is to apply to them.

We also agree with the Advisory Committee that there seems no reason why bodies such as savings banks, banks and building societies in the U.K. should not be within it. It seems to us unfortunate that various

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F.H.T.

April 1975.

THE LAW SOCIETY

MEMORANDUM BY A WORKING PARTY OF
THE COUNCIL'S LAW REFORM COMMITTEE
ON THE

CONSULTATIVE PAPER ON THE E.E.C.

PRELIMINARY DRAFT CONVENTION ON BANKRUPTCY, WINDING-UP, ARRANGEMENTS, COMPOSITIONS AND SIMILAR PROCEEDINGS -

PARTS 3 (JURISDICTION) AND 7 (UNIFORM LAW)

PUBLISHED BY THE

DEPARTMENT OF TRADE ADVISORY COMMITTEE

UNIFORM LAW

We think that the Uniform Law is fundamental to the whole of the Convention. Until one has reached a view on the acceptability of its various provisions, it is not, we think, possible to reach final conclusions on the rest of the Convention. We have thus begun with this subject.

(See page 100 of Consultative Paper et seq.)

Article 1 - We support in principle the proposal that the creditors of an insolvent business should have access to the assets of a director or manager whose negligence or dishonesty has brought the business to that state. However, we entirely agree with the Advisory Committee's view that this Article is too vague. We also agree that it is inappropriate to state a rule formulating criteria for personal liability of an individual in respect of the debts of a legal entity.

In any case, the criteria should be clearly defined. For example, it is uncertain from the Article how the term "legal entry" relates to an English partnership and whether a senior clerk with real management responsibilities could be at risk of being declared bankrupt by "association".

Furthermore, it is wrong, in our opinion, that a director, manager etc., should be declared bankrupt regardless of his ability to satisfy liabilities arising under this provision. If he has sufficient assets and is willing to pay, it is unjust to declare him bankrupt and if he cannot meet the liabilities, it may still be unfair. The concept of this provision, in any case, goes against the modern attitude of this country to insolvency whether of companies or individuals, which is whenever possible to avoid bankruptcy and to seek to preserve the business and earning capacity, rather than destroy it by bankruptcy.

In addition, inadequate provision is made to require proper judicial procedure to be observed and to ensure proper safeguards for a person against whom proceedings are brought - so that, for example, the trustee/receiver (or equivalent) must prove that the person is within one of the categories to which paragraphs (a), (b), or (c) apply and that his acts have contributed to the bankruptcy.

The additional uncertainty brought about by lack of a clear point at which bankruptcy begins (see our comments on Article 4) makes the effect of Articles 1 and 2 additionally unsatisfactory and could lead to considerable hardship.

Article 4 -

Our objections to this Article are on two main grounds:

- (a) period of relation-back
- (b) time of commencement of bankruptcy

(a) Firstly, we agree with the Advisory Committee's suggestion that to allow differences in relation-back periods between Member countries would seriously diminish the value of such a Convention.

Our second criticism under this head is that the proposed periods of relation-back are much too short. We would regard a two year period as a minimum. Where transactions are in fraud of creditors, there should be no limit on the period, as in English law at present. Some of the terms used in this Article are vague or inappropriate to English law; for example, para. 7.19: (2)-payment of debts not yet due-does not take account of the situation where adequate consideration is given for early payment or where early payment is made to help a creditor; and (4)-what consideration is given for security e.g. time for payment?

As to (3), the wording is too vague to be effective.

(b) Under the second heading, we feel that the English law concept of an act of bankruptcy is superior to the "cessation of payments" and that to accept the latter would be retrogressive as it is uncertain and artificial. We hope that agreement can be reached, as the Advisory Committee suggest in para. 7.16, on the point at which bankruptcy is to begin and we fully agree with them that failure to do so would seriously diminish the value of the Convention.

The vagueness of the definition of "cessation of payments" (para. 7.21, p.111) illustrates, we feel, the unsatisfactory nature of the concept - "debts" are not defined and the provision seems not to take account of the situation where a defence to a claim is set up, for example, on the grounds of breach of contract or set-off.

Para. 7.29 - we note that the laws of contracting states may lay down rules about transactions in fraud of creditors. However, if these differ between states, it will affect the usefulness of the Convention, though we do not think that any reduction should be accepted in the current English law powers to set aside fraudulent transactions.

We do feel that the classifying of dowries along with other gifts, and therefore as void against the general body of creditors, is wrong and that the protection given by Section 42 of the Bankruptcy Act 1914 should be preserved for all the transactions now covered.

Otherwise, the 1 year period during which gifts are void is too short. (Again see para. 7.24) and should be 2 years.

Para. 7.30 - payments in advance should not be void but voidable. There may be good consideration given for early payment. However, we agree that it should be for the bankrupt or payee to show that there was consideration and no unlawful preference. It is wrong that the burden of proof should be on the trustee/liquidator, as at present.

Para. 7.31 - we disagree that to make payments in cash would be to do so in an "unusual manner" even for a large sum and suggest that the provision is directed at other methods of payment e.g. in kind. However, the disagreement in itself indicates that the provision is insufficiently clear.

Para. 7.32 - we support the Advisory Committee's suggestion on antecedent obligations but feel that it does not go far enough and that provision should be made to take account of the situation where full consideration is given for security by way of a charge etc. However, the burden of showing the antecendent obligation for consideration should be on the creditor not the trustee/liquidator. Again, the 1 year relation-back period is not long enough.

Para. 7.34 - we agree with the Advisory Committee that Article 4 (c) (1) and (2) is unacceptable. As we have said, it is important the law should be directed to maintaining the earning power of a company or individual, subject to supervision. Though 4 (c) (1) and (2) mainly concern bankers, our view is that the protection given under Sections 4, 6 and 7 of the Bankruptcy Act 1914 is desirable and should be preserved.

Para. 7.37 - Article 4 (D) - We do not think that it is appropriate to confer a discretion of this kind without guidelines. In fact, we think that the certainty given by Sections 95 and 106A of the Companies Act 1948 is desirable and should not be lost.

Para. 7.38 - we wonder whether the rule on failure to accept a succession or gift, if retained at all, should not be modified to take account of capital transfer tax (and see next para.).

Para. 7.39 - we think that the provisions of Section 172 of the Law of Property Act 1925 should be retained and the need to prove fraudulent or dishonest intention on the debtor's part.

Para. 7.40 - we would oppose any provision being given retrospective effect and also agree with the Advisory Committee that common principles must be agreed for the setting aside of transactions on the ground of fraud.

Para. 7.41 - we appreciate that floating charges are unknown to Continental legal systems, which may have difficulty in assimilating the concept. However, such charges have become an essential part of commercial financing in the U.K. and it would be unacceptable that the Convention should inhibit their use.

JURISDICTION (See page 25)

In our opinion, it is vital that the characteristic which decides jurisdiction under the Convention should be easily ascertainable and certain. Bankruptcy proceedings must nearly always be brought urgently to prevent the debtor disposing of the remaining assets and any feature which might provide a pretext for delay should be eliminated. Once the process has begun and the assets are under the control of a trustee/liquidator (or equivalent, in other jurisdictions) the pressure is much diminished and it is possible to examine other questions which may arise at great length.

As far as limited companies are concerned, the registered office satisfies our requirements for the characteristic which is to decide jurisdiction and we feel that it should be adopted. If, then, the presumption as to the place of the registered office being the "centre of administration" were to be made absolute (para. 3.10), we would support the adoption of the "centre of administration" concept. Any drawbacks it may suffer from would, we think, be overwhelmingly outweighed on this basis by the benefits of ready ascertainment and certainty.

We would observe that though most other EEC Members have less convenient company registration systems than ours, we gather that the Commission is much impressed by ours and may be considering the introduction of similar systems throughout the Community.

The "centre of administration" of a debtor other than a limited company would be less easy to ascertain (assuming the proposal above is accepted) but we have not found any better test and we therefore accept the concept for unincorporated bodies as well. In any case, we think that very few of the bankruptcies to which the Convention provisions apply will be of this kind.

Para. 3.12 - We propose to follow the Advisory Committee in considering Article 9 under the heading of Choice of Law (para. 4.2). We would, however, observe at this point that its unsatisfactoriness is mitigated by its already limited application and that to limit this still further might be a useful method of amending it.

Para. 3.13 - We would observe that the longer duration of bankruptcy proceedings in this country is due to features which make direct comparison with proceedings in Continental systems misleading. There, the tendency is to deal with insolvency by way of a strictly judicial process, of which the object is only to collect, realise and distribute the remaining assets. In the U.K., the movement has been towards a non-judicial procedure with the same objects but in addition with sufficient flexibility to preserve a business as a working enterprise, or an individual as an earner, the results of which we have found more profitable to creditors and less damaging to debtors.

Para. 3.14 - As we have said earlier, we think that it is vital to ensure that bankruptcy proceedings can be brought quickly and that any feature of the procedure which might provide the debtor with a pretext for delay should be eliminated. To require one court to investigate whether the jurisdiction of another prevails could give rise to argument and delay and we would in principle oppose any provision of this kind. However, if the registered office is to decide jurisdiction for companies, it would be relatively easy for a court to ascertain whether it has this jurisdiction or not. In unincorporated bankruptcies, it may be unavoidable that there will sometimes be disputes over jurisdiction since we do not think that an equally decisive test can be laid down, but it is probable that there will not be many of this kind.

Para. 3.15 - We support in principle the concept of "associated" bankruptcy but we think that neither the provisions relating to it, particularly in the Uniform Lawm but also those in Articles 10 to 12, nor the necessary safeguards are sufficiently clearly defined.

We have discussed the points arising out of Articles 1 and 2 of the Uniform Law under that heading but we feel that the wording of Article 11 should also be amended so as to emphasise that the director or manager whom it is sought to bankrupt has a right to due process, by insertion of the words: "try and" after "Annexe I, to", in line 3.

We feel that there may be a conflict between the provisions of Articles 10 and 11, though it may only appear to be so because of the translation. It seems to us that it is possible that a person who may not be declared bankrupt under Article 10 because he is protected by

the law of the State in which the firm, company etc. has been declared bankrupt may nevertheless be declared bankrupt under Article 11, because the court's power is not here limited by such a protection.

Para. 3.18 - Article 17 (1): As the Advisory Committee point out, the force of the objection to not applying lex situs in matters relating to immovables would be much diminished by the establishment of uniform rules on relation-back. It will also be necessary to ensure that agreement is reached on such matters as whether marriage is to be good consideration for a transfer of assets, as at present in English law. Thus the acceptability of this Article cannot be judged until the provisions of the Uniform Law are finally settled.

We assume that the provisions of Article 17(1) will determine only whether a given transaction is void or valid, and that, if the former, it will be for the lex situs to resolve any consequent disputes. Though this may produce a satisfactory result, it requires very careful consideration and we much regret that we have not had sufficient time to examine the conveyancing implications thoroughly.

Para. 3.20 - Article 17(3) and 17(6): We regard these provisions as unacceptable because of their unforeseeable, retrospective effect. It cannot be right that re-disposals of property should be brought about as they might under these provisions, nor that the courts of the place of bankruptcy should have powers of this kind.