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Northern Ireland
Dept. of Commerce.

SHORTENED REPORT ON EEC DRAFT BANKRUPTCY CONVENTION

By A. Douglas Lawton, Barrister,

For The Department of Commerce for Northern Ireland.

I am asked to write a short report in conjunction with my main report on the draft EEC Bankruptcy Convention. The main points are:

1. The defects of national laws show up in the draft: for example, the archaisms of the French law introduce elements involving the split between civil law and commercial law, and civil courts and commercial courts, the lack of certainty, coupled with paternalistic discretions, notably in the movable feast of the cessation des paiements. There is no sign that this draft takes into account the better aspects of common law systems, nor much sign that extensive comparative work was done among civil law systems so that the original draft could be influenced by all the best features of the relevant systems, and other systems. Weeding of the United Kingdom systems is equally necessary as a preparation for such a convention, and in particular the harmonisation, or even unification of the English, Scottish and Northern Irish systems into a U.K. system which could then be dovetailed into the EEC pattern. Independent reforms in the Northern Ireland system could include (1) the abolition of bankruptcy administered by trustees (as this method is not used); (2) abolition of the arrangement under supervision of the court (as it unduly favours the debtor, and hampers the official administration - and is little used at present); (3) adoption of the English method, involving a pause between the original petition and the adjudication, which permits the rights and wrongs to be sorted out before the full effect of the bankruptcy is imposed.(This is superior to the method by which the bankruptcy, with its attendant publicity and disabilities, starts immediately upon a successful petition, and is then corrected in suitable cases by invalidation proceedings.) (It will be noticed that the less convenient Northern Ireland method of immediate bankruptcy coupled with possible invalidation is employed in the draft convention.) No system is without its defects and archaisms, so that the consideration of an EEC draft should be regarded as the opportunity to reform and modernise the national systems; this would eliminate many of the problems in the convention. It would still fall short of unified law. The suggestion by Mr. John Hunter, Bankruptcy Registrar for Northern Ireland, that a new system, based on no-fault or fault, as in Ghana, be adopted in the U.K.,

should, I suggest, be considered for every one of the EEC states, as this would greatly simplify the agreement on international elements.

2. This particular method of producing an international system loses the advantages of the national systems. Possible losses to Northern Ireland include:

The certainty which is so crucial in commercial transactions, as for instance because of the drafting ambiguities; the discretions replacing fixed rules - notably cessation des paiements replacing an act of bankruptcy; the intrusion of foreign laws into local transactions, especially the "bankruptcy blight" which makes every local transaction capable of being invalidated by events and decisions abroad; and the fact that events and notices abroad may be unknown, or not understood; foreign concepts and time limits may prove to surprise everyone; and above all that local transaction wholly related to the local law may prove to be influenced or entirely governed by foreign law. Also centre des affaires.

Procedural and practical advantages and certainties may be lost: for example, Efficiency - attendance for statements, discussions, disputes, and hearing; the debtor's spouse may also be examined this way; the convenience and protection of the local creditors' assignee; local notices and advertisement; timing; vesting in the local Official Assignee, and the seizing of movables; disclaimer of onerous assets; costs; costs of delay; discretion to stay; stay by deed of arrangement. Ending proceedings by composition, or adjournment sine die. And dealing with deceased's insolvent estates and companies largely outside the bankruptcy court.

3. Inclusions

Bankruptcy itself should be included in the convention (but bankruptcy administered by a trustee could be abolished); I(a) of the Protocol.

Arrangements under supervision of the court should be abolished (but should be included in I(b) of the Protocol if retained in N.I. law).

Deeds of arrangement should be excluded, but should be a possible end of a bankruptcy, and the prevention of petitions for bankruptcy resulting from court approval under section 2 of the 1929 Act should be retained.

Inclusion of bankruptcy of deceased persons' estates, or their exclusion, should be considered.

Companies should be excluded, owing to the convenience of handling them by reference to their structure, and outside the bankruptcy court, as is almost invariably the case now. Their inclusion should not be agreed until the pros and cons of bankruptcy aspects versus form aspects have been considered in detail, and the corresponding major exclusions of the other contracting states, notably non-traders and piccoli imprenditori, have been included.

4. Exclusions

Reservations and exclusions are evidence of the unsuitability of the basic principles of unity and universality. Laying down these two principles as a conceptual framework for the draftsmen and committees is an inconsistent act by the governments of the member states. The question whether unity and universality are desirable objectives compared with co-operation internationally by correlating the results of national bankruptcies should be carefully considered by reference to actual cases, statistics, certainty, convenience, and especially justice and costs. The desire for justice by national governments can be tested by their willingness to rank equally with other innocent creditors in a bankruptcy, and to abandon parallel methods of recovery which compete with the fairness and protections of the bankruptcy. It must also be clearly acknowledged that any part of the bankruptcy referred to national law also represents an exclusion from the unity and universality of the convention. So does any exception to the effectiveness of judgments and orders and events in every state. The problems of this draft convention stem largely from the fact that lip-service is paid to the concepts of unity and universality, while the acts and rules of the member states operate in the opposite direction. Why not drop the alleged principles in favour of convention providing new co-operation in the international arena through correlating the results of national bankruptcies? Then reliance on local laws would produce certainty and justice locally, while correlation would prevent the international defects which are so apparent in the present anarchical pattern of competing national proceedings. For such correlation, national governments would have to serve justice by not claiming priority.

5. Starting from one language without simultaneous drafts in the other official languages must, I think, be inconsistent with the EEC Treaty, when the use of travaux préparatoires for interpretation is borne in mind, as the original draft must necessarily have more influence than later translations.

This aspect is even more serious when it is related to the nine and more different systems of law which have to be accommodated in a balanced conventional law, though it seems that the objection on the ground of inequality has not the same formal expression in the Treaty as the equality of the languages.

The problem of admissible methods of interpretation must be sorted out, and expressly stated in the convention, before any common rules can be agreed.

And in my opinion, the entire drafting exercise must be started afresh, after adequate comparative research, with drafts in each of the official languages (with, I believe, the agreed omission of Irish Gaelic).

6. Apart from the above five groups of background points, the most fundamental features of the draft itself, a r e , in my opinion, the rules for determining jurisdiction and the rules for determining which law should apply to the various aspects of the bankruptcy. I find both these sets of rules gravely defective. For locating jurisdiction, the"centre des affaires" (whatever that means) is far too uncertain a concept; it is clearly derived from the French separation of enterprises from individuals; for enterprises, it could apparently mean the same thing as "main control and management", a concept which has long been used for some tax systems - if this is the meaning, we do not need the new, invented concept; for individuals, it is doubtful whether it has any meaning - does an individual manage his affairs from his home or his office? Almost certainly from both. And many people manage their affairs from wherever they happen to be. And more and more people are become itinerant in a modern, jet-age sense.

The attempt to make the concept more certain by introducing presumptions is too unrealistic to succeed: not all firms have a registered office; but, more important, the great majority of companies (if N.I. companies were to be included) are not administered from their registered office.

And the attempt to make the jurisdiction in question unchallengeable should be condemned from the outset, for, apart from embalming a defective jurisdiction just as surely as the right jurisdiction, it leaves all the consequent and related doubts, possibly affecting thousands of transactions, as rampant as ever; it even sets up the possibility that two competing jurisdictions in which proceedings have been started are not challengeable.

On another aspect, the many places where jurisdiction is given to a court in a state other than the local one for the transactions, the asset, or the liability, cannot fail to be a disadvantage.

It is in connection with jurisdiction above all that the lack of provision for adequate preliminary investigation into the facts would be most damaging. The draft speaks like an examination paper in which all the facts are stated, whereas in practice, the establishment of the facts is often at once the most important and the most difficult part of the case.

The importance of certainty in the rules governing jurisdiction is enhanced by the fact that the applicable law has in several circumstances been hitched to the jurisdiction. (This connecting of law to jurisdiction is itself defective.)

7. Applicable law

As mentioned in 6., the second most fundamental feature is the choice of law to govern the bankruptcy, and its various aspects. I find the rules in the draft for choice of law almost wholly defective: the bankruptcy law is mainly a matter of assets and debts; the location or situation of both assets and debts is a question of mixed fact and law, and the rules suggested for such location for the purposes of this convention are almost wholly unrealistic, and seem to show very little acquaintance with the ordinary law on the question. This may be because the French law differs from the English and Northern Irish law on locality of assets and debts, but from my experience of double taxation treaties, I should say that it is possible for different countries to recognise the same rules for a specific purpose. The comparative research should be done, and an agreed realistic rule adopted for the situation of assets and debts.

When a contract is concerned, as it often is in the case of debts, and sometimes with assets, it is clear that the "proper law of the contract" must be employed in connection with location, as well as interpretation and other aspects of the contract. I have little doubt that the appropriate law for the various aspects of the contract will differ from one national system of law to another, so that the comparative research must be done in order to find whether a "proper law" can be agreed. The essential thing is that the law applied must not depart from the law which the contracting parties had in mind when they entered into the contract. The idea of the greatest realistic connection with the contract and its performance must be right; thus the application of irrelevant law must be wrong, and yet this seems to be the effect of most of the rules of the draft on location and applicable law. Here again, it seems likely that the only common rule which could fit in with the intentions of the contracting parties will be the application of the proper law which applies to every other aspect of the contract. (I have had cases in practice where the Germans were trying to do just that, so that they would presumably agree with this inevitable conclusion.)

A practical result of the application of irrelevant law is that courts are required to apply foreign law, which is both difficult and costly;

or the answers rely upon rules of conflict of laws, which are notoriously underdeveloped, and often uncertain, and which in different national systems will all give different answers. But, even more important, the effect of applying a different (and usually irrelevant) law to assets and debts, and especially contracts, would be to scrap the intended results and the accrued results, and to replace them (to everyone's surprise) by an entirely fresh set of features and consequences.

8. Unknown concepts

Concepts and liabilities unknown to other systems must be researched, listed and dealt with specifically. The two obvious cases in common law, unknown to civil law, are (1) equitable interests, charges and obligations, and (2) (if companies are included) floating charges.

9. Preferences should be abolished unless they can be justified in the eyes of every member state. If any preference is agreed, it could be adopted as an exception to the general rule that debts rank pari passu in a bankruptcy, but it should be borne in mind that preferences affect ordinary (and deferred) creditors more than the preferred creditor, and are unfair to ordinary creditors, and probably resented by them. Most persons dealing with a firm in the ordinary course of business are usually ordinary creditors, so that it is the business fraternity in that trade who are being disadvantaged by any preference.

Preference has nothing to do with locality of assets, and should not be confused with security for the debt. The rules for choice of law covering movable security are perhaps the most extraordinary in this area. And floating charges should be borne in mind (if companies are to be included). Equitable charges must also be dealt with expressly.

Another type of preference occurs in competing methods of recovery of a debt, such as distress for rent, so all such rival methods must be researched, listed and dealt with expressly.

The two main areas for special preferences seem to be government debts and wages. Both represent injustices to other innocent creditors, and should be abolished. The tendency to create superpreference for wages, and to extend it to future remuneration, is little short of a fraud on other creditors, as it makes them pay instead of the society as a whole. It also shows the lack of sincerity in governments when they say they seek fairness in the bankruptcy rules, whether national or this draft.

Governments should not take preference over other innocent creditors. They are behaving hypocritically when they talk of fairness between creditors and keep preference. Both their preferences and their alternative or additional remedies (such as the well-known self-help of the French fisc) are inconsistent with their declared intention to adopt principles of unity and universality.

10. Drafting

Many of the defects of the draft are the result of ambiguous or doubtful

wording: for example, the opening of bankruptcy proceedings and the opening of a bankruptcy must be distinguished (if there is any difference), and the "cessation des paiements" is ill-defined (as well as being unsatisfactory); while "centre des affaires" and "establishment", even if they were to be used for jurisdiction and choice of law, must be clearly defined. I feel that such definition would soon highlight their deficiencies. But the weaknesses in wording are far less important than the many defects in concept and application.

11. The uniform law

The subjects dealt with in the Uniform Law in the Annex are rather minor and supplementary aspects of a bankruptcy, and this fact demonstrates that the contracting states are not really trying to achieve unity and universality. If these two were in fact the principles on which the draft is based, they should be the first two rules of the Uniform Law, backed up by rules, particularly concerning jurisdiction and choice of law, which were common to all nine states.

12. Conclusions

Despite my tendency to an international and comparative approach, I regret to say that my conclusions in the large and in detail are almost wholly against the draft and the alleged system which it attempts to portray. I find that it does nothing to reduce the complexities, the unknown elements, the uncertainties, and above all, the cost, of the current position. Instead I find it worse in each of these aspects. It does not in fact or proposed law pursue the two principles of unity and universality which it pretends to follow; exclusions, reservations, references to national law, and cases which do not have universal effect throughout the Community area, are all large and important exceptions to those alleged principles. This is not a conclusion based on the balance of advantages and disadvantages; I find virtually no significant offsetting advantages in the pattern attempted by this draft, though I do not rule out a better synthesis. There would be less unrealism, and less cost, in the correlation of national results.

A. Douglas Lawton

18th April, 1975.

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20 February 1975

Dear Traylor

EEC BANKRUPTCY CONVENTION

I have been invited to comment on the preliminary draft Convention on Bankruptcy etc and would like to begin by first disclaiming any real knowledge of, or even acquaintance with, the subject of bankruptcy. Next, I would like to congratulate the Committee on the excellence of the consultative paper which is as lucid as it is thorough. Finally, I would also like to congratulate them on having had the good sense to co-opt John Hunter who, of course, knows all there is to know about Irish bankruptcy law and is held in the highest possible regard here. So far as Northern Ireland is concerned, there is really no need for anyone else to say a word on this subject. Nevertheless, I offer the following comments with some diffidence in case they might be thought of some possible help. (The references are to the paragraphs of the consultative paper):-

1.11 I think that the Convention ought to allow reference to the report and other travaux preparatoires so long as the latter are specified precisely. One has to read an incredible amount of paper nowadays and it is vital to keep this within sensible limits if possible.

1.12 I agree with the comment here. The whole arrangement is untidy and the draft flits about like the proverbial bluebottle. It deals with the same concepts at different points and it does not tackle procedural points in the order

/in which

in which they actually occur in practice. This is purely negative criticism but lack of time prevents my offering more positive suggestions. Personally, I find it quite impossible to draft anything in committee. Responsibility for a draft ought to rest with one person alone after everybody else has expressed their views.

2.2 On the whole I think the Convention should extend to the winding-up of the estates of insolvent debtors. A distinction between such estates and those of a living bankrupt is something which should be avoided if possible. But there are difficulties about the Convention on International Administration of Estates which have still to be ironed out and I do not see how we could have the one Convention without the other.

2.3 I agree that private arrangements should be brought in if this is practicable at all and, with reciprocal enforcement, one would think it could be made to work. One has to bear in mind that occasionally private arrangements are little more than complete swindles and possibly this is a reason for second thoughts on the subject. Much the same considerations apply to voluntary liquidations (paragraph 2.4).

2.5 We do not have criminal bankruptcy in Northern Ireland and the answer depends really on how it works out in England. I never knew any criminal who had any property at all by the time he was sentenced but I have never defended anyone in the present age of affluence. I would still think, that 98% of the persons actually sentenced by the courts here are by that time wholly impoverished so that the practical scope of criminal bankruptcy would be slight.

2.6 I agree with the Committee.

/2.7

2.7 I think the proposal at the end of this paragraph is fair enough.

2.8 I have no new institutions to suggest.

2.9 This is a matter for the Channel Islands and the Isle of Man but as respects this and the succeeding paragraphs I would be inclined to take a power to include overseas territories by Order in Council. What is also needed in our law is the preservation of the general power to act in aid of other courts. See section 71 of the Act of 1872. There should then be a power to apply that provision to any other country if we are satisfied that reciprocal facilities will be afforded to our courts by the courts of that country.

3 and 4 I find these the most difficult parts of the Convention. I may be old fashioned in feeling that there is possibly some benefit in leaving local creditors at an advantage. They are the people who are likely to trust a potential bankrupt more and who will suffer most should he come to grief. For my part, I would prefer to aim at a Convention which provided for the harmonisation of the bankruptcy laws of the countries concerned. There could be a discretionary power in the local court to leave bankruptcy administration to the foreign court. What I have in mind is a rule authorising the local court, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, and having regard to the rights and convenience of local creditors and other relevant circumstances, may either to dismiss the case or suspend proceedings in it under such terms as it may think appropriate. This would allow bankruptcy proceedings in the foreign court to continue where the local court was satisfied that no injustice would be done to local creditors by such continuance. There is an American rule (Rule 119 of the Federal Bankruptcy Rules) to this effect. The great difficulty about the proposed Convention is that it introduces into our law concepts and

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procedures entirely strange to us without really providing any hard and fast practical advantages that I can see. It would be much easier for countries trained in the continental tradition, and perhaps even for Scotland, to accept the Convention than for England and Wales, Northern Ireland or the Republic of Ireland. My idea would be to allow foreign bankruptcy to operate in the first instance as a kind of second string. If the advantages of dealing with bankruptcy on the basis of the Convention become clear then a more complete acceptance of the proposals would be fully justified.

On paragraph 5 I think there ought to be a standardisation of preferential categories in any event but I am not in the least qualified to deal with the specified points raised in the paper.

6.4 I think the individual needs the same protection as the liquidator but I wonder if some continental systems would not already give him this by subrogation.

6.5 Would it be possible to adopt the sort of procedure used in the Convention for the legalisation of foreign documents.(Cmd. 4503).

6.7 and 6.8 The Committee's suggestions agreed.

6.12 I whole-heartedly agree with the Committee as to the High Court.

6.13 I support the suggestion of notice.

6.14 I agree with the Committee's general recommendation.

6.15 I think the grounds for challenge are too limited and would prefer to use section 4 of the Act of 1933 as a model.

6.16

6.16 I think that in the nature of things longer time limits are probably necessary.

6.17 Again, I agree to channelling through the High Court but I prefer "habitual residence" to "domicile".

6.18 I agree to limit appeals to the Court of Appeal. In bankruptcy matters any appeal is something of a luxury.

6.19 I respectfully share the Committee's view on Articles 65 and 67.

7 I am in general agreement with what the Committee has said on the subject of a uniform law but I really do not know enough about our present bankruptcy law to comment usefully on this section. I do think, however, that floating charges have a useful and important part to play in our system. They enable businesses to be run without the management being hog-tied by the moneylender. Some banks can have extraordinarily restrictive ideas about how an ordinary small business should be run and to adopt a system which would allow them more readily to call the tune would simply cripple enterprise and initiative. The floating charge can be a very useful form of security.

I hope this is of some help.

Yours sincerely

W. A. Leslie

Law Reform Consultant

Bankruptcy Rules

United States Reports

Vol. 411

Rule 119. Bankrupt involved in foreign proceeding.

When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

BUCL 14/3/75

Northern Irish Insolvency Law in relation to the draft E.E.C. Convention on Bankruptcy etc.

The law governing the winding up of companies in Northern Ireland is to be found in the Companies Act (Northern Ireland) 1960, with a few later amendments. Most of the 1960 Act provisions are identical with those of the Companies Act 1948. As in Scotland, however, we do not as yet have anyone corresponding to the English Official Receiver in relation to compulsory winding up and there are other important procedural differences (e.g. no requirement for a statement of affairs). Two advisory committees, the latest reporting last year, have recommended that the Official Assignee in Bankruptcy should be given similar functions in relation to the winding up of companies as the Official Receiver has in England and Wales, and I am confident that this will be enacted in the near future. For the past few years, and as an interim measure to enable compulsory liquidations to proceed in some cases where, because of lack of assets, no creditor is prepared to carry the responsibility for the liquidator's remuneration, the Northern Ireland Department of Commerce will permit an accountant on the staff of the Department to be nominated as liquidator without requiring creditors to give an indemnity for the cost of his services.

Exclusive jurisdiction in relation to company matters, including winding up, is vested in the Northern Ireland High Court. There is no County Court jurisdiction.

Thus, in relation to the winding up of companies the draft Convention presents no problems peculiar to Northern Ireland. Our problems are the same as those which apply to the whole of the United Kingdom.

The principal Act relating to the bankruptcy of individuals and partnerships is an Act of 1857 applying to the whole of Ireland. There have been many amendments since then, particularly by major Acts of 1872 and, in Northern Ireland only, 1929. The present position is that the general principles are the same as England and Wales, but there are considerable procedural differences and significant differences, for example, in relation to exempted articles (by an amendment of 1969 the law governing the items which a bankrupt may retain was assimilated to the revised law as to items exempt from process of enforcement by an individual creditor and now comprises such articles of wearing apparel, furniture, bedding and household equipment as appear to the Official Assignee to be essential for the domestic purposes of the bankrupt, his spouse and his dependants residing with him and tools and implements of trade to the value of £50 or such higher amount as may from time to time be fixed in respect of the enforcement of judgments : thus we are even more "liberal" in this field than the recently publicised proposal of the Justice committee). Other spheres in which our law differs in detail from the law of England are - fraudulent preferences, proof of contingent debts and liabilities, set-off and discharge. Exclusive jurisdiction in bankruptcy is vested in the High Court. There is no County Court jurisdiction.

One significant difference of practice is that all bankruptcies in Northern Ireland are administered by the Official Assignee, who broadly corresponds with an Official Receiver in England and Wales). Provision was made in the 1872 Act in Ireland for the appointment of a trustee by the creditors but this appears to have been very rarely used and ~~it appears~~ only two trustees have been appointed in Northern Ireland in 100 years and none in modern times. In this respect our system is the s as New Zealand, for example.

In the adaptation of the draft Convention to our bankruptcy law most of the considerations are common to England and Wales. Perhaps I may, however, mention a few special aspects of our law which will have to be borne in mind. Firstly, we have a procedure which has not formed part of the law of England since 1861, namely, arrangements under the control of the bankruptcy court. These proceedings will fall to be listed in Article I (b) of the Protocol. Under this procedure a debtor in financial difficulties may, as an alternative to bankruptcy, petition the bankruptcy court for a protection order which, if granted, prevents enforcement by individual creditors from proceeding pending the holding of a meeting of creditors at a sitting conducted by the Registrar at which the debtor puts forward a proposal for an arrangement with his creditors. If accepted by the statutory majority of creditors and approved by the court as being reasonable and proper such proposal is binding on all creditors who had notice of the proceedings. The proposal may, and often does, involve the vesting by the debtor of all or part of his property in the Official Assignee to be realized as in bankruptcy. In all cases the Official Assignee receives creditors' proofs and any money payable by or on behalf of the debtor, and makes the payments to creditors provided for in the proposal. There are significant differences between the law applicable to an arrangement matter from that which applies in bankruptcy; for example the bankruptcy law relating to fraudulent preferences, void settlements, relation back, after acquired property and deferment of spouses' claims, do not apply. There is no examination of the debtor. All proceedings are held in chambers and there is no publication in the Gazette or a newspaper. This latter practice will, therefore, be affected by Article 25 of the draft Convention.

/Bankruptcy

Bankruptcy proceedings proper are, to use the language of the English translation of the draft Convention, "opened" in Northern Ireland by an order of adjudication which vests the bankrupt's assets in the Official Assignee. We do not have a receiving order stage preceding adjudication. The petition for adjudication is ex parte and, when a creditor is the petitioner, the order is served on the bankrupt, who has a short time within which he may show cause by challenging the petitioning creditor's debt or the act of bankruptcy. Our acts of bankruptcy do not include a notice of suspension of payments and our debtor's summons, which takes the place of the English bankruptcy notice, need not be founded on a judgment : it may be issued on prescribed proofs that the creditor has made reasonable efforts to obtain payment. The granting of a certificate from our recently constituted Enforcement of Judgments Office that a judgment is unenforceable is an act of bankruptcy as, hitherto, was a return of nulla bona by the under-sheriff, following in this respect the law in Canada, Australia and New Zealand, but not England.

Concern is being shown in Northern Ireland about the proposed basis of jurisdiction under Article 3, particularly because of our land frontier with another member State and the fact that many Northern Irish residents have interests across the border. One problem that has been posed, for example, is how the Northern Ireland court will determine if it has jurisdiction to adjudicate bankrupt a person residing exclusively in Newry (Northern Ireland) but having his sole business in Dundalk and who commits an act of bankruptcy in Northern Ireland. Will it be

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legitimate to have regard to whether the petitioning creditor's debt is for goods or services supplied to the debtor personally in Newry (e.g. a family grocery bill or overdue rates on his house) or is for a business debt? Where is his centre of affairs? He clearly administers his main business interests in the Republic of Ireland, but in relation to his personal affairs his interests are administered in Northern Ireland.

I should like to draw attention to the need for an examination of the draft Convention in the light of the special problems for the United Kingdom arising from the existence of three systems of law operating within the one member State.

Firstly, there are numerous references to the law of the State in which the bankruptcy has been opened. This can only have meaning in the United Kingdom in the sense of the law of England and Wales, Scotland or Northern Ireland, depending on what court has made the order. Does this need to be explicitly stated?

Secondly, the acceptance of the Convention by the United Kingdom would highlight the need which exists independently of it for an acceptance of the principle of the unity of the bankruptcy within the United Kingdom. Although there are extremely useful provisions in the Bankruptcy Acts of the three parts of the United Kingdom providing for mutual enforcement of bankruptcy orders ~~throughout the United Kingdom~~ and for the courts of one jurisdiction acting in aid of those of another, it is possible, for example, for a debtor who has been adjudicated bankrupt in Northern Ireland to have a receiving order made against him in England if the pre-requisites for such an order exist, with the sole

/exception

exception (which is not mutual) that under the Irish 1872 Act a debtor who resides or carries on business exclusively in Northern Ireland may only be made bankrupt in Northern Ireland). The English court may, in its discretion, and presumably usually would, decline jurisdiction or stay proceedings already commenced in such circumstances, but they are not bound to do so. Article 2 of the draft Convention would not, of course, have any bearing on the power of an English court to make a receiving order against an undischarged Northern Irish bankrupt. However, if both orders were made after the Convention became operative, prima facie, both orders are entitled to claim recognition in the other member States and there is nothing in the Convention, nor would one expect there to be, to resolve such an internal conflict. Again, at present a protection order in Northern Ireland under the arrangement provisions of the Irish 1857 Act will not prevent a subsequent bankruptcy adjudication against the debtor in Northern Ireland or England, but it would appear that the effect of Article 2 of the draft Convention will be to restrain bankruptcy proceedings against him in a member State outside the United Kingdom, and this notwithstanding that the arrangement proceedings under our law are not binding on any creditor who did not have notice of them.

Actions by individual creditors in another member State are restrained by Article 21 if the bankruptcy or arrangement order is made in Northern Ireland in exercise of jurisdiction under the Convention, but an English court would not be empowered to restrain such proceedings except after and under the terms of an order in aid of the Northern Irish court.

I would like to see United Kingdom legislation providing that a receiving order in England would have the same effect in Northern Ireland as a Northern Irish bankruptcy adjudication order in relation to staying

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proceedings in bankruptcy or actions by individual creditors against the debtor. As regards company winding up there are provisions in the Companies Act 1948 and in the Northern Irish Companies Act 1960 to prevent conflicts of jurisdiction between the courts of the three parts of the United Kingdom and for mutual enforcement of orders and the restraining of actions against the company throughout the United Kingdom. On the other hand the provisions of the Bankruptcy Acts providing for mutual orders in aid between the courts of the United Kingdom have no counterpart in the Companies legislation.

Whilst I cannot of course speak with any authority with regard to the insolvency law of the Republic of Ireland it may be useful if I indicated the position there in general terms. Company law was until 1963 governed by the United Kingdom Act of 1908. It is now contained in a new Act of 1963 which follows very closely the Northern Ireland Act of 1960, but is not identical. The bankruptcy law in the South has not been amended to any considerable extent since the 1872 Act, except with regard to preferential creditors and is broadly the law which applied also in Northern Ireland before our amendments of 1929 and later years. However, two years ago a very comprehensive report on Irish bankruptcy law was published and it is to be anticipated that there will be legislation in the fairly near future. If many of the recommendations of the committee of inquiry are implemented the law will be brought closer to that of Northern Ireland.

It is interesting to note that the provisions of the 1872 Irish Act and the 1914 Act for orders in aid between the courts of Great Britain and Ireland still operate in both parts of Ireland and quite

/recently

recently the Northern Ireland Bankruptcy Court made an order in aid of the Bankruptcy Court of the Republic of Ireland. In the 1963 Companies Act there is provision for the enforcement in the Republic of Ireland of an order made by a court of any country recognized for the purposes of the section in question (s.250) by order made by the Irish Minister for Industry and Commerce.

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9(2.6)

25th March, 1975.

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Our Ref: AGH/LWD/PS

To Commander T. H. Traylor
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Dear Commander Traylor,

Re: EEC Preliminary Draft Convention on Bankruptcy.

On behalf of the Smaller Businesses Association I have pleasure in enclosing for your attention some brief observations on the consultative paper issued by the Department of Trade Advisory Committee in respect of the above.

I believe that smaller businesses are very much involved in the export trade and other forms of business and commerce on a European scale, and are therefore likely to be effected by the Bankruptcy Proposals.

I am very grateful to have had the opportunity of looking at the consultative paper.

Yours sincerely,

A. G. Hurton

1/26/3.

The provisions of the Convention must be considered in the context of its legal basis in Article 220 of the Treaty of Rome, its declared object being "the simplication of formalities governing the reciprocal recognition of judgments of courts or tribunals". It is to be considered, therefore, whether the Convention does indeed introduce an overriding simplication, and, if it does, whether the benefits to be derived from such a simplication are accompanied, and perhaps overshadowed, by corresponding drawbacks.

The essential principle of the Convention is a simplification - the creation of a uniform condition of bankruptcy, and the establishment of a hierachy of jurisdiction for deciding questions of bankruptcy and insolvency. The Convention prescribes the rules by which the court of competent jurisdiction is to be ascertained, and a debtor having once been declared bankrupt by that court his condition of bankruptcy is required to be recognised by all other contracting states. But it is the state of bankruptcy only which has any uniformity, not the conditions for being declared bankrupt nor the consequences of such a declaration. With only a few exceptions - but the exceptions are important in introducing into English law novel and far-reaching concepts - there is no attempt to create a uniform law of bankruptcy.

In fact, the failure to prescribe uniform conditions and consequences of bankruptcy is a serious and fundamental deficiency in the Convention. The basic aim of the Convention is laudable, and the provisions of the Convention could provide a basis for a uniform law of bankruptcy. However, it is submitted that the Convention does not go far enough. To this extent - that the provisions of the Convention if given effect without the uniformity of conditions and consequences which are clearly called for would give rise to a complexity of law and a state of uncertainty that

would be directly opposed to the fundamental objective of the Convention.

The Convention does indeed assist creditors of a bankrupt debtor, in bringing all assets of a debtor wherever they may be (provided in a contracting state) within the reach of the creditor. Things are also made easier for a creditor in that it should always be possible for him to ascertain the debtor's centre of administration and thus ascertain the law which should apply to a bankruptcy of the debtor.

But is this sufficient? The creditor can, in theory, ascertain which national law would first of all be applied to the bankruptcy. But of the courts of the state of the centre of administration decline to assume jurisdiction, bankruptcy may be declared in any other state in which the debtor has an establishment. Thus, any creditor who fails to "get in first" may find himself claiming in a bankruptcy which may be governed by the law of any one of the other contracting states. The efforts to protect the body of creditors have resulted in a multiplicity of laws being applicable to a bankruptcy in any member state, and a consequent uncertainty for creditors, debtors - and indeed trustees in bankruptcy and receivers - of their respective rights and objections. The resultant uncertainty is in fact so extensive as perhaps to outweigh the obvious advantages arising from the implementation of the Convention.

SECOND MEMORANDUM FROM THE COMMITTEE OF SCOTTISH CLEARING BANKERS TO THE DEPARTMENT OF TRADE AND INDUSTRY'S COMMITTEE TO STUDY THE DRAFT E.E.C. BANKRUPTCY CONVENTION.

In offering the following comments on the draft E.E.C. Bankruptcy Convention, the Scottish Banks would mention that their views are expressed from a purely Scottish standpoint and that there are, of course, material differences between the laws of Scotland and England on matters relating to bankruptcy. It should also be noted that, at the present time, extensive changes and reform in Scottish bankruptcy law are under consideration.

Title II. Jurisdiction.

Section I. General Provisions.

Article 3. Jurisdiction based on the Centre of Administration.

Paragraph 1 "Where the centre of administration of the debtor is situated in one of the Contracting States, the courts of that State shall have exclusive jurisdiction to declare the debtor bankrupt".

The Scottish Banks seek clarification as to whether "exclusive" might mean "primary".

Title IV. General effects of the Bankruptcy.

Section II. Advertisement.

Article 26. Effects of the Bankruptcy as against Third Parties.

Paragraph 1 "In the Contracting States other than that in which the bankruptcy was declared, the bankruptcy shall take effect in full as against third parties from the eigth day following its advertisement in the Official Journal of the European Communities. Transactions effected after the expiry of that period shall be invalid as against the bankruptcy creditors".

In/

In view of the considerable number of bankruptcies which will be advertised in the Journal and the difficulties which may be encountered by a Bank in identifying any of their own customers mentioned therein, the Scottish Banks suggest that the effective date be the fifteenth day following advertisement in the Journal.

Title IV. General effects of the Bankruptcy.

Section III. Functions of Authorities administering the Bankruptcy.

Article 30. The lodging and disputing of proofs of debt.

Paragraphs 1 and 2

The Scottish Banks consider that all claims in bankruptcy proceedings should be by Affidavit sworn before a Magistrate, Justice of the Peace or Notary Public and not merely submitted by sending an ordinary letter to the Authorities of the State in which the bankruptcy proceedings have been instituted.

Title IV. General effects of the Bankruptcy.

Section IV. Effects of the Bankruptcy on the Estate of the Debtor.

Article 33. Universality of the Bankruptcy.

Paragraph 2

"The bankruptcy shall not, however, take effect with respect to property devolving on the debtor subsequent to the declaration of the bankruptcy, where the law of the State in which the bankruptcy proceedings have been instituted excludes such property".

The Scottish Banks regret that the above provision allows for a diversity of law regarding "after acquired" property. In this connection, the Scottish Banks would respectfully draw attention to the provisions of Section 98 of the Bankruptcy (Scotland) Act, 1913, (viz. If any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall ipso jure fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee .....).

Title VIII. /

Title VIII. Final Provisions.

Article 76.

Annex I.

Uniform Article 4. Periods of relation-back and actions to set aside frauds on creditors.

Paragraph 1 The Scottish Banks would recommend that the United Kingdom reserves the right, when introducing into her laws the provisions of Annex I, not to refer to the date of suspension of payments, referred to in Uniform Article 4B of Annex I.

Title VIII. Final Provisions.

Article 76.

Annex I.

Uniform Article 5. Set-off.

Paragraph 1 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 I.

PROTOCOL.

Article 1.

The Scottish Banks would recommend that, in accordance with Article 1 (1) of the Convention, the Convention, in Scotland, shall apply only to sequestrations and liquidations and not to Judicial Factories, Trust Deeds or other informal winding up arrangements.

Article VI.

The Scottish Banks would recommend that the gazetting provided for by Article 25 (3) of the Convention shall appear, in Scotland, in "The Edinburgh Gazette".

Article IX. /

Article IX.

The Scottish Banks would recommend that, in accordance with Article 30 of the Convention, proofs and disputes of debts shall be submitted, in Scotland, to the Trustee (in a sequestration) and to the Liquidator or Liquidators (in a liquidation).

March 1974.

8(2.4)

SCOTTISH LAW COMMISSION
OLD COLLEGE, SOUTH BRIDGE
EDINBURGH
EH8 9BD
Telephone: 031-667 3437

Our ref: L3/268

7 May 1975

Commander T H Traylor
Department of Trade
Insolvency Service
2/14 Bunhill Row
LONDON EC1Y 8LL

Dear Trevor,

I refer to our telephone conversation of 5 May when we discussed Article 30 of the EEC Bankruptcy Convention. You confirmed my impression that the Cork Committee would prefer, on the whole, to have a standard form of creditor's claim, if that could be devised and agreed.

On reconsidering this matter, I am more firmly persuaded that this would be of advantage. A simple informal writing is only too likely to omit essential information as to whether part of the debt has already been paid or compensated and as to whether there is any security or where there are co-obligants. This matter was considered some time ago in an internal context by our Bankruptcy Team and I enclose a minute by Mr Lewis which recommends the adoption of a style proposed by the Institute of Chartered Accountants in Scotland which was accepted by the Law Society. It would be of great assistance if I could have your Department's comments on this style both in a United Kingdom context and in an EEC context. I would be equally glad to have the comments of my colleagues on the Cork Committee.

Yours ever
Sandy

A E ANTON

SCOTTISH LAW COMMISSION BANKRUPTCY TEAM

NO. (14) REPLACEMENT OF SWORN AFFIDAVITS BY CLAIM CERTIFICATES

At para. 40 of Memo. No. 16 the Working Party dealt with the affidavit procedure as follows:- "We consider that the present statutory requirement for a sworn affidavit and claim should be removed by an appropriate section in a new Bankruptcy Act. The new statutory form of claim which we propose should replace the present affidavit and claim would be in the form suggested by the Law Society of Scotland. It would take the form of a certificate as to the veracity of the debt claimed by the creditor and would not require to be signed on oath.[1] The new statute should also provide that the making of a false statement in a claim would be a punishable offence. In view of our recommendation for the abolition of the oath, sections 21 and 22 of the 1913 Act will become superfluous and should be repealed. We also recommend that section 24 should be amended by substituting references to the certificate as to the veracity of the debt claimed by the creditor or to the certificate for references to an oath of verity or to an oath contained in that section."

Among the suggestions made in the Report which were particularly commended by the North of Scotland Hydro-Electric Board was the substitution of certificates of claim for sworn affidavits.

In his letter to the Commission dated 29th May 1973 Mr C A Taylor, the Inspector General of the D.T.I.'s Insolvency Service, noted that it is proposed to remove the statutory requirements for a sworn affidavit and claim, and pointed out that this is also one of the proposals of the draft E.E.C. Bankruptcy Convention.

---

[1] See annexation hereto for Claim Certificate.

The only comments which were received on this point being very much in favour of the Working Party's proposals it would appear that these should be given effect to in the Report to Ministers.

28.8.73 J.B.S. LEWIS

APPENDIX F

CLAIM IN BANKRUPTCY

1. Bankrupt's name, designation and address.

2. Creditor's full name, designation and address.

3. Amount of claim in words not figures.

4. If any security is held for the debt add "except" and give particulars including your valuation of each security. If there are other obligants give their names and addresses. Each security must be professionally valued and the valuation should be lodged with the claim.

5. If creditor is a partnership sign the Firm's Trading Title and add "By" A.B. Partner in said firm. If creditor is a limited company then the certificate must be signed by a director, secretary or duly authorised officer, the claim must be under the Common Seal or under the hand of some official duly authorised in that behalf and the fact that the officer is so authorised must be so stated.

I/We hereby certify that on 197 , the date of the Bankruptcy of[1].

there was and still is owing to[2].

the sum of[3].

in accordance with the annexed or attached detailed statement which I/We have signed as relative hereto.

I/We further certify that no part of said sum has been paid or compensated and that no security is held for the same, and there are no obligants bound for the Debt other than the said Bankrupt.[4].

And I/We claim to vote and rank in the said bankruptcy in terms of this certificate conscientiously believing the same to be true.

Dated at ..... this .....
day of 197 .

5.
.....
.....

MANDATE

Name and address of mandatory .....
.....

.....197..

SIR,

You are hereby authorised to attend, vote, and act for ..... at all Meetings to be held under the bankruptcy of ..... designed in the above Claim, with the same powers

as belong to

5. .....

.....

Note: This style is based on the form recommended by the Institute of Chartered Accountants.

RE 3562 600 11/71 BL(319)

10(35) Solicitors Company.

E.E.C. PRELIMINARY DRAFT CONVENTION ON BANKRUPTCY

COMMENTS ON THE CONSULTATIVE PAPER ISSUED BY THE DEPARTMENT OF TRADE ADVISORY COMMITTEE FROM THE PROFESSIONAL BUSINESS COMMITTEE OF THE CITY OF LONDON SOLICITORS COMPANY

In the Consultative Paper the Committee have invited comments and advice from interested parties on a number of matters arising. In view of the shortness of time available, we have confined our observations to matters which appear to us to be of particular direct concern to the members of the Company and clients.

We have adopted the abbreviations used in the Consultative Paper (page 5).

C.P. Par. 2.2

It seems to us that C. should apply to the estates of insolvent deceased debtors, it seems to us to be illogical that the position of creditors should be affected by the death of the debtor.

C.P. Par. 2.3.

We point out that at present trustees under deeds of arrangement and receivers under debentures do not have the powers of liquidators to attack past transactions etc., it seems to us that there is no reason why the powers of such persons should be extended by the Convention. It seems to us best to leave well alone in this respect and to leave the enforcement of rights not enforceable by a trustee or receiver to a liquidator as and when appointed.

C.P. Par. 2.4

A. It seems to us that the Convention should certainly apply to creditors' voluntary liquidations, it seems to us that it would be a recipe for chaos unless the Convention involves both compulsory winding-ups and creditors' voluntary winding-ups, indeed it would not seem likely that creditors would often vote for voluntary winding-up if the liquidator did not have the powers which he would have under the Convention. We would suggest Section 288 of the 1948 Act be amended to provide that on the calling of a meeting of creditors under that Section the liquidation should be deemed to become a creditors' voluntary liquidation.

B. It seems to us that the Registrar of the Company's Court might be empowered to make an order declaring that the Company is in creditors' voluntary winding-up *and* certifying the appointment of the liquidator on an ex party application by the liquidator. We feel it is unnecessary that such an application is ~~being~~ made in cases where there are no assets or creditors outside the jurisdiction of the English Courts.

C.P. Par. 2.10

We agree with the doubts expressed by the Advisory Committee and would plead for the Convention to be limited in its application to the European members of E.E.C.

C.P. Par. 3.9

It seems to us that the "centre of administration" should prove a satisfactory concept in principle except in the case of individual debtors who are not engaged in business. In such cases we suggest that the last known place of residence should be substituted.

C.P. Par. 3.10

We agree that it would be preferable that the presumption that the centre of administration of a company is its registered office should be transformed into an absolute rule thereby removing one source of doubt and confusion. The same would no doubt apply to registered offices of firms in countries where firms do have registered offices, consideration might perhaps be given to an amendment to the Registration of Business Names Act to provide that the Principal Place of Business registered under that Act should be considered to be the registered office of a firm or person registered under that Act.

C.P. Par. 3.11

We agree with the view that the Court should have no great difficulty in determining the existence of "establishment". Nevertheless we are inclined to suggest that Article 4 of the Convention may be superfluous (see Art. 5)

C.P. Par. 3.12

It seems to us that the situation propounded is not a satisfactory one, it would be preferable in the circumstances mentioned that the assets in the state in which is the central administration should be free from attack by creditors in other contracting states

C.P. Par. 3.20

We are of the opinion that it would be essential that with regard to immovable property the Courts of the situs should continue to have exclusive jurisdiction.

C.P. Par. 3.22

It appears to us that in the case of avoidance of transactions whether or not under the uniform law the matter should be determined by the

Courts of the state in which the transaction took place or the state governing its proper law and not by the Court of Bankruptcy. Jurisdiction in any other situation it seems to us puts third parties in an impossible position.

C.P. Par. 3.25

Here again it seems to us that the question of validity of a transaction should be decided by the Courts of the place where the transaction took place or of its proper law.

C.P. Par. 4.3

It does not seem to us reasonable that the person company or firm should escape from proceedings in the circumstances mentioned although the prospect of this happening would be it seems to us substantially reduced if the proposal with regard to registered office is accepted. We suggest that perhaps Article 5 of the Convention might be enlarged to include cases where under the law of the centre of administration no bankruptcy proceedings can be taken.

C.P. Par. 4.8

It seems to us that Article 24 should not apply to applications based upon events subsequent to the bankruptcy. On this basis the period of ....31 days seems to us not unreasonable but we consider that the competent Court should have power to extend that time.

C.P. Par. 4.12

Our opinion is that publication in a paper not read by those concerned is useless and there is a real danger of loss to U.K. creditors if they are unaware of bankruptcy proceedings abroad. We suggest that any bankruptcy or liquidation affecting more than one country should be advertised also in all countries affected.

C.P. Par. 4.13

We favour a formalised procedure.

C.P. Par. 4.21

We feel that this is a matter for the law of the state of the bankruptcy.

C.P. Par. 4.22

We agree that the bankruptcy in any of the E.E.C states should lead to the same disqualifications in England as a bankruptcy here.

C.P. Par. 4.28

We favour a solution giving the Court where an action is pending, a discretionary power to stay the action.

C.P. Par. 4.29

We agree with the Committee's view

C.P. Par. 4.30

We agree with the Committee's suggestion as to relating back of bankruptcy so as to cut down measures of enforcement against the bankrupt's property effected during a specified period before the date of the bankruptcy. It seems to us reasonable that a creditor under an execution which has been completed but set aside under the Convention as amended should be entitled to retain his costs against the liquidator.

C.P. Par. 4.35 and 4.36

We do not consider that these matters should be governed by the law of the state of the bankruptcy.

C.P. Par. 4.40 to 4.45

It seems to us that Articles 36 to 39 of C. as drafted are likely to lead to very considerable confusion of third

parties and it would be preferable that (a) all contracts relating to immovable property should be governed by the lex situs and (b) that the effect of the bankruptcy on all other contracts should be determined by the proper laws of contract to be determined in accordance with the laws of state in which the bankruptcy commences.

C.P. Par. 4.48

It seems to us that it would be preferable that the interpretation of Article 76 of the Convention should be that set out in Para 4.47 of C.P.

C.P. Par. 4.54

It seems to us that the suggested qualification is a wise one.

C.P. Par. 4.55

It seems to us that in all cases the trustee or liquidator should have power to appoint a delegate trustee or liquidator in any contracting state in which there may be assets or debts of the bankrupt. If he could not do so, it seems to us that great difficulties might arise for the liquidator in the state of the bankruptcy.

C.P. Par. 4.58

We agree with the Committee's preliminary view.

C.P. Par. 5.10

The considerable preference claimed by the Revenue Authorities in the case of bankruptcy raises fundamental problems because in practice it results in available assets not infrequently being absorbed by fiscal claims. This may not be the place to argue for a change and there may be no present alternative to accepting the position.

C.P. Par. 5.12

The proposal that foreign revenue authorities can make claims is a fundamental change with far-reaching consequences. It may result in very difficult problems for legal advisers, accountants and others, who can hardly be expected to give opinions on such points. We would favour a solution that fiscal claims could only be enforced against assets situate in the country of the claiming authority.

C.P. Par. 5.12 to 5.17

It seems to us that the proposals contained in the Convention which deal with preferential debt are unnecessarily complicated, perhaps not quite fair to unsecured creditors and might cause the liquidator a great deal of trouble. We agree that the suggestion contained in 5.17 of C.P. would be a considerable improvement.

C.P. Par. 6.4.

It seems to us essential that protection should be given to any individual who acts in accordance with a judgment or order of his own state

C.P. Par. 6.13

It seems to us that the general principle embodied in Article 62 of the Convention is acceptable.

C.P. Par. 6.14.

We agree with the view expressed by the Committee

C.P. Par. 6.15

We agree that the text of Article 63 is confusing and requires improvement. It appears to us that the grounds of challenge are too limited and it would be preferable to bring them

into line with Section 4 of the Foreign Judgments (Reciprocal Enforcements) Act 1933.

C.P. Par. 6.16

We consider that the time should be at least doubled.

C.P. Par. 7.4

It seems to us preferable that Articles 3-6 of U.L. should apply only where there are bankruptcy proceedings.

C.P. Par. 7.7

We do not consider that any person should be declared bankrupt until a claim has been established in a Court of Law and he has failed to meet it.

C.P. Par. 7.9

We agree that U.L. Article 1 is much too vague and must be made more specific.

C.P. Par. 7.10

It seems to us that U.L. Article 1 (2) should stand.

C.P. Par. 7.11

It seems to us that Article 1 when clarified should be included in English law particularly bearing in mind that the decisions of the Courts over a number of years have made it very difficult indeed to establish liability under Section 332 of the 1948 Act which seems to us therefore to be in need of amendment in any event.

C.P. Par. 7.14

We consider that in Article 4 (A) of U.L. the period should be two years.

C.P. Par.7.15

We agree with the view expressed by the Committee and

consider it essential that there should be unification of the periods for relation back.

C.P. Par. 7.16

We agree that it is essential that there should be a uniform definition of cessation of payments.

C.P. Par. 7.17

We should have thought that U.L. Article 4(F) is acceptable ~~which favours a solution on the lines of those of C.P. Par. 7.21.~~

C.P. Par. 7.23

In our opinion the proposed definition of "cessation of payments" is acceptable.

C.P. Par. 7.29

We agree in general with the basis of U.L. Article 4(a) but are not happy with the expression "in fulfilment of a moral obligation". It seems to us this requires a more concise definition. Consideration should also be given to the question of the payments made under orders of Divorce or other Family Courts.

C.P. Par. 7.30

We should have thought that something on the lines of U.L. Art. 4(B)(1)(a) might be acceptable.

C.P. Par. 7.31-7.32

It seems to us to be illogical that under U.L. Art.4(B)(1)(b) payment by cheque would be good for purposes mentioned but then in similar circumstances a giving of a security would be ~~alright~~ Void under U.L. Art.4(B)(2). The giving of security or payment by cheque or ~~un~~other usual means should only be invalid if made with intention to prefer or under the 1948 Act, Section ~~22~~ 322.

C.P. Par. 7.34

We agree with the view of the Committee.

C.P. Par. 7.37

We agree that U.L. Art.4(D) is not acceptable in its present form and should lay down guidance lines if it is to stand.

C.P. Par. 7.39

It seems to us that there should be retained the right to set aside (a) any transaction with intent to defraud creditors and (b) any improper disposition of the property of a Company. It might perhaps be useful to incorporate ~~under~~ something equivalent to the 10 year period of Section 42 of the Bankruptcy Act 1914.

C.P. Par. 7.41

We agree strongly with the Committee's view.

General

If the United Kingdom remains in the E.E.C. it seems to us that it is beneficial that the attempt should be made to harmonise the insolvency laws of the various countries concerned and it seems to us that this aim will be destroyed if substantial reservations by any country are permitted. It is appreciated that this will mean alterations in the law relating to insolvency in the United Kingdom in the case of domestic as well as international insolvencies and it is considered that this must be accepted providing it can be done without seriously weakening the position of the creditors. It is considered however that better protection must be given to third parties who deal innocently with the bankrupt person, firm or company. It is also considered important that the law should not be tipped so heavily in

favour of bankruptcy proceedings as to cause prejudice to other voluntary proceedings aimed at avoiding bankruptcy.

Insurance Brokers - 4221 11

Chairman Francis Perkins DSC (telephone 01-709 0575) Secretary Alan Teale (telephone 01-626 6257)
COMITE EUROPEEN DES COURTIERS D'ASSURANCES DU ROYAUME UNI
UK INSURANCE BROKERS' EUROPEAN COMMITTEE 3-4 LIME STREET LONDON EC3M 7DQ
EUROPEES COMITE VAN VERZEKERINGS-MAKELAARS UIT HET VERENIGD-KONINKRIJK
Permanent Delegate Ronald Smurthwaite, Rue du Commerce 124, 1040 Brussels (telephone 13-39-14)

T/BW

18th April 1975

T.H. Traylor, Esq.,
Secretary to the Advisory Committee,
Department of Trade,
Insolvency Division,
2-14 Bunhill Row,
London, EC1Y 8LL.

Dear Mr Traylor,

We now submit our views on the draft Convention on "Bankruptcy, Winding-up, etc.".

Would you please take the following views into consideration:-

Preamble

(1) We have considered the Convention both in relation to its application to companies, firms and individuals trading as insurance brokers and to their clients (policyholders and reinsurers).

(2) We have done so on the basis that Articles 18 and 19 will remain unchanged and that the law of the country of the centre of administration of the debtor will govern all proceedings and applicable law.

(3) We do not feel that the draft is sufficiently clear in one important respect. In consequence a problem recurred constantly in relation to the two bases of consideration we adopted.

We were uncertain what is intended where an insolvent company is a subsidiary and the parent is itself not insolvent or the parent is insolvent but a subsidiary is not.

Permutations which further confuse the matter are that parents and subsidiaries may be in different countries and/or they may be involved in different types of undertaking within a conglomerate group.

It could occur that within such a group some "undertakings" are exempted and others not.

/.....

1/21/4

It was assumed that each company (being a separate legal entity with its own specific "centre of administration") would be treated individually. Further, this individual application of the Convention provisions would proceed even if other companies in the same group are also insolvent.

Reinsurance Companies

We are of the view that having regard for the confusion that will otherwise result in the U.K. the inclusion of reinsurance undertakings should be limited. Only those cases where such undertakings are not subject to other specific law relating to winding-up proceedings should be affected.

In the U.K. the majority of insurance companies underwrite both direct and reinsurance business.

Non-Contracting States

We are not certain what the position would be if a jurisdiction of a non-contracting state maintained proceedings irrespective of Article 6.

Applicable Law

Article 18

Arising from the general question of the treatment of corporate entities, we feel it to be unclear whether in the event that local law is applied to assets, a local liquidation (bankruptcy) could occur with assets being applied entirely locally to the detriment of creditors in other E.E.C. countries.

The same point is felt to arise in regard to the seizure of assets in satisfaction of debts.

Moveable and Immoveable Property

Article 21

The distinction made in the Article between immoveable and moveable property is not in our opinion clear; the difference between the two forms of property is fine, and in practice without definition the reasons for making the distinction will not easily be grasped.

Advertisements

Article 25

Whilst the use of gazetting as a means of announcing liquidation proceedings is seen to be a simple practical course even if of doubtful value, it is felt that a system of circulation of information on the liquidation to all creditors should also be required.

Contracts of Sale

Article 38

The view implied in clause 4.43 of the Consultative Note that the establishment of special choice of law rules to come into operation

/.....

only upon bankruptcy of one of the parties to a contract could be undesirable is supported. It is preferred that the application of law should be consistent throughout the life of the contract concerned.

Further, it is not clear whether "contracts for sale" includes both tangible and intangible goods (services).

Preferential and Secured Creditors

Article 40

The proposals relative to preferential and secured creditors should include unpaid insurance premiums on the grounds that the assets protected by the insurances would be in jeopardy if the premiums for the insurance protection are not paid.

The Uniform Law

The proposed extension of the bankruptcy of a firm or company to the persons directing or managing the firms or companies and the method of putting these persons into bankruptcy is felt to be a serious deterrent to the future progression of staff to positions of responsibility.

Examples have occurred of such a deterrent working in practice in countries where this principle of law already exists.

The provision in the Uniform Law for the maintenance of rights of set-off is welcomed.

Yours truly,

p.p. Secretary

Stewart Wrightson
(Credit Management) Limited

Kingston Bridge House, Church Grove
Kingston upon Thames, Surrey KT1 4AG

Telephone 01-546 3801-977 8951
Telex: 929606
Cables: Lutidine
Kingston upon Thames

9(1-6)

Commander T.H. Taylor
EEC Bankruptcy Convention Advisory Committee
Gavrelle House
2-14 Bunhill Row
London EC1Y 8LL

Your ref:

Our ref: PAD/MD

Date: 7th January 1975

Dear Sir,

re: Consultative Paper
7.39 Paulian Action
Question (b) "Modification"

We would suggest to the Committee that the present English Law which places onus of proof on the creditor should be amended.

The Scots Act and Article 1167 of the French Civil Code provide the seller with a much less onerous task.

Wherever Court Action, whether brought for Fraud or Insolvencies are involved, we should like to see clear provision being made for action to be brought by the Credit Insurer where it is clear that that organisation does have an interest in recoveries.

Yours faithfully,

P.A. Dawson
Managing Director