

INTERIM REPORT

by  
the Council of the Society  
to  
the Department of Trade Advisory  
Committee  
on

the EEC PRELIMINARY DRAFT CONVENTION  
ON BANKRUPTCY, winding up, Arrange-  
ments, Compositions and similar  
proceedings.

The Law Society of Scotland is a statutory body set up by the Solicitors (Scotland) Act 1949 and comprises all solicitors practising in Scotland. The Council consists of forty representative members and two co-opted members.

On first receiving the Draft Convention for consideration, the Council appointed a special committee of persons experienced in the field to consider the Draft and to prepare a detailed report to the Council.

At an early stage in its deliberations the Committee had an opportunity of considering the Memorandum prepared by the Faculty of Advocates in Scotland on the Draft Convention and found itself in agreement in general terms with the conclusions of the Faculty as summarised on Pages 18 and 19 of that Memorandum. (See Appendix).

Nevertheless the Committee proceeded with its consideration of the detailed terms of the Draft Convention and would by now have placed a report before the Council were it not for receipt by the Council at this stage of the Consultative Paper from the Department of Trade Advisory Committee upon the Draft Convention. The Committee has decided to delay its report to the Council until it has had an opportunity of completing an examination of the /

of the Consultative Paper so as to be in a position to advise the Council at the one time of its detailed views of the Draft Convention and as to possible comments and criticisms which it considers might be sent to the Advisory Committee in accordance with the invitation to do so.

In the meantime, however, the Committee has reported to the Council that the more it continues its detailed consideration of the Draft Convention, the more it shares the general criticisms of the Draft Convention set out in the Memorandum by The Faculty of Advocates in Scotland referred to above and the Council, having considered these views, has agreed to the submission of this Interim Report, feeling strongly that the considerable volume of comment and criticism which may be expected to arise as a result of the invitation so to do by the Advisory Committee, and which will tend to be directed to a considerable extent to detailed points in the draft Convention, may obscure the fundamental weaknesses in the proposals which are the subject of the Memorandum by the Faculty of Advocates. Since, in the view of the Council, these fundamental weaknesses cannot be corrected by adjustment or amendment of the present Draft Convention, it is proper, in the view of the Council, to consider independently of any detailed consideration of the Draft Convention, the question of whether or not the negotiations towards the adoption of the Convention on its present lines should be pursued.

In the view of Members of the Council, the various countries making up the EEC have developed over the years elaborate and sometimes idiosyncratic systems for dealing with insolvent persons and companies. These systems not only embrace the administrative arrangements for dealing with the insolvency but the attendant considerations of equalisation of diligence, reduction of fraudulent preferences and gratuitous alienations, personal liability of directors in the case of companies, criminal liability and so on. It is inherent in the conception of the Draft Convention that, apart from very limited fields, each of the countries will preserve its own system, not only for insolvencies where there is no question of either assets /

assets and/or creditors in another country, but for insolvencies where there are assets and/or creditors in another country or countries but the bankruptcy falls to be wound up under the jurisdiction of the country concerned.

Against that background, the Draft Convention relies for "uniformity" upon the creation of a single bankruptcy for each insolvency, such bankruptcy excluding all other bankruptcies in other countries in the EEC and, faced thereafter with the complicated problems which will arise where an administrator in one country requires to deal with assets and/or creditors in other countries, evolves a set of rules as to the law to be applied in any particular case. Such rules are of course essential to the concept of a single bankruptcy but result, in the view of the Council, because of the differences in national laws, in quite arbitrary decisions requiring to be made which will, in many instances, seem to the parties involved to be quite illogical and unfair. Moreover the proposition of a single bankruptcy is to be overridden by national concepts such as that in some countries a non-trader or even a small trader cannot be made bankrupt so that, in practice, anomalies will abound. The Council shares the view of the Faculty of Advocates in Scotland that the introduction of the concept of the single bankruptcy without the contemporaneous adoption of a uniform bankruptcy law for the countries of the EEC is likely to give rise to complicated disputes; to delay insolvency proceedings; and to be seriously prejudicial to creditors of and persons trading with concerns which become insolvent.

It is important, in this connection, to appreciate that, in the field of commerce, Insolvency Law and Procedure assume importance not only when insolvency actually occurs but form the background of many commercial dealings. Over the years, commercial concerns in the various countries have built up through experience and advice a considerable knowledge of the effects of insolvency and conduct their relationships with other trading concerns in the light of that knowledge. Thus the willingness of a particular trading concern to offer credit to another on certain terms such as the provision of security/

of security and the like may well turn upon the knowledge of both concerns of the effect of insolvency upon one or the other. In the view of the Council, the uncertainty in commercial dealings which would be created by the adoption of the present Draft Convention would be very damaging, quite apart from the difficulties which would arise in the operation of single bankruptcies as envisaged by the Draft Convention.

In the two cases where the adoption of uniform law is proposed, i.e. personal liability of directors and managers and the effects of bankruptcy on antecedent and current transactions, radical amendment of the law of Scotland would be required which has not been thought to be justified in recent considerations of the Bankruptcy and Companies Acts. In the view of the Council, it would be quite wrong to amend the law of Scotland in these two limited respects except as part of a general exercise directed towards the introduction of a uniform bankruptcy law for the countries of the EEC. As the adoption of such a uniform bankruptcy law seems remote in view of the insistence of the Member States upon the maintenance of specialities of their own insolvency law in fields other than the two mentioned, any question of amendment of the law in these two fields should be postponed indefinitely.

Notwithstanding these criticisms of the Draft Convention, the Council appreciates that considerable difficulties are experienced in practice in tracing and realising assets in other countries and in ascertaining and ranking the claims of creditors in a fair and reasonable way. Having declared that the basic proposals contained in the Draft Convention would produce more difficulties in practice than they would resolve, the Council has applied its mind to the question of whether interim measures are possible which would assist in dealing with the difficulties immediately above mentioned.

In the practical experience of Members of the Council, a trustee in bankruptcy, or liquidator of a Scottish company, will almost inevitably require professional assistance to realise assets in other countries. He will similarly require professional assistance in dealing with claims and in /

and in particular special claims by creditors in other countries e.g. lien, and set off. In the field of relation back, where the acts complained of had occurred in other countries, professional assistance in these countries would inevitably be required.

In these circumstances, the Council sees considerable advantage in that professional assistance being provided in other countries where there are creditors and assets by a trustee or liquidator appointed. In such other countries the estate of the insolvent would thereafter be administered by co-operation among the various trustees or liquidators in accordance with rules designed to secure an equitable distribution to creditors in all Member States.

In a simple<sup>e</sup> case, for example, of a Scottish liquidation where the company concerned had factories in both Scotland and in France, a French liquidator would be in a position to realise the assets there; to deal under French law with any special problem arising such as relation back; to deal with preferential claims in accordance with French law; and to adjudicate upon the claims of ordinary creditors.

The Scottish liquidator would carry out similar functions in Scotland and what would be required, thereafter, would be a basic framework of rules under which the two liquidators would meet the fees and expenses incurred in conducting their respective operations and would then distribute the ingathered assets among the various classes of creditors in the two countries.

The Council suggests that the first trustee or liquidator to be appointed should be responsible for the initiation of bankruptcy or liquidation proceedings in any other country of the EEC where there are assets and creditors of the bankrupt, firm, or company, unless such proceedings have already been initiated in such other countries. The trustee or liquidator first appointed should also be responsible for taking the initiative in making such arrangements as may be necessary between or among the trustee to trustees/

or trustees, liquidator or liquidators, however appointed, and himself to carry into effect the proposals referred to above.

To avoid unnecessary expense, the "registration" in another country of the EEC of a bankruptcy or liquidation order made in the "first" country should be sufficient in itself to authorise the Court of that other country to issue a first order in bankruptcy or liquidation under its own procedures. The Council does not exclude the possibility of arrangements being made for "registration" in the case of voluntary liquidations.

The fees and outlays of each trustee or liquidator would be a first charge on the assets ingathered by him. Any unpaid balance of fees and outlays of other trustees or liquidators would form a second charge on these assets. For the reasons expressed earlier in this Interim Report, this would cause little prejudice in circumstances where the costs of professional advisers in other countries inevitably form, in almost every case a first charge upon assets realised there.

Where there are assets only, or creditors only, in other countries of the EEC where a trustee or liquidator had not been appointed, the duty and right to deal with these would fall upon the trustee or liquidator in the "first" country unless otherwise agreed between him and the other trustees and liquidators.

The same procedure would be adopted in the matter of assets and creditors in countries outwith the EEC.

As a general principle, the Council feels that the framework of rules governing the relationship between the trustees or liquidators in the various countries of the EEC should be incorporated in a Convention. It would be a central provision of the Convention that there be set up a European Bankruptcy Court with wide discretionary powers to resolve disputes or differences between or among trustees and liquidators. These problems would arise between or among experienced trustees or liquidators and the Council/

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Council is confident that in many cases they could be eliminated through the good sense and expertise of such persons. In the event of submissions to the European Bankruptcy Court being required, it is thought that, before submission, the disputes could be reduced to critical issues capable of being disposed of with the minimum of expense by a form of procedure similar to a Stated Case.

As to the fundamentals of the rules, the Council considers that fees and outlays of trustees or liquidators should be dealt with as set out above; that generally speaking secured creditors should be dealt with under the law of the country in which the security subject lies whether moveable or immoveable; that preferred creditors should rank in the first instance only upon available assets in the country in which their debt arises and that any ranking elsewhere should be an ordinary ranking only; and that all ordinary creditors, including preferred creditors who have not obtained payment in full out of the assets in the country in which their debt arises, should rank pari passu on the total assets available for distribution to ordinary creditors.

Such rules would in the view of the Council have the advantage of clarity although there are obviously specially difficult cases such as where a creditor holds security and/or preferred claims over assets in more than one country and makes advances in more than one country.

There remain, in the view of the Council, some difficult problems such as that which occurs in the case of a small trader in Italy, where, according to present Italian law, bankruptcy cannot occur. If the insolvent had assets in Scotland and were sequestrated here, Italian creditors would be entitled to rank on the Scottish assets although neither they nor the Scottish creditors would be entitled to rank upon the insolvent's Italian estate. There is no alternative, in the view of the Council, but to incorporate in the framework of rules, the provision that the general ranking of creditors is conditional upon bankruptcy or liquidation being legally /

legally competent in the particular case in each of the two countries concerned. Thus, in the example quoted, Italian creditors could not rank in the Scottish sequestration.

An advantage of these proposals in the present context is that no radical amendment of the laws of the countries of the EEC would be required either dealing generally with bankruptcy or liquidation or dealing with such matters as personal liability of directors and managers or relation back. All these would fall to be dealt with within the context of the various national bankruptcies and liquidations.

The present bankruptcy law of Scotland, for example, does not exclude the right of foreign creditors to rank in their various classifications nor does it envisage that the trustee will not collect assets in other countries to be applied and distributed in accordance with Scottish bankruptcy law. The difficulties arise in the practical application of the existing law to creditors and/or assets abroad and a Convention providing overriding rules for a situation where there are assets and/or creditors in more than one country in the EEC would be welcomed because, in the view of the Council, it could not but assist. Further, through the co-operation of trustees and liquidators in the various countries, there might well evolve more extensive rules which might ultimately form the basis of uniform bankruptcy law.

The Council does not pretend that this Interim Report has produced a scheme in sufficient depth to be utilised at once as an interim measure if, as the Council recommends, the present Draft Convention be abandoned. The Council urges, however, that the basic proposals be given very serious consideration and, if approved, made the subject of further consultation.

In name of the Council.

J.D. WHELAN

President.

28 February 1975



Extract from Memorandum by the  
Faculty of Advocates

Conclusion

The Faculty's conclusions may be summarised as follows:-

(a) The Convention leaves the major matters of the content and application of bankruptcy law to be determined by national laws, and in these respects makes no contribution to achieving the aims of unity and uniformity.

(b) The principal innovation proposed is the creation of a new ground of exclusive jurisdiction in bankruptcy matters. The introduction of this ground would be likely to give rise to complicated disputes, to delay bankruptcy proceedings, and to be seriously prejudicial to creditors of and persons trading with bankrupt concerns.

(c) The provisions of the Convention and Uniform Law relating to the personal liability of directors and managers would involve major alterations in the rules of limitation of liability, for which no justification is put forward. The provisions of the proposed Uniform Law are vague and uncertain, and do not adequately define the conditions on which personal liability would arise.

(d) The provisions of the Convention and Uniform Law relating to the effects of bankruptcy on antecedent and current transactions are inapplicable in Scotland without major amendment to the system of bankruptcy law. They are also illogical and obscure.

(e) Many of the provisions of the Convention are obscurely drafted and unsatisfactory.

The Faculty would accordingly be opposed to acceptance of the Convention and Uniform Law by the United Kingdom.

COUNCIL DRAFT

11.3.75.

THE LAW SOCIETY OF SCOTLAND

*Law Society of  
Scotland*

*Arts 1-27*

FIRST MEMORANDUM

by

the Council of the Society

to

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similar proceedings.

The Law Society of Scotland is a statutory body set up by the Solicitors (Scotland) Act 1949 and comprises all solicitors practising in Scotland. The Council consists of forty representative members and two co-opted members.

Reference is made to the Interim Report on the draft Convention already submitted by the Council on 28 February 1975. In particular the Council wishes to make it clear that the following detailed comments on the Convention only apply if the adoption of the Convention is to proceed. The comments do not in any way imply that the Council is departing from its previously expressed view that the present draft Convention should be abandoned.

The comments are made on the original English text dated 4 June 1973 prepared for the then Department of Trade and Industry and revised by the Foreign and Commonwealth Office.

I - ARTICLES 1 to 27

TITLE 1.

SCOPE OF THE CONVENTION AND GENERAL PROVISIONS.

Article 1 - Scope of the Convention.

1. This Convention shall apply, irrespective of the nationality of the persons concerned, to the forms of proceeding (hereinafter called "bankruptcy"), specified in Article 1(a) of the Protocol to this Convention, and to the arrangements, compositions and other forms of proceeding listed in Article 1(b) of the Protocol.

2. In so far as is not otherwise provided, the provision relating to bankruptcy shall apply by analogy to the arrangements, compositions and other forms of proceeding listed in Article 1(b) of the Protocol.

Comment: The Council assumes that in the event of the United Kingdom acceding to the Convention, sequestration in Scotland would be incorporated among those forms of proceeding specified in Article 1(a) of the Protocol but it is not wholly clear whether the Convention is intended to extend to sequestration of the estates of a deceased debtor. It is also assumed (despite the opinion to the contrary expressed by the Department of Trade Advisory Committee in their Consultative Paper (Para. 23)) that Voluntary Trust Deeds for behoof of Creditors and creditors voluntary liquidations of companies (but not composition arrangements as at present obtaining) would be included among those proceedings listed in Article 1(b) of the Protocol. It is however noted that the forms of proceeding already listed under the latter Article appear to involve the participation either of the Courts or administrative machinery of the States concerned. In these circumstances the current rules concerning the operation of Trust Deeds would require to be amended so as to bring them under the supervision of the Scottish Courts.

3. This Convention shall not apply to bankruptcy or to the arrangements, compositions and other forms of proceeding listed in Article 1(b) of the Protocol, if such proceedings are instituted in respect of:

- insurance undertakings of all kinds, irrespective of their legal form, with the exception of those which engage only in re-insurance;
- the undertakings designated by each Contracting State and listed in Article 11 of the Protocol, to the extent determined by that Article.

Comment: Without the benefit of specialist knowledge of the operation of insurance undertakings in European States the Council can see no valid reason why these should be excluded from the Convention or indeed that any types of bankruptcy proceedings taken in respect of the institutions listed in Article 11 of the Protocol should be regarded as being outwith the scope of it.

Article 2 - Unity of the bankruptcy.

The proceedings specified in this Convention, when instituted in one of the Contracting States, shall have full legal effect in the other Contracting States and shall be a bar to the institution of any other such proceedings in those States.

Comment: The Council fully accepts that in the event of the Convention becoming part of the Law of the United Kingdom, the institution of bankruptcy proceedings in any Contracting State should be a bar to the institution of any other similar proceedings in other Contracting States, and that the debtor should be automatically regarded as bankrupt in all of the States which are parties to the Convention. This Article embodies the principle of unity of the bankruptcy throughout the E.E.C. which underlies the draft Convention.

TITLE 11

JURISDICTION.

SECTION 1: GENERAL PROVISIONS.

Article 3 - Jurisdiction based on the principal place of business.

1. Where the principal place of business 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.

2. The principal place of business means the place where the main interests of the debtor are usually administered. In the case of firms, companies or other legal persons that place shall, for the purposes of this Convention, be presumed to be their seat as prescribed in their statutes until the contrary is proved.

Comment: The Council has strong reservations about the proposition that jurisdiction to declare a person bankrupt should be decided with reference to that person's principal place of business ("centre d'administration"). The Council appreciates that the underlying reason for the proposition is that in certain European States an individual may not be made formally bankrupt unless he is engaged in trade or business, or even in Italy if he is a "small trader" (piccolo imprenditore). This is a concept entirely foreign to the Law of Scotland and one which the Council would not wish to see enacted in this country. From the U.K. standpoint, therefore it would /

it would appear to be more logical for the Convention to state that the Courts of the Contracting State in which the debtor has his domicile (or possibly his usual residence) should have exclusive jurisdiction to declare him bankrupt, and that in the case of legal persons such as firms and limited companies, the Contracting State in which the registered office is situated should have exclusive jurisdiction. It is in any case understood that the expression "seat as prescribed in their statutes" would be more accurately translated from the French as "registered office".

Article 4 - Jurisdiction based on the existence of a business establishment.

Where the principal place of business is not situated in a Contracting State, the courts of any Contracting State in which the debtor has a business establishment shall have jurisdiction to declare the debtor bankrupt.

Article 5 - Jurisdiction based on national law.

Where neither the principal place of business nor any business establishment is situated in a Contracting State, the courts of any Contracting State whose law permits them to declare the debtor bankrupt shall have jurisdiction to do so.

Comment: If the location of the debtor's centre of administration is to be the criterion for determining jurisdiction in bankruptcy proceedings, the Council has no comment to make on either of these Articles which follow logically from the main principle. (Reference is however, made to the Council's comments on Article 3. 2 above).

Article 6 - Transfer of the principal place of business to another Contracting State.

1. Where the debtor has, within the six months before the court becomes seised of the matter, transferred his principal place of business to another Contracting State, both the courts of the latter State and those of the State where the principal place of business was previously situated shall have jurisdiction to declare the debtor bankrupt.

2. The courts of a Contracting State in which there has been instituted, in accordance with this Convention, one of the forms of proceeding referred to in Article 1(b) of the Protocol to this Convention, shall retain jurisdiction to substitute for the form of proceeding instituted any other form of proceeding referred to in the Convention, even where the conditions of jurisdiction laid down in Articles 3 to 5 are no longer satisfied. However, so long as such substitution has not taken place, any court which has acquired jurisdiction under Articles 3 to 5 may, where an arrangement or /

or composition is already being implemented, entertain bankruptcy or other proceedings instituted in respect of debts incurred after the approval of the arrangement or composition. When such bankruptcy or other proceedings have been instituted the courts which previously had jurisdiction shall cease to have jurisdiction to effect such substitution as is referred to above.

Comment: The Council accepts that where a debtor has transferred his principal place of business from one Contracting State to another, that the courts of both States should have concurrent jurisdiction to declare him bankrupt and the suggested period of six months during which this jurisdiction is to remain seems reasonable. The proposal whereby the forms of proceeding listed in Article 1(b) of the Protocol may be superseded by any other form of proceeding referred to in the Convention is also approved, in particular the proposal whereby a Court having jurisdiction under Articles 3 to 5 of the Convention may declare a debtor bankrupt where a composition arrangement has been entered into at the sight of the courts in another Contracting State .

Article 7 - Transfer of the principal place of business to a non-Contracting State.

Where the debtor has transferred his principal place of business to a non-Contracting State, the courts of the Contracting State in which the principal place of business was previously situated shall retain jurisdiction if they become seised of the matter within six months of the transfer.

Comment: The Council approves of the terms of this Article but suggests that the period during which the courts of the Contracting State in which the debtor previously had his principal place of business should retain their jurisdiction for a period of one year as opposed to six months.

Article 8 - Transfer of a business establishment..

Where the jurisdiction of the courts of one of the Contracting States is based on the existence of a business establishment, the provisions of Articles 6 and 7 shall apply to the transfer of that business establishment..

The comments on the immediately preceding Article apply here also.

SECTION 11 - SPECIAL PROVISIONS

Article 9 /

Article 9 - Non-merchants and small traders.

1. Where the courts of a Contracting State, which have jurisdiction under the provisions of the preceding Section, are unable to declare a debtor bankrupt by reason of their national law because the debtor is not a merchant, or is a small trader (piccolo imprenditore) within the meaning of Italian law, the bankruptcy may be declared by the courts of one of the other Contracting States if the debtor has a business establishment in that State, or if in the absence of an establishment the law of that State authorises such proceedings.

2. Judgments given under the rules of jurisdiction laid down in paragraph 1 shall not take effect in the Contracting State in which the debtor's principal place of business is situated.

Comment: While welcoming the provision whereby the courts of a Contracting State, which have jurisdiction to do so, may declare a debtor bankrupt notwithstanding the fact that under his national law such a person may not in fact be rendered bankrupt, the Council considers that this Article cuts directly across the principle of universality of the bankruptcy embodied in the draft Convention and that all Contracting States should effect such legislative changes in their domestic legal systems as may be necessary to ensure that all individuals may be made bankrupt whether or not they are engaged in business. It follows that the Council does not accept the terms of paragraph 2 of this Article. In any event a Liquidator's authority to act on behalf of all creditors wheresoever situated should be acknowledged by the courts of all Contracting States.

Article 10 - Members of firms, companies or other legal persons with unlimited joint and several liability.

The courts of a Contracting State in which a firm, company or other legal person, comprising one or more members with unlimited joint and several liability for the debts of that firm, company or other legal person, has been declared bankrupt shall, where the law of that State permits such members to be declared bankrupt, have jurisdiction so to do, irrespective of where the principal place of business of the individual members is situated.

No comment.

Article 11 - Persons directing or managing a firm, company or other legal person.

The courts of the Contracting State in which a firm, company or other legal person has been declared bankrupt shall have jurisdiction, in accordance with Article 1 of Annex 1, to declare the persons referred to therein bankrupt.

Comment: /

Comment: The principle of this Article is approved but reference is made to the Council's observations on Article 1 of Annex 1.

Article 12 - Persons responsible for the management of a firm, company or other legal person.

1. The courts of the Contracting State in which a firm, company or other legal person has been declared bankrupt shall have jurisdiction to entertain actions founded on the liability incurred by the persons specified in Article 2 of Annex 1 by reason of their management.

2. Those courts shall have jurisdiction to declare such persons bankrupt under the conditions defined in Article 2 of Annex 1.

Comment: The principle of this Article is also accepted by the Council, but again reference is made to its Comments on Article 2 of Annex 1.

Article 13 - Jurisdiction in special cases.

1. Where the law of the State in which the firm, company or other legal person has been declared bankrupt does not permit the declaration of the bankruptcy of the members with unlimited joint and several liability referred to in Article 10, or of the persons who have been directing or managing it referred to in Article 11, such members or persons may be declared bankrupt by the courts of the other Contracting States in accordance with the rules of jurisdiction laid down in Articles 3 to 8.

2. When one of the persons referred to in Articles 10, 11 and 12 is already a bankrupt in one of the Contracting States, that bankruptcy shall be a bar to the institution of fresh bankruptcy proceedings under those Articles.

Article 14 - Proof of the debts of a bankrupt firm, company or other legal person in the bankruptcy of a person who has been directing or managing it.

In the cases referred to in Articles 11, 12 and 13, the liquidator of the firm, company or other legal person shall prove in the name and for the account of the bankruptcy creditors of that firm, company or other legal person as a creditor in the bankruptcy of the persons referred to in those Articles.

Comment: The Council approves of the principle embodied in these two Articles but considers that in practice inequities could arise. It is possible to envisage a situation where a partnership having its principal place of business in a Contracting State, the domestic laws of which do not enable the individual partners to be rendered bankrupt, to have one partner whose principal place of business is situated in a Contracting State whose laws do permit his individual bankruptcy. This constitutes a departure from the /



the Convention's central jurisdictional principle which is that the courts of the Contracting State in which the debtor has his centre of administration should have exclusive jurisdiction to declare him bankrupt. In these circumstances that partner could be made personally liable for the entire partnership debts in the event of there being insufficient assets in the State where the bankruptcy was declared.

SECTION 111 - CONFLICTS OF JURISDICTION.

Article 15 - Claims of Jurisdiction

1. Where the courts of different Contracting States are seised of bankruptcy proceedings in respect of the same debtor, and the jurisdiction of one court prevails under this Convention, the other courts shall, if necessary of their own motion, either decline jurisdiction or stay the proceedings until the judgment of the court whose jurisdiction prevails has become res judicata.

Comment: It is accepted that where bankruptcy proceedings are raised simultaneously in a number of different Contracting States the court which has prevailing jurisdiction in terms of the Convention should proceed to deal with the application, while the courts in the other Contracting States either decline jurisdiction or stay proceedings until the judgment of the courts in the State with prevailing jurisdiction is final. The expression "res judicata" in this context appears to be inappropriate, the original French text of the draft Convention having used the word "Jugée", which the Council construes as "final".

2. Where the courts of different Contracting States which have concurrent jurisdiction under this Convention are seised of bankruptcy proceedings in respect of the same debtor, and the courts of one State have already declared the debtor bankrupt, all other courts shall stay the proceedings until the judgment declaring the debtor bankrupt has become res judicata.

Comment: Again it is accepted that where bankruptcy proceedings are raised in different Contracting States, and the courts of one of the States has already declared the debtor bankrupt, the proceedings in other States should be stayed until the judgment of the court in the first State is final. The same comment in relation to the use of the expression "res judicata" applies to this.

Article 16 - Disclaimers of jurisdiction.

1. Where circumstances are such as to cause to prevail the jurisdiction of the courts of a Contracting State other than the State whose court is seised of the matter, the latter court shall, if necessary of its own motion, either stay the proceedings and grant time to enable the applicant to bring proceedings in the former courts, or decline jurisdiction.

No comment.

2. Where, by a judgment having become res judicata, the court of a Contracting State has declined jurisdiction pursuant to paragraph 1, the courts of the other Contracting States may not decline jurisdiction on the ground that in the first-mentioned State there exists a basis of jurisdiction which the courts of that State have refused to acknowledge.

Comment: The principle is accepted but the English translation requires clarification.

SECTION IV - ACTIONS ARISING FROM THE BANKRUPTCY.

Article 17

The courts of the State in which the bankruptcy proceedings have been instituted shall have exclusive jurisdiction to entertain proceedings arising from:

- (1) claims as to the invalidity as against the bankruptcy creditors of certain transactions carried out by the debtor during the period of relation-back, even where such transactions relate to immovable property;
- (2) claims for payment or for recovery of property founded upon the invalidity of the transactions mentioned in paragraph 1;
- (3) applications to set aside transactions effected by the debtor in fraud of his creditors, even where such applications have a basis other than the laws of bankruptcy;

Comment: It is accepted that the courts of the Contracting State in which the bankruptcy proceedings have been instituted should have exclusive jurisdiction to entertain proceedings arising out of transactions of the kind described in sub-paragraphs (2) and (3). However, as regards sub-paragraph (3) the phrase "even where such applications have a basis other than the laws of bankruptcy" is not understood. It is, however, considered that the Courts of the State in which immoveable property is situated should have exclusive jurisdiction to determine all claims relating to that property. The Council nevertheless appreciates that in the event of /

of the provisions of Article 4 of Annex 1 being incorporated into the domestic laws of all contracting states, this objection becomes less pressing.

(4) disputes relating to the sale by the liquidator of the moveable property of the bankrupt, where non-compliance with the rules determining the powers of the liquidator is alleged;

Comment: It is not understood why there should be a distinction drawn between moveable and immovable property sold by the liquidator when the proceedings have been raised on the ground that the liquidator has not complied with the rules determining his powers.

(5) claims for the recovery of moveable property from the estate of the bankrupt, subject to Article 21(4);

No comments.

(6) claims against the spouse of the bankrupt in application of a specific provision of bankruptcy law;

Comment: The principle of this sub-paragraph is accepted provided it is not construed to mean that the liquidator has the right to initiate proceedings in respect of a spouse's property situated in any of the Contracting States other than the State in which the bankruptcy proceedings have been instituted. It is submitted that the liquidator should have no rights against the bankrupt's spouse in any other Contracting State except where there has been prima facie evidence of a benefit having been conferred upon that spouse during the period of the relation-back.

(7) complaints regarding professional misconduct on the part of the liquidator, and disputes relating to the submitting of his accounts;

Comment: It is submitted that what is meant here is that the courts of the State in which the bankruptcy proceedings have been instituted shall have exclusive jurisdiction to entertain proceedings arising from complaints regarding misconduct on the part of the liquidator in relation to the conduct of the bankruptcy and not "professional misconduct" in the general sense.

(8) /

(8) disputes relating to the admission of debts, with the exception of fiscal debts or debts recoverable in like manner, social security debts and debts arising under contracts of employment. In the case of these exceptions, the courts or authorities normally having jurisdiction shall determine the existence and the amount of the debt and the extent of such preferential rights as it may enjoy.

Comment: The proposal that the courts or authorities normally having jurisdiction in relation to fiscal debts or debts recoverable in like manner, Social Security debts and debts arising under contracts of employment should retain that jurisdiction after the declaration of bankruptcy cuts across the principle of "universality" of the bankruptcy. According to the Noel-Lemontey Report (p. 73) "it did not seem possible nor opportune to depart from the usual rules of jurisdiction of the country to which such debts relate". The expression "the courts or authorities normally having jurisdiction" in relation to the excepted debts is lamentably vague, particularly in regard to contracts of employment, and requires detailed clarification.

(9) disputes in which it is sought to terminate current contracts by virtue of a provision of bankruptcy law, with the exception of contracts of employment and leases of immoveable property.

Comment: It is accepted that the courts of the Contracting State in which the bankruptcy proceedings have been instituted should have jurisdiction to consider disputes in which it is sought to terminate contracts which are challengeable by virtue of a provision of bankruptcy law and the two exceptions seem sensible. It is however submitted that all contracts relating to immoveable property should only be terminable in respect of any provision of bankruptcy law by the courts of the State in which that property is situated.

TITLE 111

APPLICABLE LAW

Article 18 - Conditions governing the institution of bankruptcy proceedings.

The conditions governing the institution of bankruptcy proceedings shall be determined by the law of the Contracting State in which the court having jurisdiction in accordance with this Convention is situated.

No comment.

Article 19 - Procedure in and effects of the bankruptcy.

1. The law of the State in which the bankruptcy proceedings have been instituted shall determine the procedure to be followed.

2. Subject to any contrary provisions of Title IV, the law of the State in which the bankruptcy proceedings have been instituted shall determine the effects of the bankruptcy and also the conditions under which the bankruptcy is valid as against a third party.

No comment.

TITLE IV

GENERAL EFFECTS OF THE BANKRUPTCY.

SECTION 1 - EFFECTS OF THE BANKRUPTCY INDEPENDENTLY OF ADVERTISEMENT.

Article 20 - Divesting the debtor of his property.

Independently of the provisions for advertisement contained in Article 25, the bankruptcy shall take effect against the debtor in each Contracting State, and in particular with respect to divesting him of his property.

Comment: The principle of this article is accepted but as presently drafted would conflict with the Law of Scotland in regard to the requirement for the recording of an Abbreviate of Sequestration in the Diligence Registers within a period of two days from the date of the first deliverance. The effect of recording of an Abbreviate is not to divest the debtor of his heritable property but has the effect of an Inhibition and of a Citation in an adjudication of the estate of the debtor at the instance of the creditors afterwards ranked upon the estate (Bankruptcy (Scotland) Act 1913, section 44).

Article 21 - Staying of proceedings by individual creditors.

1. In the Contracting States other than that in which the bankruptcy proceedings have been instituted, the judgment declaring the debtor bankrupt shall, independently of the provisions for advertisement contained in Article 25, be a bar to any proceedings on the part of individual creditors whose debts incurred before the bankruptcy was declared are not secured by a charge on moveable or immoveable property.

No comment.

2. /

2. In respect of claims for the payment of money, that judgment shall likewise operate to stay proceedings already instituted at the time when the debtor was declared bankrupt; in such cases the creditor must prove his debt in the bankruptcy proceedings. However, if liability is disputed, the issue shall nevertheless be determined by the court originally seised of the claim, if in the course of those proceedings that court has already ruled upon any contentious issue other than one of jurisdiction.

Comment: The principle of this article is accepted but clarification of the expression "any contentious issue" is required.

3. The provisions of paragraphs 1 and 2 shall not affect such rights of recovery as exist in favour of the authorities and agencies responsible for the collection of fiscal debts and debts recoverable in like manner.

No comment.

4. The judgment declaring the debtor bankrupt shall not in the other Contracting States be a bar to the bringing of actions for the recovery of property. Actions for recovery of moveable property may be brought or pursued only in the courts having jurisdiction in accordance with Article 17(5) unless the court originally seised has already ruled upon any contentious issue other than one of jurisdiction.

Comment: This article appears to be incomprehensible unless the word "immoveable" is inserted immediately before the word "property" at the end of the first sentence. If this interpretation is correct the principle of the article is accepted. There should in all circumstances be an exclusion in respect of trust property or other property held by the bankrupt in a fiduciary capacity.

5. Proceedings to enforce other claims may be brought afresh against the liquidator in the manner prescribed by the law governing these proceedings.

Comment: It is assumed that this article refers to proceedings originally raised against the bankrupt and subsequently brought afresh against the liquidator where there has been no ruling "on any contentious issue". The translation is, however, not at all clear.

Article 22 - Stay of execution.

In the individual Contracting States the bankruptcy shall, independently of the provisions for advertisement contained in Article 25, operate to stay proceedings for enforcement already instituted against the debtor in accordance with the law of the Contracting State in which those proceedings have been instituted, as if the bankruptcy had been declared in that State.

Comment: The principle that the bankruptcy shall operate to stay proceedings for /

enforcement in the State where these proceedings have been instituted is accepted provided that the preferences accorded by the existing laws of the Contracting States are preserved for example, the preference for expenses in the law of Scotland. Provision will also require to be made to accommodate our law of equalisation of diligences.

Article 23 - Interruption of periods of limitation

Notwithstanding Articles 20 to 22, transactions effected by third parties after the declaration of the bankruptcy and before it has taken effect against them in accordance with Article 26 shall interrupt any periods of limitation enuring in favour of the bankruptcy creditors and shall prevent the latter from relying on any loss of rights resulting from any failure to perform transactions which are to be effected within a fixed time.

Comment: The existing law of Scotland in regard to the interruption of prescription on the institution of bankruptcy proceedings is preferred to this Article. Section 105 of the Bankruptcy (Scotland) Act 1913 (imported into Companies legislation by Section 318 of the Companies Act 1948) states that the presenting of or concurring in a Petition for Sequestration or the lodging of a claim in the hands of the Trustee or Sheriff ... shall interrupt prescription of the debt of the creditor so petitioning and the interruption of the prescription continues to be effectual notwithstanding recall of the sequestration.

Article 24 - Exercise of certain legal remedies

1. If the law of the State in which the bankruptcy proceedings have been instituted permits applications to set aside the judgment declaring the bankruptcy to be made (opposition) or to be made by a third party (tierce opposition) then, where the applicant has neither his principal place of business, his (domicile) nor his residence in the State in which the bankruptcy has been declared but one or more of these is situated in another Contracting State, such applications may be made within a period of thirty-one days following the day which under that law initiated the period.

Comment: It is considered that this Article is simply intended to specify a maximum period within which all applications to set aside a bankruptcy order are to be made. If the Council is correct in this assumption consequential changes would be required to the domestic bankruptcy laws of the United Kingdom.

2. The law of the State in which the bankruptcy proceedings have been instituted shall determine the conditions for the extension of that period, where it expires on a Saturday or Sunday, or on a day which according to that law is a public holiday.

No comment.

SECTION II - ADVERTISEMENT.

Article 25 - Provisions for Advertisement.

1. It shall be the duty of the liquidator to advertise the bankruptcy by the insertion in the Official Journal of the European Communities of an extract of the judgment declaring it. The liquidator must cause this insertion to be made in cases where a business establishment of the bankrupt or the principal place of business of one of the persons referred to in Article 10 to 12 is situated in a Contracting State other than that in which the bankruptcy has been declared, and also in all cases where the court has declared the bankruptcy has so ordered. He may in any event effect such advertisement if he thinks fit.

Comment: It is anticipated that only one insertion in the Official Journal of the European Communities would be required in the majority of cases other than the liquidation of large companies.

2. In the Contracting States other than that in which the bankruptcy proceedings have been instituted, the liquidator shall ensure that the bankruptcy judgment is entered upon the trade registers in which the bankrupt is registered.

Comment: Clarification of the expression "trade registers in which the bankrupt is registered" is required and it would be necessary to specify which registers are involved in the United Kingdom. As the law stand at present the duty of recording in Diligence Registers and where appropriate in the Register of Companies would be placed upon the Trustee or liquidator.

3. In the Contracting States other than that in which the bankruptcy proceedings have been instituted, the liquidator may cause the bankruptcy judgment to be gazetted in the Official Gazettes listed in Article VI of the Protocol to this Convention and may if need be effect such further advertisement of the judgment as he thinks fit.

Comment: It is suggested that this should be mandatory where the liquidator has reason to think that there have been business dealings in the Contracting State in question.

4. /



4. The provisions for advertisement laid down in paragraphs 1 to 3 shall, so far as may be necessary, apply to the other judgments listed in Article IV of the Protocol to this Convention. The particulars to be advertised in respect of each category of judgment are listed in Articles III and V of that Protocol. It shall be the duty of the liquidator to effect such advertisement.

Comment: Similar provisions relating to Scotland will require to be included in Articles III, IV and V of the Protocol to the Convention.

5. The law of the State in which the bankruptcy proceedings have been instituted may provide for some other person or authority to carry out the provisions for advertisement prescribed above.

No comment.

Article 26 - Effects of the bankruptcy as against third parties.

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 eighth 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.

Comment: The period of eight days from the date of advertisement in the Official Journal of the European Communities after which transactions by third parties are to be invalid against the bankruptcy creditors would appear to be too short. It is appreciated that the period must be relatively short but it is unreasonable to expect parties trading with a debtor in the U.K. to have knowledge of that debtor's bankruptcy in say Italy within so short a period of time. An alternative suggestion would be to make intimation in the Edinburgh and London gazettes mandatory in every case where the liquidator has reason to believe that the debtor is conducting business dealings in the U.K. and then to give third parties four days from the date of printing within which to complete transactions. In any case the Council would wish to retain the existing provisions of Section 107 of the Bankruptcy (Scotland) Act 1913 which protects a bona fide purchaser for value from the debtor without limitation of time.

2. Transactions effected before this advertisement or within seven days thereafter shall also be invalid as against the bankruptcy creditors if it is proved that the third party knew or ought reasonably to have known of the bankruptcy at the time when the transaction was effected.

No comment.

3. The rules relating to the periods of relation-back shall apply to transactions effected after the debtor has been declared bankrupt and before the bankruptcy has taken effect as against third parties as provided for in paragraph 1.

See under Comments in relation to periods of relation-back.

Article 27 - Effects with regard to rights of property subject to registration.

The effects of the bankruptcy with regard to rights of property subject to registration in a public register shall, in so far as concerns the requisite registrations and the legal consequences thereof, be determined by the law of the Contracting State in which the register is kept.

Comment: On the assumption that this Article relates to the effects of bankruptcy in regard to rights of property subject to registration in a public register as we understand the term (and according to the Noel-Lemontey Report at page 90 this would appear to be the case), the expression "biens soumis" does not appear to be accurately translated as "rights of property". The principle whereby the law of the Contracting State in which the register is kept should determine the effects of the bankruptcy is, however, accepted.

(COMMENTS ON ARTICLES 28 TO 82 TO FOLLOW)

In name of the Council

J.D. WHEELANS

President.

21 March 1975.

Marked copy.

THE LAW SOCIETY OF SCOTLAND.

SECOND MEMORANDUM

by

the Council of the Society

to

the Department of Trade Advisory  
Committee

on

the EEC PRELIMINARY DRAFT CONVENTION ON  
BANKRUPTCY, Winding up, Arrangements,  
Compositions and similar proceedings.

The Law Society of Scotland is a statutory body set up by the Solicitors (Scotland) Act 1949 and comprises all solicitors practising in Scotland. The Council consists of forty representative members and two co-opted members.

Reference is made to the Interim Report on the draft Convention already submitted by the Council on 28 February 1975. In particular the Council wishes to make it clear that the following detailed comments on the Convention only apply if the adoption of the Convention is to proceed. The comments do not in any way imply that the Council is departing from its previously expressed view that the present draft Convention should be abandoned.

The comments are made on the original English text dated 4 June 1973 prepared for the then Department of Trade and Industry and revised by the Foreign and Commonwealth Office. A separate Memorandum has been prepared on Articles 1- 27.

Recd and Agenda 20.5.75

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SECTION III - FUNCTIONS OF AUTHORITIES ADMINISTERING THE BANKRUPTCY.

Article 23 - The powers of the liquidator.

1. In the Contracting States, the liquidator shall exercise the powers which are vested in him by the law of the State in which the bankruptcy proceedings have been instituted, or which have been conferred on him by the competent authority of that State.

Comment - The effect of this is to leave each State to define the powers of the liquidator. While it is accepted that complete uniformity in bankruptcy law and practice may not be possible it is considered that a greater effort to introduce more uniformity should be made and it is felt that this is one area where that would be possible. Without disrupting national laws to any great extent an attempt should be made to introduce uniform powers. Reference is made to the Council's Interim Report on the draft Convention and to the proposals outlined therein. It is assumed that the reference in paragraph 1 to powers conferred on the liquidator by the competent authority means special powers given to him by the Court but this is not clear.

2. The capacity of the liquidator to act as such shall be established by a certificate drawn up in accordance with the specimen form annexed to the Protocol to this Convention.

Comment - No comment other than to emphasise that this is an identity document only.

3. Where the law of the State in which the bankruptcy proceedings have been instituted permits the appointment of more than one liquidator, one or more of the liquidators may be chosen from among persons capable of exercising the functions of liquidator in the other Contracting States. Where the law of the State in which the bankruptcy proceedings have been instituted permits the delegation of certain powers of the liquidator to other persons, such persons may be chosen from among those capable of exercising the functions of liquidator in the other Contracting States.

Comment - A trustee or liquidator cannot delegate the exercise of his powers under existing U.K. law but employs an agent to act for him. In the case of community bankruptcies with assets situated in various States, it would be a great advantage if such powers could be delegated by the appointment of an Attorney or Attorneys. But attention is again drawn to the Council's proposals for separate and /

and simultaneous bankruptcy administration in all E.E.C. states contained in its Interim Report.

Article 29 - Redirection of mail.

1. Where the bankrupt is (domiciled) or resident, or has a business establishment or postal address, in a Contracting State other than that in which the bankruptcy has been declared, then, if an order to this effect is made by the bankruptcy judge, or, if there is no bankruptcy judge, by the court which has declared the bankruptcy, postal packets addressed to the bankrupt at his (domicile), residence, business establishment or postal address shall be re-directed to the liquidator by the postal authorities of that State.

Comment - This provision could produce the manifest absurdity that the liquidator would receive, as well as business communications, Christmas Cards, football coupons and bulb catalogues, etc. These he would presumably return to the bankrupt, using the facility created by paragraph 3. The procedure is needlessly time-wasting and an official of a local court should be authorised to receive such redirected correspondence. He would forward to the liquidator only such items as might be relevant.

2. Article VIII of the Protocol to this Convention specifies the manner in which the postal authorities are to be informed of the bankruptcy and of the duration of the duty placed upon them by the application of paragraph 1.

No Comment.

3. Postal packets which must be sent on to the bankrupt shall indicate the name and capacity of the liquidator, followed by his signature.

No Comment.

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

1. Creditors who reside in a Contracting State other than that in which the bankruptcy proceedings have been instituted may prove their debts by sending an ordinary letter to the authorities of the State in which the bankruptcy proceedings have been instituted; these authorities are specified in Article IX of the Protocol to this Convention, and they shall provide for the translation of the letter if need be. Such proof of debt shall state the amount, and whether or not it has rights of preference. Such proof of debt shall also be accompanied by a copy of any available supporting documents; the authorities referred to above may require production of the document evidencing the title or a certified true copy thereof.

Comment - The law of Scotland requires that proof of debt in bankruptcy proceedings should be of a quality not less than would have been required in legal proceedings for recovery of the debt. The wording of /

of this paragraph, however, is such as to suggest that an "ordinary letter" shall have the status of a proof of debt even if unsupported by any document vouching the transaction.

Where documents instructing the debt are produced there may be a prima facie case for dispensing with an affidavit but where the claim is unsupported by documentary evidence some sanction should be imposed to discourage the submission of spurious claims, e.g., penalties as under our statutory declaration procedure.

The creditor's claim is required to contain a statement of whether or not the debt is preferential. In many cases the creditor will be unaware of the status of his debt under the law of the Contracting State which has jurisdiction. The requirement should simply be that the circumstances giving rise to the debt shall be fully stated and that it shall be incumbent on the liquidator to accord the claim a preference if it is entitled to this under the law governing the bankruptcy.

The meaning of "the document evidencing the title" is obscure, but whether it is intended to refer on the one hand to a document vouching the debt or on the other hand to a document evidencing transmission of the claim to an assignee, it would be contrary to Scottish practice for the court awarding the bankruptcy to become involved in the first instance in testing the authenticity of creditors' claims; that function should remain in the hands of the liquidator.

2. Creditors who reside in a Contracting State other than that in which the bankruptcy proceedings have been instituted may dispute debts in like manner. Where, in accordance with the law of the state in which the bankruptcy proceedings have been instituted, such disputes are to be raised at or communicated to the meeting of creditors. Letters raising such disputes shall be read at the meeting.

Comment - It is not a function of creditors in Scotland to discuss disputed debts and as it is felt that this is a more appropriate function of the liquidator with, if necessary, the assistance of the Court it is suggested that some attempt should be made to introduce a uniform procedure.

Article 31 - Continuance of business.

The authority competent under the law of the State where the debtor has been declared bankrupt shall alone have the power to authorize the debtor to continue to carry on his business in the other Contracting States.

Comment - The idea of a bankrupt continuing his business is entirely alien to the law of Scotland under which, after divestiture, he could only intronit with the assets of the business as agent for his trustee in bankruptcy. In liquidation, it is true, continuance of a company's business in the sense of completing work in progress is not uncommon but the safeguard in that situation (as would also be the case if a Trustee authorised the bankrupt to complete certain transactions as his agent) is that the liquidator or trustee is personally liable. The wording of the paragraph is such as to suggest that its purpose is to exclude the authority of the courts of other Contracting States to sanction continuance by the bankrupt of his business in those other Contracting States but it opens the door nonetheless to continuance by a bankrupt of his business in, e.g., Scotland, under powers given him by the competent authority in, e.g., Italy, without regulating the way in which the claims of creditors of the Scottish business would be ranked on the bankrupt's assets. Furthermore, since the award of bankruptcy will have been gazetted in the other Contracting States, would there not arise a necessity for any dispensation by the competent authority permitting continuance of business to be gazetted also? And would not some qualification of Article 20 be required if continuance of business is to be catered for? In any event the Courts of each Contracting State should have overriding power to determine whether or not the bankrupt may carry on business in that State after declaration of bankruptcy.

Article 32 - Realisation of the assets.

1. The liquidator shall without further formality take such measures designed to protect the interests of the parties and effect such dispositions as are within the scope of the powers conferred upon him, either by the law of the State in which the bankruptcy proceedings have been instituted, or by an authority named by the competent authorities administering the bankruptcy.

Comment - /

This clause has been amended THY.

Comment - It is thought that the reference to "interests of the parties" is a mis-translation and should be to "the assets of the bankrupt".

2. Where the law of the State in which the bankruptcy proceedings have been instituted, or the court which has declared the bankruptcy, requires a particular mode of realisation, such as public auction, the law of the place where the property is situated shall determine the manner of its realisation.

Comment - This provision is not considered to be desirable. It is felt that the law of the locus of the asset should determine both the mode and the manner of its sale. For example, the mode of sale of heritable property in the State in which the bankruptcy proceedings have been instituted might not be the mode employed in another State where such property is situated and the use of the former mode might act to the detriment of the creditors. The translation also requires clarification.

3. Where a dispute is raised by the debtor, by a creditor or by a third party, any one of them may apply to the local court having jurisdiction in accordance with the procedure for urgent matters. That court may order, either that the objection be dismissed, or that there be a stay of execution with sufficient time granted to enable an application to be made to the court having substantive jurisdiction in accordance with the law of the State in which the bankruptcy proceedings have been instituted.

Comment - This paragraph is lamentably vague. Presumably the bankrupt or the creditor or the third party wishes to dispute the right of the liquidator either to take possession or to sell (vide paragraph 1 above). In that situation, presumably the party concerned applies to his local court and, if successful, obtains a "stay of execution", i.e., an interdict against the liquidator preventing him from taking any further steps to ingather or realise the property his title to which is disputed until the Courts of the Contracting State in which the bankruptcy was awarded have adjudicated in the matter. Presumably again the latter courts will continue the interdict or pronounce a fresh one until the issue is finally disposed of. The paragraph omits to mention this last point which is one of some importance. The paragraph can be construed in an alternative manner so far as reference to "the local court" is concerned; the "local court" may be intended to mean the court of the Contracting State where the asset is situated. This ambiguity of expression should be removed. /



removed.

SECTION IV - EFFECTS OF THE BANKRUPTCY ON THE ESTATE OF THE DEBTOR.

Article 33 - Universality of the bankruptcy.

1. Subject to Article 9(2) and Article 60, a bankruptcy declared in accordance with this Convention shall take effect with respect to the whole of the debtor's property situated in the Contracting States.

Comment - The fundamental weakness of the draft Convention in the view of the Council is that there is no uniformity as to the persons who may be made bankrupt. Universality cannot accordingly be achieved however desirable in principle.

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.

Comment - The effect of this is to remove acquirenda from the assets under the control of the liquidator where the law of the State in which the bankruptcy proceedings have been instituted exclude them. This is thought most undesirable and uniformity is essential in this field. Acquirenda should be included in the bankrupt's estate.

3. Paragraph 1 shall not apply to property which is excluded from the assets in the bankruptcy by virtue of the law of the Contracting State in which it is situated.

Comment - Again this provision is thought most undesirable bearing in mind the aims of the Convention.

Article 34 - Rights of spouses.

1. Where in a bankruptcy the law presumes that the property of the spouse has been acquired with the monies of the bankrupt, such presumption may be rebutted in accordance with Article 3 of Annex 1.

2. The law of the State in which the bankruptcy proceedings have been instituted shall determine to what extent benefits under marriage property agreements and disposals of property to a spouse without consideration are valid as against the bankruptcy creditors.

Comment - The question of the rights of a Scottish spouse would require to be considered carefully in light of this Article and the provisions of Articles 3 and 4 of the Uniform Law. Whatever possessions may finally /

finally be agreed, uniformity of legal principles must be achieved among all Contracting States.

SECTION V.

EFFECTS OF THE BANKRUPTCY OF PAST ACTS AND ON CURRENT CONTRACTS

Article 35 -

Suspect periods, actions to set aside frauds on creditors and set-off.

Comment -

1. This Article applies to European Bankruptcies and certain provisions of the Uniform Law, namely those contained in Articles 4 and 5 to Annex 1, and reference is made to the Council's detailed comments thereon. The object of these provisions of the Uniform Law is to harmonise the different Rules of the various Member States in relation to fraudulent preferences and set-off. While in principle this is an acceptable objective the effect of the Council's comments on the Uniform Law is to reject the proposition that the date of cessation of payments should be relevant in relation to fraudulent preferences set-off and the like. In any event it is absolutely essential before these provisions of the Uniform Law can be incorporated into the laws of the various Member States that a uniform definition of the term "cessation of payments" be agreed among the Member States.

2. No comment.

Article 36 -

Contracts of Employment

Comment -

This and the next two Articles contain express exceptions to the general rule contained in Article 19(2) that the Law of the State in which the bankruptcy has been opened, shall determine the effects of the bankruptcy upon contracts entered into by the debtor. Article 36 contains rules for determining the law which is to apply in relation to the effects of bankruptcy on Contracts of Employment. The reasons for making this exception are that the rights of employees in the event of the bankruptcy of their employer vary considerably from one Member State to another and because of the social considerations involved in labour contracts. The Council approves of this proposition because the lex loci contractus should always apply.

Article 37 -

Contracts of leases and hiring

Comment -

1. This rule is, in principle, acceptable as in the case of immovable property it is always desirable for the applicable law to be the lex situs. Why, however, should this rule be restricted to leases only /

only of immoveable property? Should it not also be extended to cover the purchase and sale of moveable property?

In relation to all the types of contract listed in this Article the lex situs or lex loci contractus should apply as appropriate and accordingly the Council approves of the rule contained in this Article.

Articles 38 and 39 - Contracts of Sale.

Comment - 1. Except where secured by Article 6 of the Uniform Law, the Council is strongly of the view that the applicable law in respect of all contracts, should be the lex loci contractus, and considers that to make the debtor's centre of administration the criterion is liable to give rise to great uncertainty, and lengthy disputes.

SECTION VI. PREFERENTIAL AND SECURE CREDITORS.

Sub-Section 1. General Preference.

Articles 40, 41 and 42.

Comment - It would appear convenient to deal with these three Articles together in general terms. In view of the fundamental differences in the laws of the Member States in relation to preferential debts these Articles contain provisions which endeavour to overcome these differences by setting out certain detailed rules in relation to preferences. If adopted, they would almost certainly give rise to administrative problems for the trustee or liquidator in that he would have to keep detailed records of the proceeds of disposal of assets in each State and would probably require to appoint Agents in each State where there were both assets and preferential creditors. It also appears that the preservation of the rights of self help of certain Member States in fiscal and quasi-fiscal matters is not consistent with the general principles of the Convention. The other matter which would appear to warrant very careful consideration is the introduction of the right allowing a Member State to rank for fiscal debts in a bankruptcy declared in another Member /

Member State to the extent that such debts have not been recovered in its own State. This is completely contrary to our existing law and there has already been adverse comment on this particular aspect. The general effect of these provisions would appear to be to increase the classification of preferential debts and generally to favour preferential creditors to the detriment of the general body of creditors, and consideration should be given to simplifying these rules so that a preferential creditor to the extent that his debt has not been satisfied in his own State can look only thereafter to an ordinary ranking in other States. The Council is, however, of the view that claims of fiscal authorities should only be satisfied out of assets situated in the State where the claim has arisen.

Sub-Section 2

Article 43 -

Secured rights, special preferences and possessory liens.

Comment -

This rule appears acceptable.

Sub-Section 3

Article 44 -

Ranking as between general preferences and secured rights and special preferences.

Comment -

This rule appears acceptable.

Sub-Section 4

Provisions Common to all preferential and secured rights

Article 45 -

Determination of the place where certain moveable property is situated.

Comment -

In view of our earlier comments this rule appears acceptable.

Article 46

No comment.

SECTION VII -

EFFECTS OF THE BANKRUPTCY ON THE PERSONAL CAPACITY OF THE DEBTOR.

Article 47 -

Disqualification, forfeitures and restrictions of rights.

The law of each Contracting State shall determine whether and to what extent judgments instituting bankruptcy proceedings in the other Contracting States are to give rise to such disqualifications, forfeitures and restrictions of rights as result from bankruptcies declared in that State.

No comment, other than to express approval of the principle underlying this Article.

SECTION VIII /

- 11 -

SECTION VIII - SPECIAL PROVISIONS APPLYING TO CERTAIN PROCEEDINGS OTHER THAN  
BANKRUPTCY.

Article 48 - Invalidity, as against preferential or secured creditors, of  
extensions of time for payments and releases of debts.

Extensions of time for payment or releases of debts granted to the debtor in one  
of the forms of proceeding listed in Article 1(b) of the Protocol to this Con-  
vention shall in Contracting States other than that in which the proceeding has  
been instituted be invalid as against creditors whose debts are secured by a  
right of preference or a charge over property.

Comments - This Article requires to be considered in relation to the provisions  
of the Protocol Article 1(b) which makes reference to various forms  
of arrangements falling short of bankruptcy which exist in Belgium,  
Germany, France, Italy, Luxembourg and The Netherlands; and the  
Council assumes that if the U.K. becomes a party to the Convention  
in its final form, voluntary Trust Deeds for creditors would be  
included among these arrangements. The principle whereby these  
arrangements will have no effect upon preferences or securities  
already held is, of course, approved.

TITLE V.

RECOGNITION AND ENFORCEMENT.

Article 49 - Judgments.

For the purposes of this convention "judgment" means any judgments given by a  
court or tribunal of a Contracting State, whatever the judgment may be called,  
including a decree, decision, order or writ of execution, and also includes  
the determination of costs by an officer of the court.

Comments - None.

SECTION 1 - RECOGNITION.

Article 50 - Recognition as of right.

1. Subject to the provisions of Article 9(2) to the provisions of this Section  
and to those of Article II(2) of the Protocol to this Convention, judgments given  
in a Contracting State shall be recognised in the other Contracting States without  
any formality being required. These provisions shall not apply to judgments  
concerning the liberty of the individual.

2. Arrangements or compositions certified by a court, compromises ratified by  
a court and settlements made in court in the course of proceedings, which are  
enforceable in the State in which they were ratified or made, shall be recognised  
in accordance with the provisions of paragraph 1. The same shall apply to  
executory instruments issued to creditors in accordance with the law of the State  
in /

in which the proceedings have been instituted.

Comments - As stated in its comments on Articles 1-27 of the draft Convention and in its Interim Report the Council is totally opposed to the terms of Article 9 but otherwise the principle of this Article is approved. However, the expression "executory instruments" - in the French "titres exécutoires" - would probably be better translated "writs of execution".

Article 51 - Recognition in cases of conflict between non co-ordinate jurisdictions.

Where a debtor has been declared bankrupt by the courts of different Contracting States and where the jurisdiction of one of these courts prevails under this Convention, the judgment given by the court whose jurisdiction prevails shall alone take effect, even in the States where the other judgments have been given.

Comments - None.

Article 52 - Recognition in cases of conflict between co-ordinate jurisdictions.

1. Where a debtor has been declared bankrupt by the courts of different Contracting States being courts of co-ordinate jurisdiction under this Convention the judgment of the court which first gave judgment shall alone take effect even in the States where the other judgments have been given.

2. Where in the case provided for in paragraph 1 more than one judgment has been given on the same day, the alphabetical order of the place names of the courts shall determine which takes precedence. The relevant place name for this purpose shall be that given to the place where the court sits in the State in which it is situated.

Comments - It is assumed that "co-ordinate" is equivalent to "concurrent".

Article 53 - Validity of Acts of the Liquidator.

Acts performed by the liquidator in enforcing a judgment which has been rendered ineffective by the operation of Article 51 or 52 shall not on that account only cease to be valid.

Comments - There should be an obligation to resolve the conflict immediately it is drawn to the attention of the liquidator. The principle is accepted: but the statement is too general. There should be more detailed rules. What is the outcome to be on the question of accountability: will there be an indemnity out of all the assets or only out of those involved in his intrusions and in relation to the obligations incurred. Such an indemnity should be provided for.

SECTION II.

ENFORCEMENT OF BANKRUPTCY JUDGMENTS.

Article 54 - Enforcement as of Right.

1. Judgments relating to the Institution and prosecution of bankruptcy proceedings which are recognised by virtue of the provisions of the preceding Section shall take effect as of right and shall be enforced in other Contracting States as if they had been given in these States.

2. The same shall apply to the arrangements, compositions, compromises and settlements referred to in Article 50(2).

Comments - None.

SECTION III.

PROCEEDINGS TO IMPEACH THE BANKRUPTCY.

Article 55 - Actions to impeach the bankruptcy.

In any Contracting State other than that in which the bankruptcy proceedings have been instituted an action to impeach the judgment declaring the debtor bankrupt may be brought in any of the cases specified in Article 56.

Comments - It is agreed that proceedings in the State in which the bankruptcy had been instituted are not avoided by this clause and it is merely an enabling clause.

Article 56 - Cases in which Actions to impeach the Bankruptcy may be brought.

An action to impeach the bankruptcy may be brought only in the following cases:

1. If as a result of circumstances for which he cannot be held responsible the debtor was able neither to receive adequate notice of the proceedings nor to prepare his defence nor to avail himself of any rights to appeal against the judgment declaring him bankrupt:

2. If the judgment declaring the debtor bankrupt is contrary to the public policy of the state in which the action to impeach the bankruptcy is brought: provided always that such an action may never be brought on the basis that the judgment was contrary to public policy on any of the following grounds:

(a) The form of proceeding involved is unknown to the law of that State if such proceeding is listed in Article 1 of the Protocol to this Convention:

(b) That the court which declared the debtor bankrupt had no jurisdiction:

(c) That the judgment could not have been given in the State where the action to impeach the bankruptcy is brought, by reason of its own law governing the conditions for instituting bankruptcy proceedings:

(d) That the judgment has been given against a natural person or an association of persons whether or not having legal personality who or which could not have been declared bankrupt in the State where the action to impeach the bankruptcy has been brought so long as such person or association of persons has not or no longer had his or its principal place of business in that State:

(e) /

(c) That the judgment has been given on the court's own motion or ex parte.

Comments - Actions "to impeach the bankruptcy" are unknown in Scots Law, but the Council is not opposed to the introduction of such a form of proceedings. The grounds on which an action may be brought seem unexceptionable.

In para 2 (c) "sur requete" is translated "ex parte" - presumably it means "on the bankrupt's own petition".

Article 57 - Courts with jurisdiction to entertain actions to impeach the bankruptcy.

The action to impeach a bankruptcy shall be brought in each Contracting State before the court designated in Article X of the Protocol to this Convention.

Comments - In Scotland actions to impeach the bankruptcy should be brought in the Court of Session.

Article 58 - Parties to such actions and time limits.

1. The action to impeach the bankruptcy shall be brought against the liquidator. It may be brought at the instance of the public prosecutor, the debtor or any other interested party, with the exception of the person who instituted the bankruptcy proceedings.

2. The action may be brought only within the period of three months from the date of the advertisement of the bankruptcy judgment in the official journal of the European Communities, or in the absence of such advertisement from the date when the person bringing the action had knowledge of the judgment. Such an action may on no account be brought after the closure of the bankruptcy.

Comments - Having regard to Article 25 (Provisions for advertisement) and Article 26 (Effects of the bankruptcy as against third parties) the Council takes leave to enquire how the bankruptcy can be valid if it is not advertised, unless the lack of advertisement is in itself a ground for impeachment.

Article 59 - Effects of an action to impeach the bankruptcy and rights of appeal.

3. A judgment in an action to impeach the bankruptcy shall take effect against all persons in the state in which it is given and shall be advertised in that State in the same manner as a bankruptcy judgment. The same rights of appeal shall be then available against it.

4. A judgment which has been successfully impeached shall cease to be recognised or to have effect in the state where the action to impeach the bankruptcy has been brought. The same shall apply accordingly to judgments given in any of the proceedings set out in Article 17 as well as to any other judgments given in the course of the bankruptcy proceedings. Acts performed prior thereto by the liquidator shall not however on that account only cease to be valid.

Article 60 /



Article 60 - Impeachment leading to a bankruptcy having effect in one State only.

Where the judgment declaring the debtor bankrupt in one Contracting State has been successfully impeached in an action brought in another Contracting State a fresh bankruptcy may be declared in that first State. Bankruptcy so declared shall have no effect in the other Contracting States.

Comment - It is clear from these Articles that a successful action to impeach the bankruptcy is only effective in the State in which the action is brought. There appears to be no obvious reason for this further exception to the principle of universality.

#### SECTION IV.

#### ENFORCEMENT OF BANKRUPTCY JUDGMENTS.

Article 61 - Orders for enforcement.

1. Bankruptcy judgments given in one Contracting State and in particular those given in the proceedings set out in Article 17 may be enforced by execution in another Contracting State when the order for enforcement has been issued there upon an application to the court or authority designated in Article XI of the Protocol to this Convention.

Comment - It is suggested that for Scotland the court should be the Court of Session and that the Court of Session should apply some simplified form of procedure, using printed forms.

2. This shall also apply to executory instruments issued to creditors in accordance with the Law of the State, in which the bankruptcy proceedings have been instituted.

Comment - As in Article 50 above "executory instruments" is better translated "writs of execution".

Article 62 - Issue of Orders for enforcement.

Comment - For Scotland the competent court should be the Court of Session but again a simplified procedure should be worked out using printed forms.

In para 1 (a) the expression "executory instruments" should again read "writs of execution".

Article 63 - Appeals against enforcement.

The party against whom the enforcement is sought may in the cases listed in Article 56 and to the extent that these may be applicable appeal against the judgments /

judgments or executory instrument in respect of which an order for enforcement has been issued.

Comment - None.

Article 64 - Jurisdiction in appeals against enforcement.

Comment - For Scotland this should be the Court of Session again with summary procedure.

Article 65 - Effects of appeals against enforcement.

Comment - None.

Article 66 - Further appeal.

Comment - In Scotland an appeal on matters of law only would be appropriate to the Inner House of the Court of Session quaere whether there should be a further right appeal to the House of Lords.

Article 67 - Protective measures.

1. During the time for appealing in accordance with Article 63 and until any such appeal has been determined no measures of execution may be taken against the property of the party against whom the enforcement is sought other than measures designed to protect the interests of the applicant for enforcement.

Comment - A more literal translation from the French would improve the sense of this Article such as "during the time for appealing in accordance with Article 63 and until any such appeal has been determined no enforcement shall proceed except measures designed to protect (conserve) the assets (goods) of the party against whom the enforcement is to be carried out".

2. The issue of the order for enforcement shall carry with it the power to proceed to any such measures.

Comment - None.

#### SECTION V.

#### GENERAL PROVISIONS.

Article 68 - Dispensing with the security.

Comment - None.

Article 69 ,

Article 69 - Dispensing with localization.

Comment - None.

TITLE VI.

TRANSITIONAL PROVISIONS.

Article 70 - Commencement.

Comment - None.

TITLE VII.

RELATIONSHIP TO OTHER CONVENTIONS.

Article 71 - Substitution of existing conventions between the Contracting States.

Comment - None.

Article 72 - Continuance in force of existing conventions between the Contracting States.

Comment - None.

Article 73 - Conventions concluded with non member States.

Comment - None.

TITLE VIII.

FINAL PROVISIONS.

Article 74 - Territorial scope.

1. This convention shall apply to the European Territories of the Contracting States, to the French Overseas Departments and to the French Overseas Territories.

Comment - It is assumed that this will include the United Kingdom, the Isle of Man and the Channel Islands but this may require to be specially provided.

Article 75 - Ratifications and entry into force.

Comment - None.

Article 76 -/

Article 76 - Incorporation of the Uniform Law into National Law.

Comment - Attention is drawn to the Council's detailed comments on the proposed Uniform Law.

Article 77 - Accession to the Convention.

Comment - None.

Article 78 - Notification by the Council of the European Communities.

Comment - None.

Article 79 - Protocol to the Convention.

Comment - None.

Article 80 - Duration of the Convention.

Comment - None.

Article 81 - Revision of the Convention.

Comment - None.

Article 82 - Deposit of the Convention.

Comment - The Council understands that the draft Convention has now been officially translated into English as well as the four languages listed in this Article, and that the English text will be authentic also.

THE UNIFORM LAW.

Article 1: Extension of the bankruptcy of firms, companies or other legal persons to the persons directing or managing them.

1. Any person who has, whether de jure or de facto, and whether openly or secretly, directed or managed a firm, company or other legal person which has been declared bankrupt, and who has:
  - (a) carried on business on his own under the cover of the business of that firm, company or other legal person; or
  - (b) wrongfully dealt with the property of that firm, company or other legal person as if it were his own; or
  - (c) wrongfully carried on an insolvent business for his personal benefit;

may be declared bankrupt, if the acts described in (a), (b) and (c) above have led or contributed to the suspension of payments of the firm, company or other legal person.
2. Where it is necessary to determine a date for the suspension of payment that date shall be the same as for the bankruptcy of the firm, company or other legal person.
3. In making a declaration of bankruptcy under this Article, the Court shall determine whether the person who has directed or managed the firm, company or other legal person shall be made to bear all its debts or only a part of them: in the latter case, the Court shall determine, in the same or in a subsequent judgment, for what part or for what amount of such debts that person shall be held accountable.

Comment - In the view of the Council the Article displays a total confusion of ideas - it confuses bankruptcy, which is a process designed simply to secure the equitable distribution of an insolvent's assets among his creditors with punishment of an individual found guilty of committing one of the proscribed acts. That this is so is made clear in Article 1 (3) where it is laid down that in making a declaration of bankruptcy the court is to determine the extent of the individual's personal liability. If this is taken to its logical conclusion the court could in making a declaration of bankruptcy find the individual culpable in only the slightest degree and fix his personal liability at a purely nominal amount, well within his capacity to pay. By virtue of the court's order, however, he would be a bankrupt and logically the whole process of bankruptcy would require to be followed through. The idea of bankruptcy being used as a sanction against individuals who have committed any of the offending acts should be desirably /

desirably be eliminated entirely and Article 1 should be recast in the following manner to bring it into harmony with the concept of bankruptcy as a mechanism or the equitable distribution of an insolvent's estate:-

- (1) after the recital of misdemeanours there should be inserted a provision that the court, on application by the liquidator (or any creditor if that is intended) may make a finding that the misdemeanour is proven and has contributed to the failure of the firm or company.
- (2) after making such a finding, the court should be required to fix the extent of the individual's personal liability.
- (3) the court should be empowered, on further application by the liquidator (or creditor) and on being satisfied that after a reasonable time the personal liability has not been discharged to declare the individual bankrupt.

Such a re-casting of Article 1 would make its provisions accord with the only order of events which it is possible to envisage within a framework of law corresponding to that of the U.K.

Article 2: Bankruptcy of persons responsible for the management of firms, companies or other legal persons.

Any person who has, whether de jure or de facto, and whether openly or secretly, managed a firm, company or other legal person which has been declared bankrupt, may himself be declared bankrupt, where by reason of his management he has been ordered either to compensate the firm, company or other legal person or to bear the whole or part of its liabilities, and he has failed to discharge that debt.

Comment - The provisions of this Article are totally unacceptable. They would create a major innovation upon Scots Law in that personal liability for the debts of a company could be incurred by a director or manager without the necessity of showing negligence or dishonesty. Read in conjunction with Article 11, Article 2 creates a clear inference that the court has an unfettered discretion to order such a person to compensate the company. Such a proposition is repugnant and guidelines as to the circumstances in which so extensive a power may be exercised by the court having jurisdiction are essential.

Article 3: Proof of the spouse's claim to recover property.

No comment.

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

A. The following transactions shall, if effected by the debtor less than one year before the declaration of the bankruptcy, be invalid as against the bankruptcy creditors:

1. all transfers of moveable or immoveable property made without consideration, and all disposals of property without consideration, whatever their nature. For the purposes of this provision, the conferment of a dowry shall be deemed to be such a disposal.

However, customary presents and gifts made in fulfilment of a moral obligation shall not, so long as they are not unusual having regard to the circumstances, be liable to be declared invalid as against the bankruptcy creditors by virtue of the foregoing provision:

2. all transactions effected for valuable consideration, not being transactions contingent on an uncertain event, whereunder the obligations of the bankrupt substantially exceed in value those of the other contracting party.

Comment - The law of Scotland, both common and statute, imposes no time limit beyond which gratuitous alienations escape challenge. Under the common law, irrespective of the lapse of time from the date of a transaction of this kind until the date of the bankruptcy, a challenge is competent if insolvency at the time of the alienation enduring down to the date of the bankruptcy can be established. Under the Act 1621 cap. 13, as interpreted by the courts, there is a rebuttable presumption in the case of alienations to conjunct persons, that insolvency so existed and so endured, while under the provisions of Section 5(b) of the Married Women's Property (Scotland) Act 1920, gifts inter vivos et uxorem are revocable at the instance of a bankrupt's creditors if made within a year and <sup>a</sup> day of sequestration.

In the view of the Council, the imposition of a time limit, and particularly so short a one as one year, is to be regretted. Ideally, Article 4A should require that enquiry be directed to the question of the bankrupt's solvency or otherwise at the date of the alienation regardless of when it took place. If insolvency at that date be proven, then the onus should be thrown on the bankrupt to rebut the presumption /

presumption that he remained insolvent down to the date of bankruptcy. However, the Council would not disagree with the proposition being embodied in this Article so that all alienations falling within the period of one year prior to the declaration of bankruptcy were automatically invalid. If, however, the present deficiencies of Article 4 cannot be supplied in that manner, then, in the Council's view the time limit of one year should be extended to at least two years, or else many transactions in fraud of creditors would be likely to escape challenge.

As to Article 4A(1), the inclusion of a dowry runs counter to the law of Scotland under which a reasonable provision by the parents of either of the spouses, where marriage has followed on the faith of it, is regarded as onerous. Notwithstanding that this is so, the Council accept the inclusion of a dowry as in keeping with a more modern view of what is equitable as between creditors on the one hand and children of the settlor on the other.

Reference is made to the comment (supra) on Article 34. The second paragraph of Article 4A(1) refers to "customary presents and gifts made in fulfilment of a moral obligation". Since, under Article 34(2), the law of the State in which the bankruptcy proceedings have been instituted is to determine to what extent benefits under marriage property agreements and disposals of property to a spouse without consideration are valid, it is in the Council's view essential that the interpretation to be placed upon the words quoted above should be established.

The law of Scotland regards settlements in consideration of marriage as onerous and if reasonable they are proof against the claims of creditors, whereas settlements in fulfilment of the natural or moral obligation of aliment may be exposed to challenge. In the view of the Council, it is a matter of extreme importance that the Uniform Law should safeguard reasonable ante- and post-nuptial settlements, including /



including those which would at present be protected by the Married Women's Policies of Assurance (Scotland) Act 1930. If such provisions for spouses are not to be regarded as falling within the definition of "moral obligations", then the Council would be totally opposed to Article 34 and Article 4A(1) of the Uniform Law so far as it applies to marriage settlements.

As to Article 4A(2), the Council assume that a transaction in which the consideration is inadequate would be invalid only cuoad excessum.

B. The following transactions shall also be invalid as against the bankruptcy creditors:

- 1 (a) all payments of whatever kind made by the debtor in discharge of debts which had not fallen due at the date of the declaration of the bankruptcy, if made after the date of the suspension of payments and less than six months before the declaration of the bankruptcy;
  - (b) all payments made after the date of the suspension of payments and less than one year before the declaration of the bankruptcy in discharge of debts expressed in terms of money which had fallen due, if made otherwise than in cash or by negotiable instrument, bank or postal transfer, or some other usual means of payment; and
  - (c) the performance, after the date of the suspension of payments and less than one year before the declaration of the bankruptcy, of any contractual obligation, where the manner of such performance is unusual in relation to the obligation.
- 2 all charges created by contract, by court order or by law after the date of the suspension of payments and less than one year before the declaration of the bankruptcy to secure debts existing prior to the creation of the charges, but not including the statutory charges imposed in favour of wards upon the property of their guardians or the statutory charges securing sums due to public authorities and institutions, including the authorities administering social security.

Comment

As to Article 4B(1)(a), the Council question whether the payments referred to should be required to be made after the date of cessation of payments. In the Council's view, it should be sufficient to render such payments recoverable that they were made within six months of the bankruptcy. As drafted, Article 4B(1)(a), (b)(c) invites the granting of preferences to particular creditors in the period immediately prior to the suspension of payment. The adoption of these proposals would considerably weaken the position of creditors under the existing provisions in Scotland. However, the Council /

Council accepts the desirability of extending the period of constructive bankruptcy to one year, the more so as this is the period fixed by Parliament under the Companies Act 1943, s. 322, for the challenge in comparable circumstances of floating charges, but for the reasons expressed above, the Council is strongly opposed to the reduction of transactions being referable to the date of suspension of payment. The Council would, however, advocate that an exception be made in the case of a security granted in implement of a prior obligation incurred outwith the period of one year where it can be shown that the granting of a loan and the obligation to give security were the counterparts of a single transaction, provided that the creditor was not voluntarily a party to delay in the completion of the security.

- c. (1) All other payments made by the debtor in respect of debts due at the date of the declaration of the bankruptcy, and all other transactions effected for valuable consideration by the debtor after the date of the suspension of payments and less than one year before the declaration of the bankruptcy, may be declared invalid as against the bankruptcy creditors if they have been made to the detriment of these creditors, and if the persons who receive the payments from the debtor or were parties to the transactions with him knew of the suspension of payments.

Comment - This would be an innovation in the Law of Scotland and the Council foresees great difficulty in the practical application of this part of Article 4C. "Detriment" would arise if the proceeds of a loan were to be squandered. Knowledge on the part of persons receiving payments from the debtor would be in many cases extremely hard if not impossible to prove. The Council would wish to see "detriment" more clearly defined and to know upon whom would rest the onus of proof in cases where knowledge on the part of a creditor was in question.

- (2) In the event of bills of exchange having been paid or cheques having been met after the date of the suspension of payments and less than one year before the declaration of the bankruptcy, proceedings to recover the sums thereby passing may be brought only against the drawer of the bill of exchange or the payee of the cheque, or where a bill is drawn by order for the account of a third person, against that person. In the case of a promissory note, a bill payable to order, proceedings may be brought only against the first indorser. In either case, it must be proved that the person from whom recovery is sought knew of the suspension of payment at the time when the bill or note was issued.

Comment - The Council has construed this part of Article 4C as referring to the case where a bill of exchange is paid by the bankrupt as acceptor, such payment being analogous to settlement effected by a cheque drawn

by the bankrupt in favour of his creditor, but again sees no reason to link the principle with the date of suspension of payments. The Council accepts the principle that the right of recovery should be restricted to the drawer of a bill payable to "self" or the payee of a cheque, there being a strong presumption that the drawer or payee would be creditors of the bankrupt. It finds difficulty, however, in discerning any thread of logic or equity running through the idea that any claim should become competent against a third party payee of a bill. Such a third party would be the creditor of the drawer who has chosen to utilise his claim upon his debtor as a means of settling his indebtedness to the payee. Hence it would seem logical that in such a situation the third party (whose knowledge of the insolvent's circumstances is a remote possibility) should be entitled to retain the proceeds of the bill but that the drawer, if he had knowledge of the suspension of payments, should, as in the case of a bill drawn in his own favour, be liable to account for the proceeds to the trustee.

- D. The registration of any charge created by the debtor by contract, if effected after the date of the suspension of payments and less than one year before the declaration of the bankruptcy, may be declared invalid as against the bankruptcy creditors if more than 15 days elapsed between the date of the transaction creating the charge and the date of its submission for registration.

Comment - While the phrase "any charge created by the debtor by contract" could refer to a security granted in fulfilment of a prior obligation, the use of comparable wording in Article 4B(2) leaves the Council in little doubt that the phrase is intended to describe a conventional security.

The law in regard to the creation of security in Scotland differs as regards securities granted by (a) individuals and (b) Companies. In the former case the timing of registration is largely irrelevant whereas it is a sine qua non of the creation of security by a company that statutory evidence of the charge is registered within 21 days.

To the extent that valid securities granted by an individual may  
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at present be held unpublished by the creditors in them because of the rules concerning the granting of security in implement of a novum debitum and thus the true state of a debtor's financial affairs can be cloaked from the view of others transacting with him, the Council considers that adoption of the principle contained in this Article would result in an improvement on the present rules. The Council feels, however, that the period of 15 days is too short and would recommend its extension to one of 21 days, which would of course be consistent with the formalities required for registration of securities by companies. Again, the Council considers that the date of suspension of payments should be an irrelevant consideration.

- E. When the bankruptcy supersedes a procedure other than bankruptcy proceedings then periods of time specified above shall be calculated from the date when those other proceedings were opened.

No comment.

- F. During the course of the bankruptcy, the liquidator shall alone have the right to act under the provisions of this Article, or to commence proceedings to set aside transactions effected by the debtor in fraud of his creditors.

Comment - This would be an innovation into the Law of Scotland, but in the context of a European bankruptcy, the Council considers it to be a vital provision.

Article 5: Set-off.

1. The bankruptcy shall be no bar to set-off, provided that the creditor's claim, and the debt to be set off, existed in the same estate at the date when the bankruptcy was declared. The same shall apply to claims for damages for breach of an obligation arising under a contract entered into before the declaration of the bankruptcy, even if such breach did not occur or was not established until after the declaration of the bankruptcy, or if the damages in respect of such breach were not claimed until after the declaration of the bankruptcy.
2. Set-off shall be admissible even where, at the time of the declaration of the bankruptcy, the debts to be set off, or one of them, were payable at a future date, or were not expressed in money, or were expressed in currency other than the legal tender of the State in which the bankruptcy proceedings were instituted. Such debts shall be valued as at the date of the declaration of the bankruptcy, and in accordance with any other provisions of the law of the State where the bankruptcy proceedings were instituted.

Comment - /

Comment - The principles of these sub-paragraphs of Article 5 are in large measure in conformity with the Law of Scotland and are acceptable to the Council, but clarification of the words "existed in the same estate" is required.

3. Set-off shall not be admissible where, at the time of the declaration of the bankruptcy, the debts, or one of them, were, in accordance with the contract between the parties, contingent only.

Comment - While this rule may be appropriate in some circumstances it would operate inequitably, in relation to parties subsidiarily liable on bills of exchange or under cautionary obligations on the bankrupt's account if it be assumed that such liabilities would come within the definition of contingent debts. At present the Law of Scotland allows the valuation of truly contingent debts.

4. Set-off shall not be admissible in favour of the assignee of the benefit of, or liability for, a debt, where the assignment was made after the date of the suspension of payments and after the assignee had knowledge thereof. This rule applies also to the transfer of negotiable instruments payable to bearer or to order.

Comment - The Council approves of the principle of this proposal on the assumption that the purpose of it is to prevent the purchase of claims at less than their nominal value in order to extinguish liabilities to the bankrupt's estate which would otherwise require to be met in full, but considers that some regard must be had to the position of a cautioner who after the cessation of payments but before the declaration of bankruptcy has paid off the debt which he had guaranteed and who thereafter, either by assignation or by virtue of the beneficium cedendarum actionum bonorum stands in the shoes of the creditor whose claim he has paid off. In that situation, equity would appear to demand that set-off should be competent.

Article 6: Contracts of sale under which the passing of title is deferred.

Where there has been a sale on terms that the passing of title be deferred, the bankruptcy of the vendor occurring after the thing sold has been delivered shall not be a ground for setting aside the contract, and shall not prevent the purchaser from acquiring title to the thing sold.

Comment - Again this provision would constitute a major innovation in the law of /

of Scotland, but one which has the approval of the Council. Indeed the Council would prefer that the provisions of this Article should be extended to cover cases where delivery has not taken place, for example where a house is in course of construction and both the house and the site remain in the possession of the seller until completion. In these circumstances the supervening insolvency of the vendor should not enable the liquidator to repudiate the contract. It is not clear if the Article is intended to apply to contracts of hire purchase as well as to contracts of sale where the passing of title is deferred, but in the view of the Council this should be the case.

In name of the Council

J.D. WHEELANS

President

1 May 1975

103-2 London Chamber of Commerce

MEMORANDUM OF THE COMPANY LAW COMMITTEE OF THE LONDON CHAMBER OF  
COMMERCE AND INDUSTRY ON THE DRAFT EEC BANKRUPTCY CONVENTION AND  
A CONSULTATIVE PAPER DRAFTED BY THE ADVISORY COMMITTEE OF THE  
INSOLVENCY DIVISION OF THE DEPARTMENT OF TRADE.

The London Chamber Company Law Committee wishes to congratulate the Standing Advisory Committee of the Insolvency Division of the Department of Trade on the Consultative Paper they have produced on the Draft EEC Bankruptcy Convention. It is an excellent document and represents a great deal of detailed work.

The Committee is not dealing with the document seriatim as it feels that many questions asked will be considered elsewhere by other organisations. The comments made refer to points felt to be of particular importance at this time, and the Committee would reserve the right to make further comments at a later stage.

The Committee first discussed paragraph 2.4 of the Consultative Paper on page 19, which notes the problems arising due to the fact that in the UK liquidation proceedings are available for the winding-up of both solvent and insolvent companies. It is recommended that the UK system of voluntary winding-up should not be taken away or changed by the Convention. The present system whereby a voluntary winding-up can be changed relatively easily into an involuntary or compulsory winding-up without formal bankruptcy has great advantages, and these should not be lost. The Committee would comment that it may be possible to retain the principle of unity of liquidation proceedings and initially keep them out of the Convention altogether, providing at the same time for a mechanism whereby proceedings could be brought within the Convention if a company is in fact found to be insolvent.

It should be noted that where a creditor's voluntary winding-up is in progress, and the company has assets in another Common Market country, the general rules applying to that type of winding-up procedure may prove to be insufficient to enable the liquidator to obtain control over the assets situated abroad. It would then be useful to have a mechanism (parallel to our present system) to convert the voluntary winding-up proceedings into a compulsory winding-up, and so bring it under the authority of the Court, thereby enabling the vesting of the assets in the liquidator, and coming within the provisions of the Bankruptcy Convention.

If there are no foreign assets, then it is submitted that a creditors voluntary winding-up without interference by the Court would be the most practical solution and a facility which should be retained.

The power to declare bankrupt the persons mentioned in articles 10, 11 and 12 of the Convention is considered dangerous, as being both punitive and recuperative. Whilst it is realised that its purpose could well be to get behind the Italian and French restrictions on declaring bankrupt directors of companies and small traders, yet set in the context of this country, against the background of a different philosophy, the opposite of our own, it takes on a more sinister aspect. The primary purpose of bankruptcy in the UK is to provide for the distribution of assets among creditors; not to provide punishment. Section 333 of the Companies Act 1948 sets out the circumstances in which damages can be assessed by the Court against directors. Bankruptcy may follow when these damages are left unpaid. The Convention goes further and enables an immediate declaration of bankruptcy. Whereas this might be proper where a firm or partnership is involved, it is submitted that it would be improper where company directors are concerned, as for example the Bankruptcy Court would have to make a value judgment as to the director's behaviour.

The Committee would ask that the wording of articles 1 (a) to (c) of the Uniform Law (Annex 1) should be improved. Further the Committee would hope that the directors involved would be given a written right to an opportunity of obtaining representation and a proper defence.

The Committee would underline the dangers of undermining the uniformity of the bankruptcy law existing by reason of the fact that the uniform law need not necessarily be introduced in the same way in different Member States.

The Committee would also express concern as to article 9 (1) of the Convention, which perpetuates the rule of some Continental laws that only a trader can be declared bankrupt. Thus an English lawyer or doctor practising in Paris could not be declared bankrupt by the French Courts (although probably the règlement judiciaire would apply to him - see the Protocol page 41) but he could be declared bankrupt in the UK. This is manifestly unfair, and would seem to indicate a gap in the Convention which should be covered. It was strongly felt that all distinction between traders and non-traders should be abolished as causing unnecessary complications.

A final point which the Committee would like to make concerns the position where the bankrupt is a trustee for beneficiaries. Would the trust property under his control form part of the bankrupt's estate under the convention or not? The Committee would comment that the institution of trust in the English sense is not sufficiently recognised abroad, and would recommend that express recognition of trust property in the Convention should be made to ensure that it would not be divisible property in the bankruptcy.

Conclusion

In conclusion the Committee would underline that it welcomes the Convention in general terms, but hopes that the Department of Trade will safeguard the valuable features of the present system in the UK, in particular the several existing rights of directors, individuals and beneficiaries.

27 March 1975