

INSOLVENCY LAW REVIEW COMMITTEE

Note to Members

EEC DRAFT BANKRUPTCY CONVENTION
RESERVATION OF TITLE CLAUSES

*See Minutes 11 Jul
20th July*

1 Enclosed at Annex 'A' is a draft of the United Kingdom Observations on Article 39 and Annex I (Article 6) of the draft Bankruptcy Convention, which it is proposed to send to Brussels. The current texts of the two articles are set out in Annex 'B' and the texts as they will be if the UK proposals are accepted, are in Annex 'C'.

2 The UK is proposing to undertake to recognise validly created reservation of title clauses, at least to the limited extent spelled out in Article 6(1). This would not prevent us from continuing to recognise such clauses to a much greater extent, as is the case under our law at present; nor would it prevent us from amending UK law, should we wish to ban the use of such clauses in contracts governed by UK law. It would commit us, however, to recognise in insolvency proceedings, at least to this limited extent, any such clauses included in a contract governed by a foreign law, provided that that foreign law would be applied here under our rules of Private International Law.

3 In addition to the studies of reservation of title being made by our Committee and other bodies, consultations are in hand on the EEC draft Directive concerning the recognition of securities over movable property. I understand that the general view is that the Bankruptcy Convention should not be held up until complete uniformity on this matter can be achieved by an EEC Directive, and that restricting uniformity to merely minimum recognition requirements seems to be the most acceptable position. Members may recall that the Articles are a compromise between the widely divergent laws of the original six Member States. If, at some future date, we agree to an EEC Directive allowing recognition on less stringent conditions, then, all national laws of Member States will be amended accordingly, and the present minimum requirements of the Convention will cease to apply in practice.

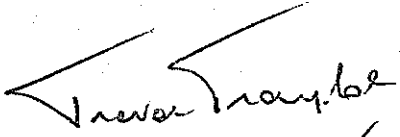
4 I have been asked to enquire whether the Committee have any objection to the course of action being proposed by the UK delegation, so far as the draft Bankruptcy Convention is concerned.

5 I have drawn the UK delegation's attention, provisionally, to two points:

- (i) The Committee might favour a restriction being placed upon the seller's right to immediate repossession; and
- (ii) The repossession of goods should automatically extinguish any claim to the original contract price for those goods.

I understand that the UK delegation would be prepared to press for these additional amendments (particularly (i)) if the Committee agrees.

6 I propose to raise this topic under "Matters arising" at the meeting on 31 August, with a view to giving the UK delegation a reply immediately following that meeting. If any member has any major reservations, however, perhaps he would kindly let me know in advance of the meeting.


T H TRAYLOR
Secretary
3.8.78

of the buyer at least to the extent that it reserves to the seller the right to re-take possession of the thing sold until payment for that thing has been made in full provided that the clause has been stipulated, by written agreement, [telegram,] telex or oral agreement, and confirmed in writing by the buyer, before delivery. The liquidator may prove by any means the fraudulent or inaccurate character of the writing or of the date thereof.

PURPOSE:

The proposed amended paragraph is intended to make clear what is believed to be the original intention. It specifically provides:

- (a) that the clause containing a reservation of title must firstly be validly created according to the law designated by Article 39(1).
- (b) that in the event of the bankruptcy of the buyer, the laws of each member State shall, at least, admit its validity against the general body of creditors to a specified extent, and provided the conditions specified are met.
- (c) the extent to which recognition will, at least, be granted is limited to
 - (i) re-taking possession of the particular thing sold but
 - (ii) only for the recovery of the unpaid price of that particular thing
- (d) the specified conditions to be met are:
 - (i) that the clause was stipulated by the seller before delivery and in the prescribed way and
 - (ii) acceptance of the clause was confirmed in writing by the buyer, before delivery.

The United Kingdom is of the opinion that, having regard to the differences in the national laws of the member States concerning the recognition of clauses containing a reservation of title, Article 6 of Annex I should spell out precisely the intention of the Convention in this respect.

DEPARTMENT OF TRADE
JULY 1978

PRESENT PROVISIONAL TEXT
OF
ARTICLE 39
AND
ARTICLE 6 OF ANNEX I

ARTICLE 39 - Contracts of Sale of of movable property with reservation of title

1. The validity of sales with reservation of title shall be governed by the law designated in accordance with the rules of private international law of the State where the bankruptcy has been opened.
2. In the event of the bankruptcy of the buyer or seller, the validity as against the general body of creditors, of clauses containing a reservation of title shall be governed by the provisions of Article 6 of Annex I.

ARTICLE 6 of Annex I

1. Clauses containing a reservation of title in the thing sold guaranteeing payment of the price, shall be valid as against the creditors of the buyer where they are stipulated before delivery, and by written agreement, telegram telex or verbal agreement confirmed in writing by the buyer. The liquidator may prove by any means, the fraudulent or inaccurate character of the writing or of the date thereof.
2. The bankruptcy of the seller occurring after the thing sold has been delivered, shall not be a ground for rescinding the contract and shall not prevent the buyer from acquiring ownership of the thing sold.

PROPOSED AMENDED TEXTS
OF
ARTICLE 39
AND
ARTICLE 6 OF ANNEX I

Article 39

Contracts of Sale /of movable property / with
reservation of title

1. The validity of sales with reservation of title shall be governed by the law designated in accordance with the rules of private international law of the State where the bankruptcy has been opened.
2. In the event of the bankruptcy of the buyer, the validity as against the general body of creditors of clauses containing a reservation of title shall be governed by the provisions of Article 6(1) of Annex I.
3. In the event of the bankruptcy of the seller, the validity in favour of the general body of creditors of clauses containing a reservation of title shall be governed by the provisions of Article 6(2) of Annex I.

Article 6 of Annex I.

1. If a clause containing a reservation of title is validly created according to the law designated by Article 39(1), it shall be valid as against the general body of creditors of the buyer at least to the extent that it reserves to the seller the right to re-take possession of the thing sold until payment for that thing has been made in full provided that the clause has been stipulated, by written agreement, telegram, telex or oral agreement and confirmed in writing by the buyer before delivery. The liquidator may prove by any means the fraudulent or inaccurate character of the writing or of the date thereof.
2. The bankruptcy of the seller occurring after the thing sold has been delivered shall not be a ground for rescinding the contract and shall not prevent the buyer from acquiring ownership of the thing sold.