8(16) Scope

Superseded

9 JUNE 1975

THE SCOPE OF THE CONVENTION

Procedures to which the Convention applies

1. The European Judgments Convention, while providing for the reciprocal recognition of judgments by the Courts of Member States of the European communities, by Article 1(2) excludes judgments relating to "bankruptcy, winding-up, arrangements, compositions or similar proceedings." This gap is to be filled by the Bankruptcy Convention which, according to the Report, is intended to apply to "any proceedings which being founded, according to different legislations, on the condition of cessation of payments, insolvency or undermining of the debtor's credit, imply an intervention of the judicial authority, not only suspending individual proceedings, but achieving forced and collective realisation of assets, or simply, control of a debtor's business". The Convention itself does not say this in terms, but achieves a similar result by listing in Article I of the Protocol the various proceedings in Member States to which the Convention applies.

2. Although the reference throughout is to "bankruptcy", it is clear that the provisions also extend to the liquidation of companies; indeed the Report states that it relates to physical persons, companies and firms and legal persons against whose assets "bankruptcy" may be instituted, irrespective of the nationality of the parties. It is also clear that the Convention is intended to apply, apart from the basic procedures of bankruptcy and liquidation, to a number of subsidiary procedures to be listed in Article I(b) of the Protocol which include judicially supervised schemes of arrangement and compositions. These procedures, it is understood, are either those covering (either) the collective liquidation of the debtor's assets or those designed to avoid such liquidation while safeguarding the creditor's interests. The

Convention also applies to judgments which are made incidentally in the course of the bankruptcy, liquidation, etc. These judgments are limitatively enumerated in Article 17 and include judgments invalidating transactions during the period of relation-back and judgments for the recovery of property consequent to such judgments.

Administration of estate of persons dying insolvent

3. It is not clear from the present text of the Convention whether it applies to the administration in bankruptcy of the estates of persons dying insolvent (in Scotland, the sequestration of a deceased debtor). It is understood that the Federal Republic of Germany has proposed an addition to Article 3 which would answer this question affirmatively. The inclusion of such administrations would, at first sight, appear to present jurisdictional difficulties, because jurisdiction in respect of a deceased insolvent debtor is in many legal systems (including the U.K.) based upon his place of death. However, since the Hague Convention on the International Administration of Estates proposes that the habitual residence of the deceased should afford jurisdiction and since this will coincide, in most cases, with the centre of administration, there should be no real problem. We understand that the United Kingdom will most likely ratify the Hague Convention.

4. It has been brought to our attention that it is not uncommon near the land border between Northern Ireland and the Republic of Ireland, for persons domiciled and/or habitually resident in Northern Ireland to have their business, and thus their centres of administration, in the Republic. Bearing in mind that the insolvent estate of a deceased person is only administered by the court if the court is petitioned to do so, it would be strange if administration by the court gave one legal system jurisdiction whilst administration out of court gave jurisidiction to another legal system. On the

other hand it would be unfair to a creditor in the State in which the debtor's centre of administration was situated, to be denied the right to have the estate dealt with in that jurisdiction simply because the debtor had died. In all probability this problem also occurs near the frontiers of continental Member States. In our view, the centre of administration should be the criterion for jurisdiction in the case of the insolvent estate of a deceased person being administered by the court.

5. It has been suggested to us that inclusion of such administrations in the Convention, with the attendant requirement to advertise in the OJEC will assist creditors in other Member States to give notice of their preferred or ordinary debts.

6. Provision is made under Section 130 of the 1914 Act for the estates of deceased debtors to be administered in bankruptcy within the general scheme of the Act. In Scotland, the sequestration of the estate of a deceased debtor is competent under Section 11 of the 1913 Act.

7. We are satisfied that, in principle, the Convention should extend to the administration in bankruptcy of the estates of persons dying insolvent. The German Government has drawn attention to the difficulties which could result where several heirs had their centres of administration in different States. They propose a provision should be added to Article 3 that "for bankruptcies of deceased person's estates, debtor will mean the de cujus". We fully support this proposal but would prefer the English text to use the words "the deceased."

8. The Blagden Committee (Report on Bankruptcy Law and Deeds of Arrangement Law Amendment, Cmnd. 221, July 1957), observed that it had been held that the provisions of Part II of the 1914 Act relating to the effect of the bankruptcy on antecedent transations, such as Sections 40, 41 and 42, were not applicable to the administration of a deceased debtor under Section 130. That Committee was of the opinion that there was no reason why the whole

amendment also needed re service of petition

of the provisions of Part II of the Act should not apply to an administration order under Section 130, and recommended appropriate amendments and additions. We support this recommendation and consider that the operation of the Bankruptcy Convention should be unaffected by the debtor's death. Indeed, this will be implemented automatically by including such administrations in Article I (a) of the Protocol to the Convention, thereby bringing them within the ambit of the Uniform Law.

Compositions and analogous proceedings

9. The terms of the Report suggest that the Convention is not intended to apply to extra-judicial and purely contractual arrangements between a debtor and his or its creditors. It would follow that deeds of arrangement, non-judicial compositions and private trust deeds for creditors are excluded. The appointment of a receiver and manager under a floating-charge for a debenture holder is equally excluded. Judgments arising out of such contractual arrangements appear to fall within the terms of the Judgments Convention. We have given careful consideration to this matter; firstly, to decide whether such allocation between the two Conventions is satisfactory to the United Kingdom and secondly, to determine whether any protective clauses for such trustees and receivers are required within the terms of the Bankruptcy Convention.

10. The normal concept of bankruptcy suggests insolvency but the legal meaning is far wider. The bankruptcy laws of the United Kingdom provide for a surplus in the bankrupt's estate which is an implication that all bankrupts are not insolvent, and that refusal to pay a debt is sometimes due to unwillingness rather than an inability to do so. It has been held that bankruptcy is a law for the benefit and the relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts. In certain continental countries (eg Italy) insolvency is a condition precedent to adjudication, while in others (eg France) it is not.

11. At a Symposium on the Community conventions held in Brussels in December 1974, M. Noel explained the scope of the Convention as follows:

> " In addition to the normal concept of "bankruptcy", there exists in all Member States various forms of equally collective procedures which, on the basis of the cessation of payments or a related concept and involved in intervention by the legal authority, have the effect of a staying process by individual creditors and result either in supervision of the debtor or in the reduction of his liabilities so as to safeguard the undertaking, or even, in the final analysis in the realisation of assets. It would have been impracticable to isolate bankruptcy in the strict sense, which is the extreme solution from the range of more flexible measures which are intended to avoid bankruptcy; consequently those more flexible measures are included within the scope of the Convention. All procedures not listed in the Protocol are excluded and will fall within the scope of the general Convention."

12. The question for decision is whether such a division as between broadly judicial and non-judicial arrangements, which is apparently acceptable on the continent, is acceptable in the United Kingdom. M. Noel admitted that these restrictions weakened the scope of the draft Convention and created difficulties and he questioned whether they really were justified.

13. We have received criticism that, while an arbitrary division between judicial and non-judicial proceedings may be acceptable on the continent, such a division is unsuitable in relation to the various bankruptcy and analogous proceedings within the United Kingdom. The College of Justice in Scotland remarks that, if extra judicial proceedings are excluded, a notour bankruptcy could occur without sequestration and leave its effect on preferences and diligences without being touched by the Convention. But under the Convention, bankruptcy proceedings could follow, possibly in another country and with a different effect on preferences and diligences. They add that similar disruption might occur when judicial proceedings were

started in a case where a receiver for a debenture holder had been appointed and had been administering a company's assets or where a voluntary winding-up was turned into a winding-up by the court. The Association of Certified Accountants considers that the Convention should be extended to cover extra-judicial and contractual arrangements in order that the powers under the Convention in respect of the collection of foreign assets should be available to trustees and receivers in such proceedings. The Association also considers that the Convention should apply to any liquidations which are consequential to practical insolvency; hence it should cover creditors' voluntary liquidations.

14. The Institute of Chartered Accountants in England and Wales adheres firmly to the view that receiverships, deeds of arrangement, and voluntary liquidations should be brought within the scope of the Convention. In their view, the whole practice of insolvency in England and Wales is fundamentally dependent on these procedures, and if they were excluded from the Convention, it would mean that the bulk of insolvencies in England and Wales would be conducted outside the scope of the Convention. Moreover, the difficulties experienced by voluntary liquidators and receivers in establishing title, carrying on business, enforcing judgments, resisting attachments, etc in Europe would undoubtedly be magnified by the fact of the exclusion. In their view whatever the practical difficulties, means must be found of harmonising the two systems.

15. We have noted that the Committee on the European Judgments Convention under Lord Kilbrandon, assumed that such matters fell to be dealt with under the Judgments Convention though they indicated that the point required clarification. At paragraph 68 of their report they said, 'It seems that compositions and arrangements effected out of court by deed under the Deeds of Arrangment Act, 1914 in England, or under the common law in Scotland, are not covered by the draft Bankruptcy Convention. However, the official report makes it

They are not judgments at all

reasonably clear that transactions of this sort not involving the intervention of the judicial authorities are not covered by the Article 1(2) exception, and therefore are covered by the Judgments Convention. This is a point of some practical importance and it would be useful to obtain confirmation that the Judgments Convention does apply in these cases."

Summary of Continental analogous proceedings

Belgium

16. (a) concordat judiciaire. Under this proceeding which is not valid against preferential creditors, the debtor is not divested of his property but continues to manage his undertaking. There is no period of relation-back but since the composition petition constitutes an acknowledgment of the suspension of payments, in the case of bankruptcy, the period of relation-back may be back dated to the day on which the composition petition was lodged. All proceedings for enforcement are stayed and the court supervises the progress of the proceedings.

(b) sursis de paiement. A moratorium granted for a term of 1 year, on condition that the debtor is able to discharge all debts in full. It appears that only one such proceeding has occured in Belgium during the last 15 years but the proceeding has been included within the terms of the Convention because it prevents bankruptcy proceedings from being instituted.

Germany

17. Gerichtliches Vergleichsverfahren. This is referred to as a rehabilitation proceeding, no dispossession takes place and an administrator is appointed whose duties are confined to supervision and inspection. Individual proceedings are suspended. There is no period of relation-back unless a bankruptcy is subsequently declared, when the period of relation-back extends to the commencement of the analogous proceeding. The composition is not valid as against preferential creditors.

France

18. (a) Reglement Judiciaire. The debtor is assisted in the administration of his estate by trustees; individual proceedings or proceedings by way of execution are suspended; the rules relating to the period of relation-back are the same as those connected with bankruptcy and the set off rules provided for in the Convention also apply. The composition is not valid against secured or preferential creditors unless they agree to be bound by it. This proceeding must lead to composition and if the composition is not adhered to, it will be dissolved and be followed automatically by bankruptcy.

(b) Concordat preventif. The debtor is not divested of his property but the courts have wide powers to decide to what extent its administration will be supervised; in all cases a trustee is appointed. Individual proceedings by both preferential and unsecured creditors are suspended. The object is to stay proceedings in order to enable the debtor to put forward a scheme with a view to discharging his liabilities. The provisional stay is for 3 months with a possible extension of one month. If the scheme is accepted, a moratorium is granted for a maximum period of 3 years.

Italy

19. (a) Concordato preventivo. The debtor is not divested of his property but he comes under the supervision of the court. Individual proceedings to obtain recognition of a right are not stayed but there is a staying of execution. There are no special provisions regarding the period of relation-back; however, when a composition leads to bankruptcy, the period of relation-back is extended by 6 months. There are no special rules regarding set off. The proceeding is valid as against preferential creditors with regard to deferment of payment, but the preferential creditors must be able to be satisfied in full. To be allowed the concordato,

a debtor must offer genuine guarantees that he will pay at least 40% of the amount due to unsecured creditors. To this end he may surrender all his property to the creditors as a guarantee. It is also possible for a third party to guarantee on his behalf that the composition will be carried out.

(b) Amministrazione controllata. This is for a debtor experiencing temporary financial difficulties and, provided he is not in a state of insolvency, he may ask the court to place his undertaking under supervised administration. If the court accepts the request, the debtor is given a deferment of payment of 1 year which is valid against all creditors. No remission of debts is allowed and all creditors must be satisfied in full. The debtor retains full freedom to manage his affairs under the courts supervision.

Luxembourg

20. (a) Concordat preventif de la faillite. This is similar to the Belgium concordat judiciaire.

(b) Sursis de paiement. This is comparable to that under Belgium law.

Netherlands

21. (a) Surséance van betaling. The debtor is assisted by a trustee and may not act alone. Proceedings for enforcement by unsecured creditors are stayed, but preference creditors retain all their rights including individual action for enforcement, but they may not petition for bankruptcy. Rules allowing for set-off apply as in bankruptcy. There is no period of relation-back unless the scheme fails, when the ensuing bankruptcy will relate back to the commencement of the scheme.

(b) Vergadering van houders van schuldbrieven aan toonder. A procedure which is rarely used whereby the rights of secured creditors such as bondholders can be modified when the company is unable to completely fulfil its obligations. Such secured creditors are prevented from petitioning for the bankruptcy of the debtor but other creditors retain such rights.

Compositions, arrangements, etc in England

22. The law is basically enacted in the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act, 1926, the Bankruptcy Rules 1952, and the Deeds of Arrangement Act 1914 and the Deeds of Arrangment Rules 1925.

23. The Deeds of Arrangement Act regulates extra-judicial arrangements and deals with the assignment of a debtor's assets for the benefit of creditors, extra-bankruptcy compositions, deeds for inspectorship, letters of licence authorising the debtor or a third party to manage or dispose of a business with a view to the payment of debts, and agreements or instruments entered into for the purpose of carrying on or winding-up the debtor's business.

24. By Section 21(1) of the Bankruptcy Act 1914, after the adjudication of bankruptcy the creditors may accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs. In either event the same proceedings will be taken and the same consequences ensue as in the case of a composition or scheme accepted before adjudication. Such a proposal may be accepted by the creditors at any time after the adjudication. Approval of the court is required, upon which the court annuls the bankruptcy and the title to the estate vests in the person the court indicates and under conditions also set forth by the court. The composition is binding on all creditors as far as they have provable debts except for certain judgment creditors, In certain cases, such as non-performance on behalf of the debtor, undue delay or fraud, the court may annul the composition and declare the defendant bankrupt upon a petition of the trustee or one of the creditors. The composition works as a conditional discharge. The debts revive on the re-adjudication bankrupt of the debtor.

Compositions to prevent bankruptcy

25. The procedure for compositions for the prevention of bankruptcy is almost the same as that in the case of the compositions for the termination of bankruptcy. But the time within which a proposal may be made is limited to within 4 days after the submission of a Statement of Affairs. In this case the proposal is lodged with the Official Receiver. Such a preventive settlement may only be initiated after the initiation of bankruptcy proceedings though before adjudication. To obtain settlement before the initiation of bankruptcy, the debtor must resort to amicable settlements or to deeds of arrangement.

Deeds of arrangement

26. Where creditors make arrangements with a debtor outside the provisions of the Bankruptcy Acts, the rules of bankruptcy do not apply and the debtor is released from the claims only of those who assent to the scheme. The arrangement is a contract and subject to the general law relating thereto. Such arrangements usually come within the Deeds of Arrangement Act 1914, and if they fall within the definition of a "deed of arrangement" they must comply with that Act in order to be valid. A deed of arrangement is any instrument, whether under seal or not, made for the benefit of creditors generally or made by an insolvent debtor for the benefit of any 3 or more creditors. It may be:

(a) An assignment of property to a trustee for the creditors.

(b) A deed or agreement for a composition.

(c) An instrument whereby creditors obtain control over the property or business of the debtor.

27. Since the making of a deed of arrangement is an act of bankruptcy, any creditor who has not assented thereto, may rely on it to present a petition against the debtor, but a creditor who has received notice from the trustee must bring his petition within one month of such notice unless the deed becomes void. If the deed does become void, even an assenting creditor may rely on its execution as an act of bankruptcy. The rights and liabilities of a trustee under a deed of arrangement do not arise from the provisions of bankruptcy law, although in some respects his duties are similar to those of a trustee in bankruptcy. They are defined by the general rules applicable to trustees and, in addition, special duties may be defined in the deed itself.

28. If a deed of arrangement becomes void and a petition in bankruptcy is presented more than 3 months from the deed's execution and a receiving order made, the trustee under the deed is protected as to dealings with and payment out of, the property, if they were proper on the footing of the deed being valid, and if he shows he did not know and had no reason to suppose that it was void. Where a deed of arrangement is avoided by reason of the bankruptcy of the debtor, any expenses properly incurred by the trustee under the deed in the performance of duties imposed on him by the act are paid to him by the trustee in bankruptcy, as a first charge on the estate. Deeds for the benefit of creditors generally may be enforced, and questions arising thereunder determined, by the local bankruptcy court, the locality being that of the debtor's residence or business at the date of execution of the deed.

29. Any other arrangements made before bankruptcy proceedings have been commenced are governed primarily by the ordinary law of contract. Such arrangements are binding only on creditors who assent and do not require the approval of the court.

30. An advantage of an analogous form of proceeding being included within the Convention is that not only is the proceeding effective in all Contracting States, but it prevents any other form of proceeding, even bankruptcy from being instituted in another Member State. Hence the Court seized of the analogous proceeding retains jurisdiction should bankruptcy be declared subsequently. In its present form the Convention could not readily be

extended to include extra-judicial proceedings and we are satisfied that Deeds of Arrangement and similar non-judicial compositions should be excluded. However, we are concerned that the trustee under a Deed of Arrangement should be adequately protected and that an Arrangement could not be upset by a subsequent bankruptcy in another Member State unless it was also vulnerable under UK laws. We attach a Note on these matters at Appendix. [This will be the note produced by Muir]

Compositions and schemes of arrangement

31. We are satisfied that compositions and schemes of arrangement provided for under the various Bankruptcy Acts in England and Wales, Scotland and Northern Ireland should be included in the Convention.

32. Although a company may make compromises or arrangements with individual creditors, it cannot transfer all its property to trustees for the benefit of its creditors (1948 Act, s.320(2)). However, schemes, compromises and reconstructions are provided for by the Companies Acts, whether or not during the course of liquidation. It is our view that where the sanction of the court is a pre-requisite to the implementation of such an arrangement and where creditors' rights are affected, such arrangements should come within the Convention.

Receiverships

33. We have received a number of representations that receiverships should be included in the scope of the Convention. Almost invariably the first step in the enforcement of a debenture is for debenture-holders or their trustees to secure the appointment of a receiver. A receivership is part of the normal commercial practice in the UK. The receiver often carries out some of the functions of a liquidator; for example, he has to have regard to rights of preference, and it has been suggested that he should have comparable powers to those afforded to liquidators under the Convention.

34. We certainly consider it desirable that the powers of a receiver for debenture holders should be given universal recognition throughout the Community. But a receivership is essentially a part of the procedure for enforcing secured debts, at the suit of creditors who rely on their security; thus, it is outside any liquidation. In principle, therefore we think that the Convention should not apply. Nevertheless, floating charges are of great importance to the commercial community in the United Kingdom and we are concerned to hear it suggested that some Member States might look upon such securities as fraudulent preferences. We understand that the Commission has under consideration a draft directive on the recognition of securities over moveable property without dispossession. We assume that such a directive would include the recognition of floating charges; but even so, we consider that special provision should be included in the Bankruptcy Convention to afford them and the powers of receivers appointed under them, recognition throughout the Community. The provisions of the Uniform Law should then expressly include them as a security for the purposes of the Law.

NOTE BY SECRETARY: Paragraph 33 and 34 will probably require amendment when the sub-committee have reported - see MR 19 para 47

Voluntary winding-up

35. The voluntary winding-up of a registered company occurs if it passes a special resolution to that effect, or if it resolves that because of its liabilities, its business cannot be continued and that it is advisable to wind up. (1948 Act, s.278). Where it is proposed to wind up voluntarily, the majority of the directors may make a statutory declaration as to the company's solvency, to the effect that in their opinion, the company will be able to pay its debts in full within a specified period not exceeding twelve months. The liquidation then proceeds as a Members' Voluntary winding-up, and the members appoint a liquidator who is not subject to the supervision of the creditors.

36. If the directors make no declaration of solvency the liquidation is a Creditors' Voluntary winding-up. The creditors then, generally, have the final choice as to who shall be the liquidator, and they may appoint a committee of inspection to assist and supervise him.

37. If the liquidator in a members' voluntary winding-up decides that it will not be possible to pay the company's debts in full within the specified period he is required to call a creditors meeting. This does not convert the liquidation into a creditors' voluntary winding-up, but it ensures that creditors are given information about the company's position, so that they may petition the court for a winding-up order if they wish.

38. The fact that a voluntary winding-up has commenced does not prevent the court from making an order for compulsory liquidation.

39. We unhesitatingly recommend that the Convention should apply to creditors' voluntary winding-up. To exclude them would be inconsistent since such a liquidation implies that the company is practically insolvent.

Surely they will need an order?

40. We can see no justification for the inclusion of members' voluntary winding-up, but we note that a problem might arise where the liquidator decides that the company will be unable to pay its creditors in full. It is possible that in such cases creditors will usually petition for compulsory liquidation. But in our view UK law could with advantage be amended, so that the liquidation was automatically converted into a creditors' voluntary winding-up and provision made for the appointment of a committee of inspection by the creditors.

41. We have considered whether creditors' voluntary winding-up should be listed under ArticleI(a) or under Article I (b) of the Protocol. Clause (a) is limited to the major bankruptcy proceedings in Member States and clause (b) lists other proceedings which, in general, are capable of being converted into full bankruptcy. We do not have strong views on the matter, but since a voluntary liquidation does not preclude the making of a compulsory winding-up order, we think it should be included in clause (b).

42. If creditors'winding-up is listed in Article I(b) of the Protocol, it follows that it should also be listed in Article XIII.

Administration orders

43. An order for the administration of a small estate may be made, in certain circumstances, under section 148 of the County Courts Act, 1959. Application for an order may be made by a debtor who is unable to pay a county court judgment and who alleges that his total indebtedness does not exceed £300. The order does not make the debtor bankrupt but it causes his assets to be administered by the court for the benefit of the creditors. A schedule of liabilities is prepared and a composition is fixed by the court. Creditors to whom such debts are due are precluded from taking action against the debtor without the leave of the court.

pecuniary limit £1000

44. Although the debtor may be insolvent in a practical sense, the purpose of the administration order system is to avoid bankruptcy proceedings and to give the debtor a chance to put his financial affairs in order. We understand that, almost invariably, debts are paid in full.

45. In our opinion a county court administration order is not a suitable proceeding for inclusion in an international bankruptcy convention.

SUMMARY

46. Procedures recommended for inclusion in Article I(a) of the Protocol

(a) Bankruptcy (England and Wales and Northern Ireland)

(b) Sequestration including the sequestration of a deceased debtor (Scotland).

(c) Administration in bankruptcy of the estates of persons dying insolvent (England and Wales and Northern Ireland)

(d) Compulsory winding up of companies.

(e) Winding-up of companies under the supervision of the court.

47. Procedures recommended for inclusion in Article I(b) of the Protocol

(a) Compositions and schemes of arrangement under the Bankruptcy Acts.

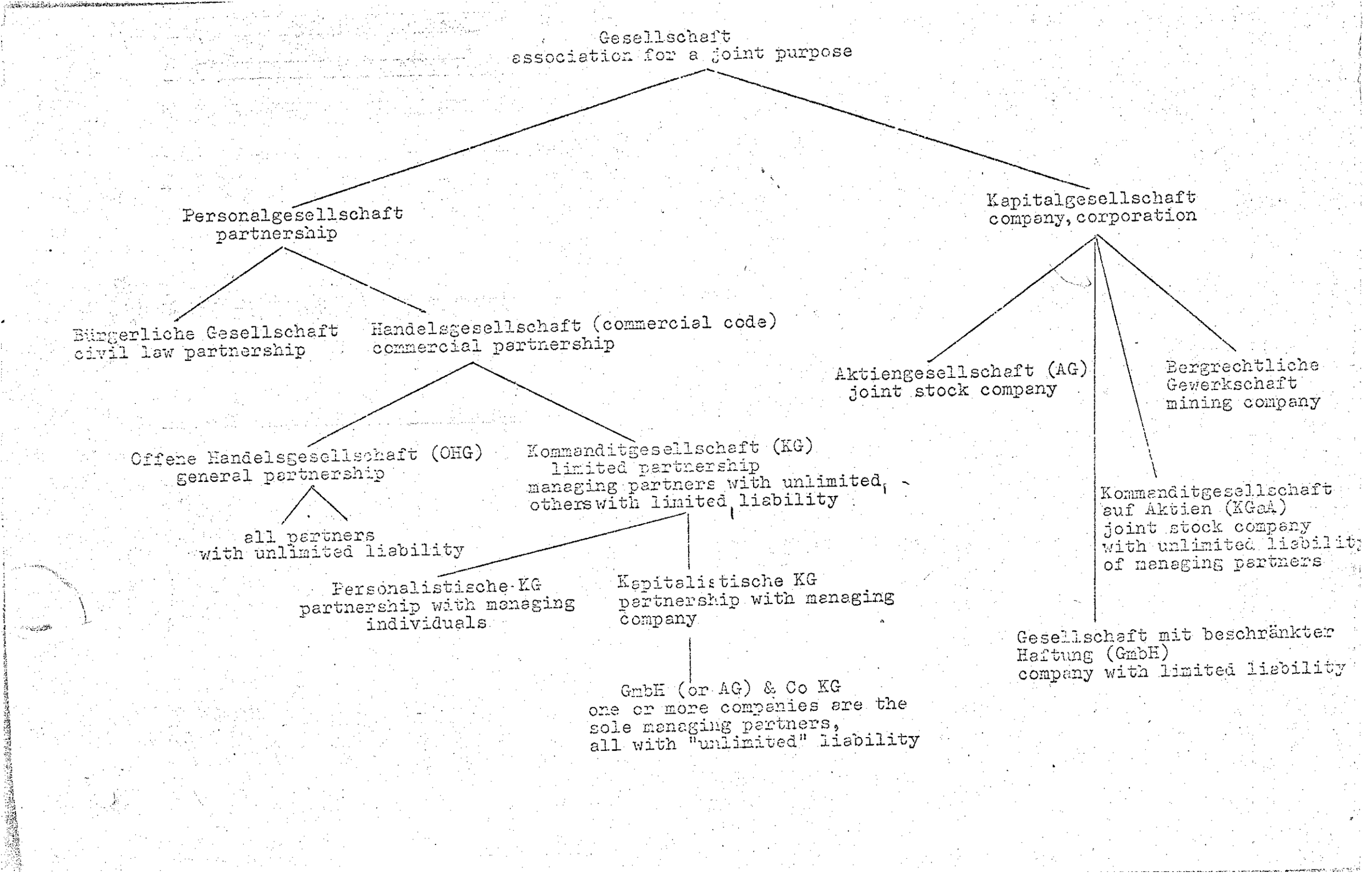
(b) Arrangements under the control of the court (Northern Ireland).

(c) Arrangements, compromises and reconstructions of companies, whether or not during the course of liquidation where the sanction of the court is required and where creditors' rights are affected.

Persons and Entities to which the Convention applies

48. The Convention does not contain a provision indicating the categories of persons and entities to which it is intended to apply. The French text of the Convention at various points assumes that it refers not only to individuals but to "sociétés et personnes morales". It has been pointed out to us that the term "société" in French (and compare "Gesellschaft" in German) is itself a genus with a number of distinct species, only some of which are equivalent to limited companies in the English sense, and which include what would here be termed partnerships or limited partnerships. Similarly, the French term "personne morale" (and compare "Juristischeperson" in German) is not adequately represented in English by the terms "legal person" or "artificial person"; for it may include groups of natural persons who do not, in England, possess a corporate personality, even though they may procedurally sue or be sued in their "firm name". We assume, however, that the Convention applies not only to the administration in insolvency of individuals, but of partnerships or firms whether or not possessing legal personality, of registered companies whether limited or unlimited, and of unregistered companies and associations, whether or not possessing legal personality. We propose for convenience to refer subsequently to these entities collectively as "companies or firms". We also assume that the Convention is not intended to apply to State corporations and other agencies of the State.

NOTE BY SECRETARY - It is for consideration whether the 2 charts prepared by Sandy should be inserted to illustrate the problem. If so, perhaps Sandy will kindly prepare a suitable explanatory note.


Gesellschaft
association for a joint purpose
Personalgesellschaft
partnership
Kapitalgesellschaft
company, corporation
Bürgerliche Gesellschaft
civil law partnership
Handelsgesellschaft (commercial code)
commercial partnership
Aktiengesellschaft (AG)
joint stock company
Bergrechtliche
Gewerkschaft
mining company
Offene Handelsgesellschaft (OHG)
general partnership
Kommanditgesellschaft (KG)
limited partnership
managing partners with unlimited,
others with limited liability
Kommanditgesellschaft
auf Aktien (KGaA)
joint stock company
with unlimited liability
of managing partners
all partners
with unlimited liability
Personalistische KG
partnership with managing
individuals
Kapitalistische KG
partnership with managing
company
Gesellschaft mit beschränkter
Haftung (GmbH)
company with limited liability
GmbH (or AG) & Co KG
one or more companies are the
sole managing partners,
all with "unlimited" liability

English	French	German
Association or Society	association	Verein
Foundation	fondation	Stiftung
Partnership	(société civile) (société particulière)	Gesellschaft des bürgerlichen Rechts (GbürgR)
Professional Partnership	Société civile professionelle	
Commercial partnership	Société en nom collectif	offene Handelsgesellschaft (OHG)
Limited partnership	Société en commandite simple	Kommanditgesellschaft (KG)
Stock partnership	Société en commandite par actions	Kommanditgesellschaft auf Aktien (KGaufAkt.)
Private limited company	Société à responsabilité limitée (SARL)	Gesellschaft mit beschränkter Haftung (GmbH)
Public company or stock corporation	Société Anonyme (S.A.)	Aktiengesellschaft (AG)

NOTE: These are rough equivalents only and should not be taken to correspond exactly in the different systems.

49. We are of the opinion that in the interests of certainty, the Convention should explicitly indicate to which persons and entities it applies. Lists applicable to each Member State should be included in the Protocol.

50. The Bankruptcy Convention specifically excludes from its ambit the winding-up of certain types of company or undertaking. The one general exclusion, contained in Article 1(3), is insurance companies other than those which engage only in re-insurance. Insurance companies are excluded by reason of the existence in Member States of special regulations relating to their operation and possible liquidation and by reason of the intended harmonisation at Community level of the law relating to insurance companies. Article II of the Protocol provides that the Convention is not to apply to proceedings for bankruptcy, etc which are instituted in particular Contracting States against specified institutions in those States, which include savings banks and mutual savings funds, institutions for saving towards, and loans for, the purchase of dwelling houses, and mutualised re-insurance undertakings. This does not, however, preclude proceedings for bankruptcy, etc., against those institutions in other Contracting States. Such proceedings, although otherwise falling within the Convention, need not be recognised in the Contracting State which specified the exclusion.

51. We understand that Article 1 of the draft Insurance Directive restricts its application to the direct insurance undertakings covered by (a) the First Indemnity Co-ordination Directive and (b) the First Life Co-ordination Directive, ie direct indemnity and life insurance undertakings only. Therefore, the exclusion clause as at present drafted in Article 1(3) of the Convention would mean that some, albeit small insurance undertakings, would be outside both the Convention and the Directive.

52. Accordingly, we recommend that the exclusion clause in Article 1(3) should be amended so that only those undertakings coming within the "Directive to co-ordinate the winding-up of direct insurance under-takings" are excluded.

53. We should put on record that the British Insurers' European Committee is against any distinguishing of companies engaged only in re-insurance so far as the UK is concerned and propose the clause should be amended to read:

> "insurance undertakings of all kinds, irrespective of their legal form, with the exception of those which engaged only in re-insurance and are not subject to the national insurance supervisory legislation of the Contracting State in which their Head Office is situated."

54. With regard to the specified institutions listed by various Member States in Article II of the Protocol, these categories of concern may all be wound up under the basic provisions of the Companies Acts, although these provisions are modified to a certain extent by legislation specifically governing these organisations. We do not consider it appropriate to object to the exclusions listed by other Member States. As regards the UK, clearly all trading organisations should be included in the Convention. We do not consider that we have the necessary information on which to recommend exclusions but in our view the Convention is not appropriate for dealing with organisations exercising public functions such as local authorities.

Territorial Scope of the Convention

55. Article 74 declares that the Convention shall apply to the European Territories of the Contracting States. In addition it is to apply:

(a) to the French overseas departments and overseas territories; and

(b) if the Kingdom of the Netherlands makes a declaration to this effect, to Surinam and the Netherlands Antilles.

This Article, though corresponding with Article 60 of the Judgments Convention, presents some problems. The Convention can only apply directly to those European Territories of the United Kingdom in respect of which the Westminster Parliament normally exercises legislative authority. Having regard to Article 26 and Protocol No 3 of the Act of Accession to the Communities, it would seem that the Convention should apply to the United Kingdom, ie England and Wales, Scotland and Northern Ireland, but not to the Channel Islands and the Isle of Man or to the non-European overseas territories and dependencies of the Crown.

56. There would be obvious advantage if the Convention could apply to the Channel Islands and the Isle of Man; indeed were they to be excluded it is conceivable that they might become "bankruptcy havens" analogous to "tax havens". It is well known that numerous companies are registered in the Channel Islands and recent reports indicate that company registrations in the Isle of Man are on the increase. Obviously there can be no question of the UK unilaterally declaring that these territories should be included in the Convention. We recognise that this is a political matter; nevertheless, we recommend that the appropriate Government Department should consult the Channel Islands and the Isle of Man, seeking agreement that the Convention should extend to those territories.

57. As a European territory, Gibraltar is presumably covered by the obligation to accede but it is not clear to us the extent to which the Convention might apply there. We suggest that this is a matter for consultation between the UK and Gibraltar governments.

58. The possible inclusion of the overseas territories of Contracting States in the Convention presents difficulties. The principles of unity and universality of bankruptcy embodied in the Convention imply a tacit acceptance that the Contracting States have reached - to speak in very general terms- a common level of attainment in matters of bankruptcy law and practice. It has been suggested, however, to the Committee that this common level of attainment will not necessarily have been reached at present by legal systems in all the overseas territories of the Contracting States and that, for this reason, the Convention should not for the time being apply to such overseas territories. We are uneasy at the proposed application of the Convention to territories outside Europe unless it can be demonstrated that the domestic bankruptcy law is as fully developed in law and practice as in the countries in Europe.

59. We recommend that the scope of the Convention should be limited at the outset to the European territories of Member States and that its extension to their overseas territories should be a matter for subsequent negotiation and the agreement of all Member States. Such territories should then be listed in the Protocol.

60. Under section 122 of the 1914 Act, "orders in aid" may be obtained between the courts of the UK, and between those courts and "every British court elsewhere having jurisdiction in bankruptcy or insolvency." We note that our colleague, Mr Muir Hunter, QC, discussed the possible problems in depth in his Opinion on the draft Bankruptcy Convention dated 17 January 1973. Therefore, we consider it necessary only to draw attention to the matter and to suggest that special consideration will require to be given to the implications of the Convention in relation to the "Imperial" provisions of the Bankruptcy Acts.

2(3)(e)

9 JUNE 1975

THE SCOPE OF THE CONVENTION

Procedures to which the Convention applies

1. The European Judgments Convention, while providing for the reciprocal recognition of judgments by the Courts of Member States of the European communities, by Article 1(2) excludes judgments relating to "bankruptcy, winding-up, arrangements, compositions or similar proceedings." This gap is to be filled by the Bankruptcy Convention which, according to the Report, is intended to apply to "any proceedings which being founded, according to different legislations, on the condition of cessation of payments, insolvency or undermining of the debtor's credit, imply an intervention of the judicial authority, not only suspending individual proceedings, but achieving forced and collective realisation of assets, or simply, control of a debtor's business". The Convention itself does not say this in terms, but achieves a similar result by listing in Article I of the Protocol the various proceedings in Member States to which the Convention applies.

2. Although the reference throughout is to bankruptcy, it is clear that the provisions also extend to the liquidation of companies; indeed the Report states that it relates to physical persons, companies and firms and legal persons against whose assets bankruptcy may be instituted, irrespective of the nationality of the parties. It is also clear that the Convention is intended to apply, apart from the basic procedures of bankruptcy and liquidation, to a number of subsidiary procedures to be listed in Article I(b) of the Protocol which include judicially supervised schemes of arrangement and compositions. These procedures, it is understood, are those covering either the collective liquidation of the debtor's assets or designed to avoid such liquidation while safeguarding the creditor's interests. The

Convention also applies to judgments which are made incidentally in the course of the bankruptcy, liquidation, etc. These judgments are limitatively enumerated in Article 17 and include judgments invalidating transactions during the period of relation-back and judgments for the recovery of property consequent to such judgments.

Administration of estate of persons dying insolvent

3. It is not clear from the present text of the Convention whether it applies to the administration in bankruptcy of the estates of persons dying insolvent (in Scotland, the sequestration of a deceased debtor). It is understood that the Federal Republic of Germany has proposed an addition to Article 3 which would answer this question affirmatively. The inclusion of such administrations would, at first sight, appear to present jurisdictional difficulties, because jurisdiction in respect of a deceased insolvent debtor is in many legal systems (including the U.K.) based upon his place of death. However, since the Hague Convention on the International Administration of Estates proposes that the habitual residence of the deceased should afford jurisdiction and since this will coincide, in most cases, with the centre of administration, there should be no real problem. We understand that the United Kingdom will most likely ratify the Hague Convention.

4. It has been brought to our attention that it is not uncommon near the land border between Northern Ireland and the Republic of Ireland, for persons domiciled and/or habitually resident in Northern Ireland to have their business, and thus their centres of administration, in the Republic. Bearing in mind that the insolvent estate of a deceased person is only administered by the court if the court is petitioned to do so, it would be strange if administration by the court gave one legal system jurisdiction whilst administration out of court gave jurisidiction to another legal system. On the

other hand it would be unfair to a creditor in the State in which the debtor's centre of administration was situated, to be denied the right to have the estate dealt with in that jurisdiction simply because the debtor had died. In all probability this problem also occurs near the frontiers of continental Member States. In our view the centre of administration should be the criterion for jurisdiction in the case of the insolvent estate of a deceased person being administered by the court.

5. It has been suggested to us that inclusion of such administrations in the Convention, with the attendant requirement to advertise in the OJEC will assist creditors in other Member States to give notice of their preferred or ordinary debts.

6. Provision is made under Section 130 of the 1914 Act for the estates of deceased debtors to be administered in bankruptcy within the general scheme of the Act. In Scotland, the sequestration of the estate of a deceased debtor is competent under Section 11 of the 1913 Act.

7. We are satisfied that, in principle, the Convention should extend to the administration in bankruptcy of the estates of persons dying insolvent. The German Government has drawn attention to the difficulties which could result where several heirs had their centres of administration in different States. They propose a provision should be added to Article 3 that "for bankruptcies of deceased person's estates, debtor will mean the de cujus". We fully support this proposal but would prefer the English text to use the words "the deceased."

8. The Blagden Committee (Report on Bankruptcy Law and Deeds of Arrangement Law Amendment, Cmnd. 221, July 1957), observed that it had been held that the provisions of Part II of the 1914 Act relating to the effect of the bankruptcy on antecedant transactions, such as Sections 40, 41 and 42, were not applicable to the administration of a deceased debtor under Section 130. That Committee was of the opinion that there was no reason why the whole

of the provisions of Part II of the Act should not apply to an administration order under Section 130, and recommended appropriate amendments and additions. We support this recommendation and consider that the operation of the Bankruptcy Convention should be unaffected by the debtor's death. Indeed, this will be implemented automatically by including such administrations in Article I (a) of the Protocol to the Convention, thereby bringing them within the ambit of the Uniform Law.

Compositions and analogous proceedings

9. The terms of the Report suggest that the Convention is not intended to apply to extra-judicial and purely contractual arrangements between a debtor and his or its creditors. It would follow that deeds of arrangement, non-judicial compositions and private trust deeds for creditors are excluded. The appointment of a receiver and manager under a floating-charge for a debenture holder is equally excluded. Judgments arising out of such contractual arrangements appear to fall within the terms of the Judgments Convention. We have given careful consideration to this matter; firstly, to decide whether such allocation between the two Conventions is satisfactory to the United Kingdom and secondly, to determine whether any protective clauses for such trustees and receivers are required within the terms of the Bankruptcy Convention.

10. The normal concept of bankruptcy suggests insolvency but the legal meaning is far wider. The bankruptcy laws of the United Kingdom provide for a surplus in the bankrupt's estate which is an implication that all bankrupts are not insolvent and that refusal to pay a debt is sometimes due to unwillingness rather than an inability to do so. I t has been held that bankruptcy is a law for the benefit and the relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts. In certain continental countries (eg Italy) insolvency is a condition precedent to adjudication while in others (eg France) it is not.

11. At a Symposium on the Community conventions held in Brussels in December 1974, M. Noel explained the scope of the Convention as follows:

> " In addition to the normal concept of "bankruptcy", there exists in all Member States various forms of equally collective procedures which, on the basis of the cessation of payments or a related concept and involved in intervention by the legal authority, have the effect of a staying process by individual creditors and result either in supervision of the debtor or in the reduction of his liabilities so as to safeguard the undertaking, or even, in the final analysis in the realisation of assets. It would have been impracticable to isolate bankruptcy in the strict sense, which is the extreme solution from the range of more flexible measures which are intended to avoid bankruptcy; consequently those more flexible measures are included within the scope of the Convention. All procedures not listed in the Protocol are excluded and will fall within the scope of the general Convention."

12. The question for decision is whether such a division as between broadly judicial and non-judicial arrangements, which is apparently acceptable on the continent, is acceptable in the United Kingdom. M. Noel admitted that these restrictions weakened the scope of the draft Convention and created difficulties and he questioned whether they really were justified.

13. We have received criticism that, while an arbitrary division between judicial and non-judicial proceedings may be acceptable on the continent, such a division is unsuitable in relation to the various bankruptcy and analogous proceedings within the United Kingdom. The College of Justice in Scotland remarks that, if extra judicial proceedings are excluded, a notour bankruptcy could occur without sequestration and leave its effect on preferences and diligences without being touched by the Convention. But under the Convention, bankruptcy proceedings could follow, possibly in another country and with a different effect on preferences and diligences. They add that similar disruption might occur when judicial proceedings were

started in a case where a receiver for a debenture holder had been appointed and had been administering a company's assets or where a voluntary winding-up was turned into a winding-up by the court. The Association of Certified Accountants considers that the Convention should be extended to cover extra judicial and contractual arrangements in order that the powers under the Convention in respect of the collection of foreign assets should be available to trustees and receivers in such proceedings. The Association also considers that the Convention should apply to any liquidations which are consequential to practical insolvency; hence it should cover creditors' voluntary liquidations.

14. The Institute of Chartered Accountants in England and Wales adheres firmly to the view that receiverships, deeds of arrangement, and voluntary liquidations should be brought within the scope of the Convention. In their view the whole practice of insolvency in England and Wales is fundamentally dependent on these procedures and if they were excluded from the Convention, it would mean that the bulk of insolvencies in England and Wales would be conducted outside the scope of the Convention. Moreover, the difficulties experienced by voluntary liquidators and receivers in establishing title, carrying on business, enforcing judgments, resisting attachments, etc in Europe would undoubtedly be magnified by the fact of the exclusion. In their view whatever the practical difficulties, means must be found of harmonising the two systems.

15. We have noted that the Committee on the European Judgments Convention under Lord Kilbrandon, assumed that such matters fell to be dealt with under the Judgments Convention though they indicated that the point required clarification. At paragraph 68 of their report they said, "It seems that compositions and arrangements effected out of court by deed under the Deeds of Arrangment Act, 1914 in England, or under the common law in Scotland, are not covered by the draft Bankruptcy Convention. However, the official report makes it

reasonably clear that transactions of this sort not involving the intervention of the judicial authorities are not covered by the Article 1(2) exception, and therefore are covered by the Judgments Convention. This is a point of some practical importance and it would be useful to obtain confirmation that the Judgments Convention does apply in these cases."

Summary of Continental analogous proceedings

Belgium

16. (a) concordat judiciaire. Under this proceeding which is not valid against preferential creditors, the debtor is not divested of his property but continues to manage his undertaking. There is no period of relation-back but since the composition petition constitutes an acknowledgment of the suspension of payments, in the case of bankruptcy, the period of relation-back may be back dated to the day on which the composition petition was lodged. All proceedings for enforcement are stayed and the court supervises the progress of the proceedings.

(b) sursis de paiement. A moratorium granted for a term of 1 year, on condition that the debtor is able to discharge all debts in full. It appears that only one such proceeding has occured in Belgium during the last 15 years but the proceeding has been included within the terms of the Convention because it prevents bankruptcy proceedings from being instituted.

Germany

17. Gerichtliches Vergleichsverfahren. This is referred to as a rehabilitation proceeding, no dispossession takes place and an administrator is appointed whose duties are confined to supervision and inspection. Individual proceedings are suspended. There is no period of relation-back unless a bankruptcy is subsequently declared, when the period of relation-back extends to the commencement of the analogous proceeding. The composition is not valid as against preferential creditors.

France

18. (a) Reglement Judiciaire. The debtor is assisted in the administration of his estate by trustees; individual proceedings or proceedings by way of execution are suspended; the rules relating to the period of relation-back are the same as those connected with bankruptcy and the set off rules provided for in the Convention also apply. The composition is not valid against secured or preferential creditors unless they agree to be bound by it. This proceeding must lead to composition and if the composition is not adhered to, it will be dissolved and be followed automatically by bankruptcy.

(b) Concordat preventif. The debtor is not divested of his property but the courts have wide powers to decide to what extent its administration will be supervised; in all cases a trustee is appointed. Individual proceedings by both preferential and unsecured creditors are suspended. The object is to stay proceedings in order to enable the debtor to put forward a scheme with a view to discharging his liabilities. The provisional stay is for 3 months with a possible extension of one month. If the scheme is accepted, a moratorium is granted for a maximum period of 3 years.

Italy

19. (a) Concordato preventivo. The debtor is not divested of his property but he comes under the supervision of the court. Individual proceedings to obtain recognition of a right are not stayed but there is a stayin g of execution. There are no special provisions regarding the period of relation-back; however, when a composition leads to bankruptcy, the period of relation-back is extended by 6 months. There are no special rules regarding set off. The proceeding is valid as against preferential creditors with regard to deferment of payment, but the preferential creditors must be able to be satisfied in full. To be allowed the concordato,

a debtor must offer genuine guarantees that he will pay at least 40% of the amount due to unsecured creditors. To this end he may surrender all his property to the creditors as a guarantee. It is also possible for a third party to guarantee on his behalf that the composition will be carried out.

(b) Amministrazione controllata. This is for a debtor experiencing temporary financial difficulties and, provided he is not in a state of insolvency, he may ask the court to place his undertaking under supervised administration. If the court accepts the request, the debtor is given a deferment of payment of 1 year which is valid against all creditors. No remission of debts is allowed and all creditors must be satisfied in full. The debtor retains full freedom to manage his affairs under the courts supervision.

Luxembourg

20. (a) Concordat preventif de la faillite. This is similar to the Belgium concordat judiciaire.

(b) Sursis de paiement. This is comparable to that under Belgium law.

Netherlands

21. (a) Surséance van betaling. The debtor is assisted by a trustee and may not act alone. Proceedings for enforcement by unsecured creditors are stayed, but preference creditors retain all their rights including individual action for enforcement, but they may not petition for bankruptcy. Rules allowing for set-off apply as in bankruptcy. There is no period of relation-back unless the scheme fails, when the ensuing bankruptcy will relate back to the commencement of the scheme.

(b) Vergadering van houders van schuldbrieven aan toonder. A procedure which is rarely used whereby the rights of secured creditors such as bondholders can be modified when the company is unable to completely fulfil its obligations. Such secured creditors are prevented from petitioning for the bankruptcy of the debtor but other creditors retain such rights.

Compositions, arrangements, etc in England

22. The law is basically enacted in the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act, 1926, the Bankruptcy Rules 1952, and the Deeds of Arrangement Act 1914 and the Deeds of Arrangment Rules 1925.

23. The Deeds of Arrangement Act regulates extra-judicial arrangements and deals with the assignment of a debtor's assets for the benefit of creditors, extra-bankruptcy compositions, deeds for inspectorship, letters of licence authorising the debtor or a third party to manage or dispose of a business with a view to the payment of debts, and agreements or instruments entered into for the purpose of carrying on or winding-up the debtor's business.

24. By Section 21(1) of the Bankruptcy Act 1914, after the adjudication of bankruptcy the creditors may accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs. In either event the same proceedingswill be taken and the same consequences ensue as in the case of a composition or scheme accepted before adjudication. Such a proposal may be accepted by the creditors at any time after the adjudication. Approval of the court is required, upon which the court annuls the bankruptcy and the title to the estate vests in the person the court indicates and under conditions also set forth by the court. The composition is binding on all creditors as far as they have provable debts except for certain judgment creditors, In certain cases, such as non-performance on behalf of the debtor, undue delay or fraud, the court may annul the composition and declare the defendant bankrupt upon a petition of the trustee or one of the creditors. The composition works as a conditional discharge. The debts revive on the re-adjudication bankrupt of the debtor.

Compositions to prevent bankruptcy

25. The procedure for compositions for the prevention of bankruptcy is almost the same as that in the case of the compositions for the termination of bankruptcy. But the time within which a proposal may be made is limited to within 4 days after the submission of a Statement of Affairs. In this case the proposal is lodged with the Official Receiver. Such a preventive settlement may only be initiated after the initiation of bankruptcy proceedings though before adjudication. To obtain settlement before the initiation of bankruptcy, the debtor must resort to amicable settlements or to deeds of arrangement.

Deeds of arrangement

26. Where creditors make arrangements with a debtor outside the provisions of the Bankruptcy Acts, the rules of bankruptcy do not apply and the debtor is released from the claims only of those who assent to the scheme. The arrangement is a contract and subject to the general law relating thereto. Such arrangements usually come within the deeds of Arrangement Act 1914, and if they fall within the definition of a "deed of arrangement" they must comply with that Act in order to be valid. A deed of arrangement is any instrument, whether under seal or not, made for the benefit of creditors generally or made by an insolvent debtor for the benefit of any 3 or more creditors. It may be:

(a) An assignment of property to a trustee for the creditors.

(b) A deed or agreement for a composition.

(c) An instrument whereby creditors obtain control over the property or business of the debtor.

27. Since the making of a deed of arrangement is an act of bankruptcy, a creditor who has not assented thereto, may rely on it to present a petition against the debtor, but a creditor who has received notice from the trustee must bring his petition within one month of such notice unless the deed becomes void. If the deed does become void, even an assenting creditor may rely on its execution as an act of bankruptcy. The rights and liabilities of a trustee under a deed of arrangement do not arise from the provisions of bankruptcy law, although in some respects his duties are similar to those of a trustee in bankruptcy. They are defined by the general rules applicable to trustees and, in addition, special duties may be defined in the deed itself.

28. If a deed of arrangement becomes void and a petition in bankruptcy is presented more than 3 months from the deed's execution and a receiving order made, the trustee under the deed is protected as to dealings with and payment out of, the property, if they were proper on the footing of the deed being valid, and if he shows he did not know and had no reason to suppose that it was void. Where a deed of arrangement is avoided by reason of the bankruptcy of the debtor, any expenses properly incurred by the trustee under the deed in the performance of duties imposed on him by the act are paid to him by the trustee in bankruptcy, as a first charge on the estate. Deeds for the benefit of creditors generally may be enforced, and questions arising thereunder determined, by the local bankruptcy court, the locality being that of the debtor's residence or business at the date of execution of the deed.

29. Any other arrangements made before bankruptcy proceedings have been commenced are governed primarily by the ordinary law of contract. Such arrangements are binding only on creditors who assent and do not require the approval of the court.

30. An advantage of an analogous form of proceeding being included within the Convention is that not only is the proceeding effective in all Contracting States, but it prevents any other form of proceeding, even bankruptcy from being instituted in another Member State. Hence the Court seized of the analogous proceeding retains jurisdiction should bankruptcy be declared subsequently. In its present form the Convention could not readily be

extended to include extra-judicial proceedings and we are satisfied that Deeds of Arrangement and similar non-judicial compositions should be excluded. However, we are concerned that the trustee under a Deed of Arrangement should be adequately protected and that an Arrangement could not be upset by a subsequent bankruptcy in another Member State unless it was also vulnerable under UK laws. We attach a Note on these matters at Appendix. /This will be the note produced by Muir/

Compositions and schemes of arrangement

31. We are satisifed that compositions and schemes of arrangement provided for under the various Bankruptcy Acts in England and Wales, Scotland and Northern Ireland should be included in the Convention.

32. Although a company may make compromises or arrangements with individual creditors, it cannot transfer all its property to trustees for the benefit of its creditors (1948 Act, s.320(2)). However, schemes, compromises and reconstructions are provided for by the Companies Acts, whether or not during the course of liquidation. It is our view that where the sanction of the court is a pre-requisite to the implementation of such an arrangement and where creditors' rights are affected, such arrangements should come within the Convention.

Receiverships

33. We have received a number of representations that receiverships should be included in the scope of the Convention. Almost invariably the first step in the enforcement of a debenture is for debenture-holders or their trustees to secure the appointment of a receiver. A receivership is part of the normal commercial practice in the UK. The receiver often carries out some of the functions of a liquidator; for example, he has to have regard to rights of preference and it has been suggested that he should have comparable powers to those afforded to liquidators under the Convention .

34. We certainly consider it desirable that the powers of a receiver for debenture holders should be given universal recognition throughout the Community. But a receivership is essentially a part of the procedure for enforcing secured debts, at the suit of creditors who rely on their security; thus, it is outside any liquidation. In principle, therefore we think that the Convention should not apply. Nevertheless floating charges are of great importance to the commercial community in the United Kingdom and we are concerned to hear it suggested that some Member States might look upon such securities as fraudulent preferences. We understand that the Commission has under consideration a draft directive on the recognition of securities over moveable property without dispossession. We assume that such a directive would include the recognition of floating charges but even so, we consider that special provision should be included in the Bankruptcy Convention to afford them and the powers of receivers appointed under them, recognition throughout the Community. The provisions of the Uniform Law should then expressly include them as a security for the purposes of the Law.

/ NOTE BY SECRETARY: Paragraph 33 and 34 will probably require amendment when the sub-committee have reported - see MR 19 para 47

Voluntary winding-up

35. The voluntary winding-up of a registered company occurs if it passes a special resolution to that effect, or if it resolves that because of its liabilities, its business cannot be continued and that it is advisable to wind up. (1948 Act, s.278). Where it is proposed to wind up voluntarily, the majority of the directors may make a statutory declaration as to the company's solvency, to the effect that in their opinion, the company will be able to pay its debts in full within a specified period not exceeding twelve months. The liquidation then proceeds as a Members' Voluntary winding-up, and the members appoint a liquidator who is not subject to the supervision of the creditors.

36. If the directors make no declaration of solvency the liquidation is a Creditors' Voluntary winding-up. The creditors then, generally, have the final choice as to who shall be the liquidator and they may appoint a committee of inspection to assist and supervise him.

37. If the liquidator in a members' voluntary winding-up decides that it will not be possible to pay the company's debts in full within the specified period he is required to call a creditors meeting. This does not convert the liquidation into a creditors' voluntary winding-up, but it ensures that creditors are given information about the company's position, so that they may petition the court for a winding-up order if they wish.

38. The fact that a vuluntary winding-up has commenced does not prevent the court from making an order for compulsory liquidation.

39. We unhesitatingly recommend that the Convention should apply to creditors' voluntary winding-up. To exclude them would be inconsistent since such a liquidation implies that the company is practically insolvent.

40. We can see no justification for the inclusion of members' voluntary winding-up, but we note that a problem might arise where the liquidator decides that the company will be unable to pay its creditors in full. It is possible that in such cases creditors will usually petition for compulsory liquidation. But in our view UK law could with advantage be amended, so that the liquidation was automatically converted into a creditors' voluntary winding-up and provision made for the appointment of a committee of inspection by the creditors.

41. We have considered whether creditors' voluntary winding-up should be listed under ArticleI(a) or under Article I (b) of the Protocol. Clause (a) is limited to the major bankruptcy proceedings in Member States and clause (b) lists other proceedings which in general, are capable of being converted into full bankruptcy. We do not have strong views on the matter but since a voluntary liquidation does not preclude the making of a compulsory winding-up order we think it should be included in clause (b).

42. If creditors'winding-up is listed in Article I(b) of the Protocol it follows that it should also be listed in Article XIII.

Administration orders

43. An order for the administration of a small estate may be made, in certain circumstances, under section 148 of the County Courts Act, 1959. Application for an order may be made by a debtor who is unable to pay a county court judgment and who alleges that his total indebtedness does not exceed £300. The order does not make the debtor bankrupt but it causes his assets to be administered by the court for the benefit of the creditors. A schedule of liabilities is prepared and a composition is fixed by the court. Creditors to whom such debts are due are precluded from taking action against the debtor without the leave of the court.

44. Although the debtor may be insolvent in a practical sense, the purpose of the administration order system is to avoid bankruptcy proceedings and to give the debtor a chance to put his financial affairs in order. We understand that almost invariably, debts are paid in full.

45. In our opinion a county court administration order is not a suitable proceeding for inclusion in an international bankruptcy convention.

SUMMARY

46. Procedures recommended for inclusion in Article I(a) of the Protocol

(a) Bankruptcy (England and Wales and Northern Ireland)

(b) Sequestration including the sequestration of a deceased debtor (Scotland).

(c) Administration in bankruptcy of the estates of persons dying insolvent (England and Wales and Northern Ireland)

(d) Compulsory winding up of companies.

(e) Winding-up of companies under the supervision of the court.

47. Procedures recommended for inclusion in Article I(b) of the Protocol

(a) Compositions and schemes of arrangement under the Bankruptcy Acts.

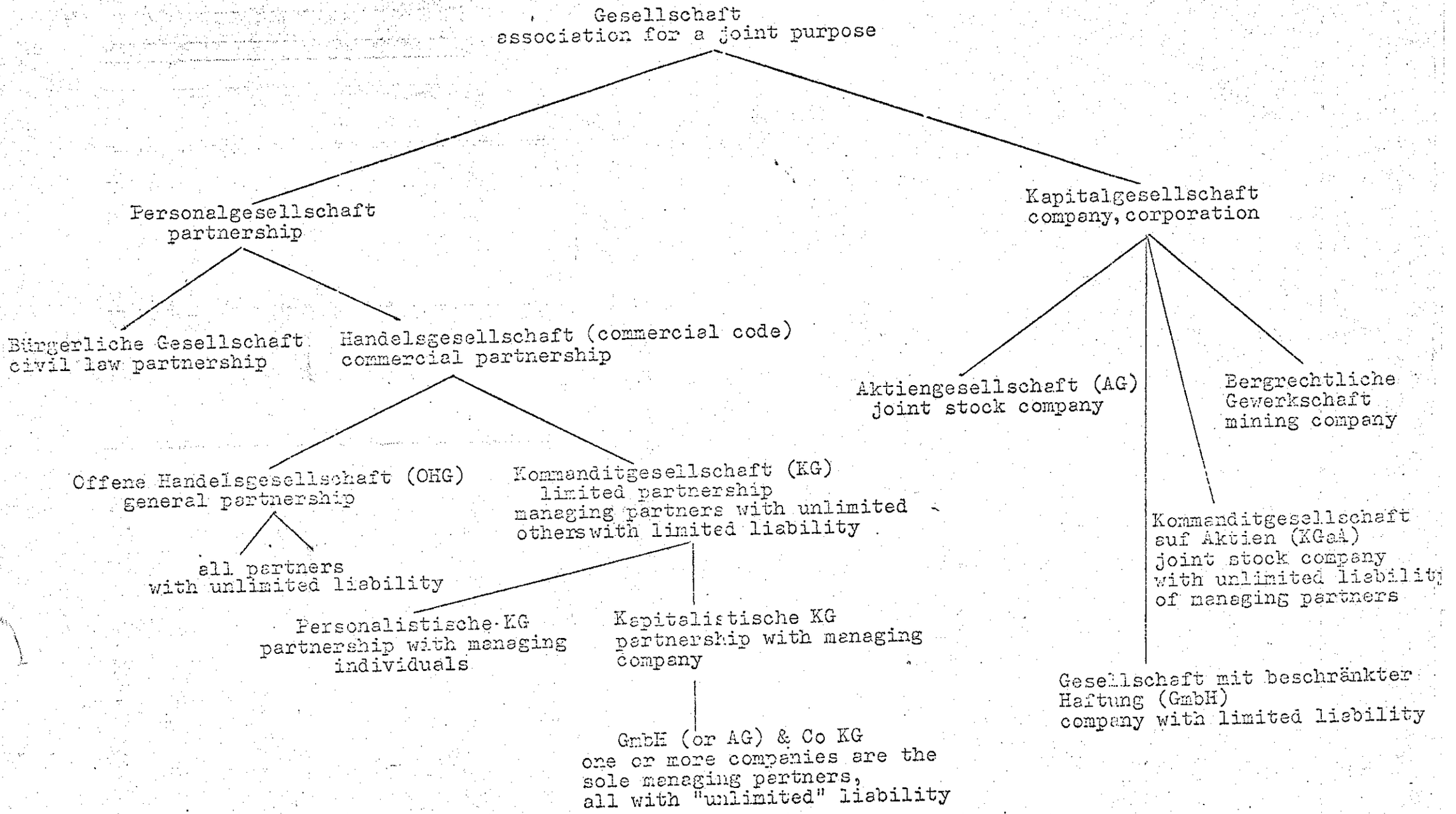
(b) Arrangements under the control of the court (Northern Ireland).

(c) Arrangements, compromises and reconstructions of companies; whether or not during the course of liquidation where the sanction of the court is required and where creditors' rights are affected.

Persons and Entitites to which the Convention applies

48. The Convention does not contain a provision indicating the categories of persons and entities to which it is intended to apply. The French text of the Convention at various points assumes that it refers not only to individuals but to "sociétés et personnes morales". It has been pointed out to us that the term "société" in French (and compare "Gesellschaft" in German) is itself a genus with a number of distinct species, only some of which are equivalent to limited companies in the English sense, and which include what would here be termed partnerships or limited partnerships. Similarly, the French term "personne morale" (and compare "Juristischeperson" in German) is not adequately represented in English by the terms "legal person" or "artificial person"; for it may include groups of natural persons who do not, in England, possess a corporate personality, even though they may procedurally sue or be sued in their "firm name". We assume, however, that the Convention applies not only to the administration in insolvency of individuals, but of partnerships or firms whether or not possessing legal personality, of registered companies whether limited or unlimited, and of unregistered companies and associations, whether or not possessing legal personality. We propose for convenience to refer subsequently to these entitites collectively as "companies or firms". We also assume that the Convention is not intended to apply to State corporations and other agencies of the State.

[NOTE BY SECRETARY - It is for consideration whether the 2 charts prepared by Sandy should be inserted to illustrate the problem. If so, perhaps Sandy will kindly prepare a suitable explanatory note.]


Gesellschaft
association for a joint purpose
Personalgesellschaft
partnership
Kapitalgesellschaft
company, corporation
Bürgerliche Gesellschaft
civil law partnership
Handelsgesellschaft (commercial code)
commercial partnership
Aktiengesellschaft (AG)
joint stock company
Bergrechtliche
Gewerkschaft
mining company
Offene Handelsgesellschaft (OHG)
general partnership
Kommanditgesellschaft (KG)
limited partnership
managing partners with unlimited
others with limited liability
Kommanditgesellschaft
auf Aktien (KGaA)
joint stock company
with unlimited liabilit
of managing partners
all partners
with unlimited liability
Personalistische KG
partnership with managing
individuals
Kapitalistische KG
partnership with managing
company
Gesellschaft mit beschränkter
Haftung (GmbH)
company with limited liability
GmbH (or AG) & Co KG
one or more companies are the
sole managing partners,
all with "unlimited" liability

English	French	German
Association or Society	association	Verein
Foundation	fondation	Stiftung
Partnership	(société civile) (société particulière)	Gesellschaft des bürgerlichen Rechts (GbürgR)
Professional Partnership	Société civile professionelle	
Commercial partnership	Société en nom collectif	offene Handelsgesellschaft (OHG)
Limited partnership	Société en commandite simple	Kommanditgesellschaft (KG)
Stock partnership	Société en commandite par actions	Kommanditgesellschaft auf Aktien (KGaufAkt.)
Private limited company	Société à responsabilité limitée (SARL)	Gesellschaft mit beschränkter Haftung (GmbH)
Public company or stock corporation	Société Anonyme (S.A.)	Aktiengesellschaft (AG)

NOTE: These are rough equivalents only and should not be taken to correspond exactly in the different systems.

49. We are of the opinion that in the interests of certainty, the Convention should explicitly indicate to which persons and entities it applies. Lists applicable to each Member State should be included in the Protocol.

50. The Bankruptcy Convention specifically excludes from its ambit the winding-up of certain types of company or undertaking. The one general exclusion, contained in Article 1(3), is insurance companies other than those which engage only in re-insurance. Insurance companies are excluded by reason of the existence in Member States of special regulations relating to their operation and possible liquidation and by reason of the intended harmonisation at Community level of the law relating to insurance companies. Article II of the Protocol provides that the Convention is not to apply to proceedings for bankruptcy, etc which are instituted in particular Contracting States against specified institutions in those States, which include savings banks and mutual savings funds, institutions for saving towards, and loans for, the purchase of dwelling houses, and mutualised re-insurance undertakings. This does not, however, preclude proceedings for bankruptcy, etc., against those institutions in other Contracting States. Such proceedings, although otherwise falling within the Convention, need not be recognised in the Contracting State which specified the exclusion.

51. We understand that Article 1 of the draft Insurance Directive restricts its application to the direct insurance undertakings covered by (a) the First Indemnity Co-ordination Directive and (b) the First Life Co-ordination Directive, ie direct indemnity and life insurance undertakings only. Therefore, the exclusion clause as at present drafted in Article 1(3) of the Convention would mean that some, albeit small insurance undertakings, would be outside both the Convention and the Directive.

52. Accordingly, we recommend that the exclusion clause in Article 1(3) should be amended so that only those undertakings coming within the "Directive to co-ordinate the winding-up of direct insurance under-takings" are excluded.

53. We should put on record that the British Insurers' European Committee is against any distinguishing of companies engaged only in re-insurance so far as the UK is concerned and propose the clause should be amended to read:

> "insurance undertakings of all kinds, irrespective of their legal form, with the exception of those which engaged only in re-insurance and are not subject to the national insurance supervisory legislation of the Contracting State in which their Head Office is situated."

54. With regard to the specified institutions listed by various Member States in Article II of the Protocol, these categories of concern may all be wound up under the basic provisions of the Companies Acts, although these provisions are modified to a certain extent by legislation specifically governing these organisations. We do not consider it appropriate to object to the exclusions listed by other Member States. As regards the UK, clearly all trading organisations should be included in the Convention. We do not consider that we have the necessary information on which to recommend exclusions but in our view the Convention is not appropriate for dealing with organisations exercising public functions such as local authorities.

Territorial Scope of the Convention

55. Article 74 declares that the Convention shall apply to the European Territories of the Contracting States. In addition it is to apply:

(a) to the French overseas departments and overseas territories; and

(b) if the Kingdom of the Netherlands makes a declaration to this effect, to Surinam and the Netherlands Antilles.

This Article, though corresponding with Article 60 of the Judgments Convention, presents some problems. The Convention can only apply directly to those European Territories of the United Kingdom in respect of which the Westminster Parliament normally exercises legislative authority. Having regard to Article 26 and Protocol No 3 of the Act of Accession to the Communities, it would seem that the Convention should apply to the United Kingdom, ie England and Wales, Scotland and Northern Ireland, but not to the Channel Islands and the Isle of Man or to the non-European overseas territories and dependencies of the Crown.

56. There would be obvious advantage if the Convention could apply to the Channel Islands and the Isle of Man; indeed were they to be excluded it is conceivable that they might become "bankruptcy havens" analogous to "tax havens". It is well known that numerous companies are registered in the Channel Islands and recent reports indicate that company registrations in the Isle of Man are on the increase. Obviously there can be no question of the UK unilaterally declaring that these territories should be included in the Convention. We recognise that this is a policitical matter; nevertheless, we recommend that the appropriate Government Department should consult the Channel Islands and the Isle of Man, seeking agreement that the Convention should extend to those territories.

57. As a European territory, Gibraltar is presumably covered by the obligation to accede but it is not clear to us the extent to which the Convention might apply there. We suggest that this is a matter for consultation between the UK and Gibraltar governments.

58. The possible inclusion of the overseas territories of Contracting States in the Convention presents difficulties. The principles of unity and universality of bankruptcy embodied in the Convention imply a tacit acceptance that the Contracting States have reached - to speak in very general terms- a common level of attainment in matters of bankruptcy law and practice. It has been suggested, however, to the Committee that this common level of attainment will not necessarily have been reached at present by legal systems in all the overseas territories of the Contracting States and that, for this reason, the Convention should not for the time being apply to such overseas territories. We are uneasy at the proposed application of the Convention to territories outside Europe unless it can be demonstrated that the domestic bankruptcy law is as fully developed in law and practice as in the countries in Europe.

59. We recommend that the scope of the Convention should be limited at the outset to the European territories of Member States and that its extension to their overseas territories should be a matter for subsequent negotiation and the agreement of all Member States. Such territories should then be listed in the Protocol.

60. Under section 122 of the 1914 Act, "orders in aid" may be obtained between the courts of the UK, and between those courts and "every British court elsewhere having jurisdiction in bankruptcy or insolvency." We note that our colleague, Mr Muir Hunter, QC, discussed the possible problems in depth in his Opinion on the draft Bankruptcy Convention dated 17 January 1973. Therefore, we consider it necessary only to draw attention to the matter and to suggest that special consideration will require to be given to the implications of the Convention in relation to the "Imperial" provisions of the Bankruptcy Acts.