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INSOLVENCY LAW REVIEW COMMITTEE

TENTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Thursday, 17 November, 1977 at 10.00 a.m.

AGENDA

1. Minutes of the meeting on 17 October.
2. Matters arising.
3. Secretary's report.
4. Written evidence submitted by consultees; how this should be dealt with in committee.
5. Commencement of compulsory winding up (ILRC's 12, 30 and 48).
6. Bankruptcy (ILRC's 33 and 49).
7. Administration Orders (ILRC's 31, 39 and 45).
8. ^{Rev 17 Mar.} Majority rule by creditors in insolvency (ILRC 41).
9. ^{Debt of arrangements} Any other business. *Wij's paper on v. b. by.*
10. Agenda for the next meeting.
11. Confirm date of next meeting (12 December).

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T H Traylor

T H Traylor
Secretary

28 October 1977 *which shd. be rebuttable presumption*

10th Mtg
17.11.77

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INSOLVENCY LAW REVIEW
Minutes of the Tenth Meeting of the
Review Committee on
17 November 1977

Present:

K R Cork (Chairman)
P G H Avis
J S Copp
G Drain
A I F Goldman
J M Hunter
D McNab
T R Penny
C A Taylor
E I Walker-Arnott
M V S Hunter
T H Traylor (Secretary)
E L Reeves (Assistant Secretary)

In Attendance:

J R Endersby
D Graham
R B Jack
G A Weiss

1. The Committee met at 10.00a.m. The minutes of the ninth meeting held on 17 October 1977 were discussed. The last sentence of para 30 should read "This was not accepted". In para 46, the reference to "para 31" should read "para 31 of ILRC 46". The minutes as amended were agreed and signed.

INSTITUTE'S CODE OF ETHICS

2. The Chairman reported that the Institute of Chartered Accountants were preparing a code of ethics for receivers and liquidators. Since publication of this might pre-empt what the Committee were doing, he proposed to ask them to give oral evidence before they went into print.

ENFORCEMENT PROCEDURES

3. The Chairman referred to para 2 of the minutes of the ninth meeting and said that he had written to the Deputy Secretary. He read out the reply of 5 November. During discussion, the following points were made:-

(a) the Committee could not evade the issue that bankruptcy proceedings had been used increasingly because other enforcement measures were considered to be unsatisfactory,

(b) they would be discussing proposals to alter the Administration Order procedures and this was an enforcement procedure,

(c) in some instances, enforcement procedures enter directly into the field of bankruptcy and winding-up,

(d) the ideas which the Committee have in mind for less formal procedures may help to fill the gap which was widened by the 1976 Insolvency Act,

(e) some proposals were going to increase the area of bureaucracy and it would be helpful to ascertain whether there is an upper limit to what the state will pay for a service in order to ensure it does social justice; if there was a limit which would not eliminate the more painful aspects of bankruptcy the Committee would be wasting its time, and

(f) clearly the Government did not intend to go ahead with the Payne recommendations.

4. The Committee concluded that they could make recommendations but that discussion of these matters could be left until towards the end of their deliberations.

SECRETARIAT

5. The Chairman raised the question of the staffing and accommodation of the secretariat. Following discussion by the Committee, Mr Muir Hunter proposed, and Mr Goldman seconded, the following resolution which was passed unanimously:-

- (1) "that no changes should be made in the secretarial or the accommodation arrangements of their staff, until the Committee has been satisfied that such changes would on balance be beneficial to the functioning of the Committee; in this context the Committee bore in mind the need to preserve its independent status vis a vis the Department;
- (2) that the work of the Committee at its present level already required the appointment of an additional clerical assistant to the present staff of the Secretariat."

The Committee agreed that the Chairman should notify the Department of the resolution which had been passed.

MATTERS ARISING

6. The Secretary said that he had written to GKN (paras 20-21 of the minutes of the ninth meeting) but they had not yet replied. He had also written to Mr Farrar (para 46) who had replied amplifying his remarks. The Chairman had produced an example of a report (para 52); the Committee asked, however, whether a copy of a 'first report' could be provided.

SECRETARY'S REPORT

7. The Secretary reported as follows:

(a) papers circulated since the last meeting were:

- (i) ILRC 47 to 51,
- (ii) the reply received from Mr Farrar (para 6 above),
- (iii) a copy of the Times Law Report on the Barrows case about the powers of a receiver following a winding-up order; this was relevant because the Accountants' Panel are worried about the interpretation of a receiver's agency and may suggest that this requires clarification,
- (iv) a High Court Practice Note on Companies Winding-up, and
- (v) an explanatory leaflet on the Insolvency Act 1976.

(b) the Life Offices Association had asked him to stress that ILRC 50 is preliminary and confidential and should be treated as such,

(c) papers put before the Committee at its present meeting were:

- (i) an updated list of ILRC's with an index,
- (ii) an example of a report to creditors from a liquidator provided by the Chairman,
- (iii) the 1976 Annual Reports on Bankruptcies and Companies,
- (iv) the Press Notice on the lapsing of the Department's power to authorise individuals to act as auditors, and
- (v) ILRC 52 and 53.

ORAL EVIDENCE

8. The Committee discussed the taking of oral evidence and agreed that, as from January, there would be an extra monthly all-day meeting at which it was hoped to see the representatives of two consultees. The more important consultees would be seen at these sessions of the Committee, which all members would not be obliged to attend. Each session would start with a short discussion to decide on the main questions to be put. The Chairman suggested that the Guildhall would be more suitable

for these meetings. In addition, the less important consultees and individuals would be seen by a small sub-committee in the room made available to the Secretariat and Panels; any other member of the Committee could attend however if he wished to do so. Transcripts of evidence would be sent to the consultees concerned for editing; they would be required to side-line any part which they did not wish to be published.

9. By the next meeting, the Secretary should draw up a list of the people who might be seen in the first six months. It would not be possible to see consultees more than once. There was some discussion as to who might be seen; it was agreed that those to be seen at an early date should include the City of London Solicitors' Company, the British Bankers Association, the Insolvency Service and the Institute of Credit Management. Mr Goldman raised the problem of the consumer debtor and undertook to obtain a list of people who might be seen in this connection.

CONSULTATIVE DOCUMENT

10. It was hoped to publish a consultative document or progress report by June 1978.

WRITTEN EVIDENCE

11. The Committee discussed how the written evidence from consultees should best be presented to the Committee. There were two alternatives (a) papers on particular subjects, such as ILRC 46, which set out solely the comments from consultees or (b) papers on particular subjects which set out the present position, other related matters such as the Jenkins' proposals, and also the comments from consultees. The majority of the Committee favoured the latter approach; the point was made however that the Committee itself would not have time to consider in detail any points raised by consultees relating to "nuts and bolts" but should confine itself to discussing questions of principle. The Chairman suggested that the Secretary should indicate in the paper those points which he thought were for consideration by a panel and members would have the opportunity of bringing these up in Committee if they disagreed. The Secretary should have all original documents at hand in case reference had to be made to them.

FINAL REPORT

12. It was suggested that the Committee should set out its guidelines for the future structure of insolvency procedures now. The Chairman suggested that this could best be done by a drafting panel comprising Mr Graham, Mr Weiss and the Secretary, co-opting such additional members as might be necessary.

FRAUDULENT ACTIONS BY DIRECTORS

13. The Chairman drew attention to a matter which he felt was a grave injustice and would need discussion as a matter of principle. A company could borrow money on the strength of a false balance sheet, or shareholders could buy on the basis of false information supplied by directors. Nearly half the fraudulent things directors did were of benefit to the company and the liquidator could not take any action if the company had not suffered. He would like to see it possible for the liquidator to take legal action on behalf of any group of people who had suffered injustice in the liquidation. Mr Muir Hunter said that the provisions of the Acts dealing with fraudulent trading required detailed consideration and amendment. It was agreed that this would require full discussion by the Committee in due course.

COMMENCEMENT OF WINDING-UP

14. The Committee had before it ILRC 30, the first three paragraphs of which were introductory.

15. On para 4, the Committee agreed that the presentation of a winding-up petition should be filed with the Registrar of Companies.

16. On para 5 it was agreed that an insolvent company should be able to put itself into voluntary liquidation without having to go to Court.

17. Para 6 referred to uncontested petitions being heard before a Registrar. There were problems; for example it might not be known until the last moment whether a petition would be contested; there was also the question of the petition being heard in open court. It was agreed that this should be pursued by the Legal Panel. The Ghana proposals (in paras 6 and 7 of ILRC 12) related to the grounds in which a petition to wind up could be presented; this was a major topic to be discussed at a later stage.

18. Para 7 was thought to be outside the Committee's remit.

19. Para 8 was felt to be a "nuts and bolts" matter to be considered by the Accountants Panel.

20. Para 9 suggested that the trustee in bankruptcy or personal representative of a contributory should be able to petition the Court for winding-up. This would tidy up some unsatisfactory case law and was agreed.

21. There was some discussion on the suggestion in para 10 regarding the presentation of petitions by the Secretary of State and the OR. It was thought that it would be necessary to ask the Department about this but meanwhile Mr Taylor agreed to produce a paper.

22. Para 11 referred to the Jenkins' proposals regarding s.225. Mr Muir Hunter pointed out that there was an extremely inequitable situation; a shareholder whose equity had been destroyed could not do anything unless he was a creditor. It was agreed that the Court's discretion should not be limited.

23. The rest of ILRC 30 dealt with s.227 and it was agreed that this should be dealt with separately. Mr Muir Hunter had dealt with some of the matters in ILRC 26.

24. Members were invited to ^{raise} ~~raise~~ any points they wished on ILRC 48 which they thought were matters of principle; the "nuts and bolts" would be dealt with by the panels.

25. Mr John Hunter pointed out that para 5 did not mention a point raised by the Midland Bank. They had also suggested that a non-judgment creditor should be required to deposit a sum of £200 by way of security for any damage sustained by a company if the petition was dismissed.

26. On para 9 (British Bankers Association) the Committee took the view that petitions should be collectivised and that costs should not be lost. They could not therefore agree with the proposal.

27. A point of principle was raised in para 11 (Association of Certified Accountants): the Inland Revenue always petition in London; if bankruptcy was going to be collectivised it would be essential to have the collectivised hearing where the debtor lived. The Committee agreed in principle.

is carried a business?

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COMMENCEMENT OF BANKRUPTCY

28. The Committee had before them ILRC 33 and 49.

29. The Chairman said that he thought that there were two points of principle:-

(i) the jurisdiction rules - the accommodation of the EEC bankruptcy convention rules and possibly harmonisation with Scotland and Northern Ireland and

(ii) aiming at the complete integration of the grounds for presenting bankruptcy and winding-up petitions.

30. Mr Muir Hunter drew attention to two typing errors in ILRC 33:-

- (i) in para 9, "s.147" should read "s.137", and
- (ii) "sheet" in the sixth line of para 10 should read "direct".

Acts of Bankruptcy had been dealt with in paras 1-3, which had been reinforced by ILRC 49.

31. Discussion of the EEC position took place and the following points were made:-

(i) Cessation of payments had not yet been considered in Brussels, following upon the Report of Cork MKI,

(ii) until a Treaty was signed it would not be known what the final position would be,

(iii) the law on purely domestic matters was not likely to be changed,

(iv) we should try to co-ordinate with the uniform law because we should not have a different set of rules for a bankruptcy which goes over international boundaries.

32. It was suggested that the Cork MKI Report had attempted to distil what was meant by a state of insolvency and how to recognise it. Para 340 had put forward a definition of Cessation of Payments and this could be put in an Insolvency Bill; Acts of Bankruptcy as such would disappear but would be replaced by the events set out in the bracketed section of 340(2). The majority of the Committee went along with this, but Mr Taylor argued against it. He said that different considerations apply in bankruptcy as compared with winding-up. In bankruptcy there is often only one other party (creditor) and many cases involve no concept of insolvency at all. Although some of the acts of bankruptcy might appear to be archaic, they were of value in a minority of hard cases. On the basis that an act of bankruptcy was evidence of the right to petition, Mr Goldman supported this. It was suggested, however, that society was entitled to say that if you will not pay your debts you must be deemed to be unable to do so.

33. Mr Copp was not satisfied that it was correct to have a bankruptcy petition. He suggested that before a debt could be enforced a judgment should be obtained and that the Court should then be satisfied as to how the judgment was going to be met and satisfy itself that the debtor should not be made bankrupt. This proposition was discussed at some length and in particular, the problem of the debtor who called his creditors together and gave notice of suspension of his debts. Most members did not feel able to support the idea.

34. ILRC 49 was examined and the Committee looked at the views which had been expressed by consultees about acts of bankruptcy. Attention was drawn particularly to the comments from the Report of the Canadian Study Committee.

35. By a majority the Committee agreed that there should be some identifiable acts or events which would lead a Court to determine that a person is to be subject to having his assets distributed. It was agreed to set up a sub-committee to consider whether and how there could be harmonisation of the acts and events leading up to a bankruptcy or winding up petition, and to what extent para 340 of the Cork MKI Report might subsume both. It was further agreed that the sub-committee consisting of Mr Muir Hunter (Chairman) Mr Avis (assisted by Mr Endersby), Mr McNab, Mr Taylor and the Secretary would meet on Wednesday, 23 November.

36. Mr Muir Hunter added that a point which might arise from the sub-committee's findings would be that the principle of relation back should be imported into winding-up.

FUTURE MEETINGS

37. It was agreed that the next meeting would be held on Monday, 12 December, the agenda being:-

A report from the sub-committee meeting on 23 November,

Majority rule by creditors in insolvency, and

Deeds of Arrangement (if time permitted).

38. Administration Orders would be taken on Friday, 13 January, and Mr Penny agreed to get out a list of the main issues involved.

39. The dates for meetings after April were provisionally fixed for

Wednesday, 10 May 1978
Wednesday, 14 June ?
Tuesday, 11 July

40. Dates for hearing oral evidence from principal consultees (for members who could attend) were fixed for:

Wednesday 11 or Thursday 12 January 1978
Tuesday, 7 February
Tuesday, 7 March.

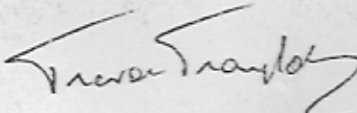
41. An additional meeting was provisionally fixed for Tuesday 23 May to consider the draft of a consultative document or progress report.

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INSOLVENCY LAW REVIEW COMMITTEE

NOTE TO MEMBERS

1. The following papers are enclosed:-
- (a) Agenda for the Tenth Meeting
 - (b) ILRC 47 - A note on "Romalpa" by Mr E I Walker-Arnott
 - (c) ILRC 48 - Compulsory Winding-up
- Written evidence from consultees.
 - (d) "Powers of receivers" - The Times law report of the judgment in Barrows and Others v. Chief Land Registrar and Another.
 - (e) High Court "Practice Note" regarding the undesirability of lengthy unopposed adjournments of creditors petitions for compulsory winding-up.
 - (f) Insolvency Act 1976 - explanatory leaflet.
2. ILRC 48 summarises the written evidence received to date on the commencement of winding-up (Item 5 of the agenda). The Practice Note (e) is also relevant to Item 5.
3. ILRC 47 has been issued also to the Legal Panel and "Powers of Receivers" is being issued to the Accountants' Panel.
4. ILRC 49 (Agenda, item 6) is in course of preparation, as is an index to the ILRC working papers.


T H TRAYLOR
1 November 1977