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INSOLVENCY LAW REVIEW COMMITTEE

NINTH MEETING

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

AGENDA

1. Minutes of the meeting on 23 September.
2. Matters arising
3. Secretary's report
4. Complete the preliminary review of voluntary winding-up (paper(s) being prepared).
5. Commencement of Compulsory Winding-up (ILRCs 12 and 30).
6. Bankruptcy (ILRC 33)
7. Administration Orders (ILRCs 31 and 39 plus additional paper being prepared).
8. Any other business
9. Agenda for the next meeting.
10. Confirm date of next meeting (17 November).

T H TRAYLOR
Secretary
3 October 1977

9th Mtg
17.10.77

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INSOLVENCY LAW REVIEW

Minutes of the Ninth Meeting of the Review Committee on

17 October 1977

Present:

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

In Attendance:

J R Endersby
D Graham
R B Jack

1. The Committee met at 10.00 a.m. The minutes of the eighth meeting held on 23 September 1977 were agreed.

MATTERS ARISING

2. The Chairman referred to para 12 of the minutes of the eighth meeting where it was agreed that he should write to the Minister regarding the extent to which the Committee should consider enforcement procedures; on reflection he had felt that it would be better if he sought an interview with the Minister instead. Several members suggested that the inadequacies of existing debt-collecting enforcement procedures were fundamental to a consideration of insolvency procedures. It was agreed that such consideration of enforcement procedures as proved to be necessary should come towards the end of the Committee's deliberations, and that the Chairman should seek to discuss the question with the Minister in due course.

3. The Secretary said that various papers had been referred to in paras 5,7 and 19 of the minutes of the eighth meeting. Mr Millett's paper on Romalpa and Mr Penny's paper had been circulated; Mr Walker-Arnott's paper on Romalpa would be available in the next few days; and the papers on Deeds were in hand.

4. The Chairman said that he had discussed with the Deputy Secretary the question of the treatment of consultee's comments and oral evidence. Concern had been expressed that if too much oral evidence was taken, the Report would take a very long time to come out. The Minister and the Deputy Secretary would provide their views as to what the Committee should do regarding oral evidence but this would still be a matter for decision by the Committee. There followed a discussion as to when oral evidence should be taken and concern was also expressed that the Committee might not be assimilating consultee's recommendations to a sufficient extent before coming to their provisional conclusions. Some members felt that oral evidence should be taken before any provisional conclusions were reached as such evidence might affect these decisions. The Committee were at present proceeding on the basis that a consultative document or documents would be sent out; if no oral evidence was taken before that stage there was a danger that consultees might feel that everything was all cut and dried. It was finally agreed that before a consultative document was sent out, the consultees' comments would be considered and if there were particular points on which the Committee felt that oral evidence would be desirable, the consultees should be invited to give oral evidence on those points. After the consultative document had gone out, oral evidence would be taken on matters which the consultee wished to bring up. On Romalpa it might be necessary to hear oral evidence before any tentative decision was made, and Mr Millett suggested that apart from the consultees it might be desirable to hear evidence from the Chancery Judges, the Law Reform Committee of the Bar Council and the banks. On the question of dealing adequately with the consultees' comments, the Chairman suggested that the Secretariat should produce a schedule (or schedules by subject) summarising these and indicating whether the recommendation had been accepted or rejected; if rejected the reason why it had been rejected should be given. This would be circulated to members of the Committee and members would be given the opportunity of discussing further any item which they felt needed further consideration. Mr Avis suggested that the appropriate time might be when the first draft of the consultative document was being produced.

Are we confusing law reform with social reform.

SECRETARY'S REPORT

5. The Secretary reported as follows:

(a) Mr Muir Hunter and Mr Weiss had sent apologies for absence,

(b) papers circulated since the last meeting were:

(i) ILRC 42-46,
(ii) an article on Administration Orders by Dawn Oliver published in the Legal Action Group Bulletin, October, 1974,
(iii) a letter by P Beales about Administration Orders published in the New Law Journal on 1 September 1977, and
(iv) a press notice issued on 29 September regarding automatic discharge from bankruptcy.

VISIT TO CROYDON COUNTY COURT ON 6 OCTOBER

6. Members who had taken part in the visit remarked how useful and instructive it had been. Individual members were then asked for their impressions.

7. Mr Walker-Arnott remarked that those examined had ranged from the hopelessly incompetent (where it seemed absurd to have the full panoply of the law) to the man from prison who had fleeced people as an insurance broker (where it was right that he should be publicly examined). A creditor who had exercised his right to examine had highlighted the social and public interest aspect of the matter. He was struck by the inequality between the examiner (a confident and experienced OR) and the examined (not represented and not apparently realising the implications of what he was admitting). He hoped that it would be possible to arrange a similar visit to the High Court.

8. Mr Graham said that it had been clear that public examination was not needed in every case. The OR had concentrated on things which seemed trivial and had been sidetracked from asking things more important to the creditors. Apparently in the absence of the trustee he had refrained from asking about the possibilities of discharging indebtedness from after-acquired earnings. Answers had been given without sufficient reflection and no-one had been legally represented. He was also troubled by the lack of creditor participation. He was not convinced that bankruptcy is necessarily cost-effective and, following a talk with the OR afterwards, he would suggest that the Committee should consider the career structure of the OR Service and the adequacy of training.

9. Mr McNab did not think enough information had been ferreted out, particularly about the assets. There was a lack of getting down to facts which should have been brought out in Court.

10. Mr Avis thought the questioning had a soft approach. Matters however were brought out which should have come to light before and if he had been a creditor he would have had no confidence that every possible effort had been made to get back money from the debtors.

11. Mr Copp was struck by the cost of the proceedings; nothing had really been achieved for the creditors. In addition a large area was covered by a central office, which meant a great deal of travel for the small debtors. He was convinced that the Committee had to give some thought to the early stages of insolvency.

12. Mr John Hunter had a different impression. This was a grilling not conducted in Belfast. There, the real work of ascertaining assets and facts as to conduct is done in the preliminary examination by the Official Assignee. The points are recorded in narrative form and sent to the bankrupt before the public examination, and he is advised to show it to a solicitor should he wish to do so. He is then asked in Court if he accepts it (which he usually does). He signs it and it is accepted as evidence. Only points which require cross-examination are pursued and it is not usual to have a shorthand writer. Questions which are directed towards incriminating answers being given are not allowed.

Debt counselling

13. Mr Penny suggested that often debtors are simply in a muddle over accounts. It might be that the Citizens Advice Bureaux as well as having lawyers could have accountants as well.

14. Mr Taylor said that there were clearly some cases which could have been dealt with more properly by a simplified procedure. He regretted that the trustees (where trustees had been appointed) had not attended. Where there is a trustee, asset recovery is primarily a matter for him and not for the OR. The OR's questions where he is not trustee are on matters of conduct which are taken into account on application for discharge. In most cases creditors and the Court have had copies of a summary of the statement of affairs and OR's observations before the examination. He felt that the Committee should look into costs but most Court procedures were costly compared with end-results.

15. The Chairman added that a point for further discussion was that the debtor's position seemed unfair. The Committee ought to consider whether there was a case for a kind of welfare officer who is an accountant to be attached to a Court, so that there is a neutral State official available to provide advice.

VOLUNTARY WINDING UP

16. The Committee had before them ILRC 46 (Extracts from the written evidence submitted by consultees).

17. It was noted that Mr R B M Knight (C17) had suggested that it should be possible for the directors of a company to appoint a provisional liquidator or administrator. The Chairman recalled that the Committee were already thinking along these lines. There were dangers in allowing the directors to appoint except with the consent of the Court (see para 25 of the minutes of the eighth meeting); the administrator should have the same rights and duties however he was appointed.

18. Paras 3 to 8 of ILRC 46 dealt with Creditors' Meetings.

19. In para 3 Mr Knight had suggested that the chairman should have power to nominate creditors to act as members of a Committee of Inspection. This was thought to be undesirable; it could lead to greater abuse than having a director in the chair.

20. GKN (C29) had suggested in para 4 that creditors should be provided with details of the other creditors before the meeting. It was felt that this was not necessary for the purpose of the meeting and that there was a danger that early disclosure of the amount owed to a creditor could be damaging to that creditor. It was not clear, however, what GKN had in mind and it was agreed that they should be invited to expand on their comment. Who votes at a meeting is a separate issue and the question of trade associations would be discussed later.

21. GKN (in para 5) had also suggested that representatives of firms of accountants attending the meeting should be required to declare their interest. It was decied that GKN should also be asked what they intended by this.

22. The Association of Certified Accountants (C46) (supported by the Insolvency Practitioners Association (C56)) had suggested (para 6) that as annual general meetings are seldom attended by any member or creditor, the liquidator should be required to send instead annually a summary of his receipts and payments. The Secretary pointed out that this had also been referred to in ILRC 43, paras 35 to 40, dealing with s.299. There was some discussion in which the Chairman stated that meetings were normally a waste of time because no-one turned up. Most members agreed with the suggestion that the liquidator should send an annual summary together with a report, and a notice saying that a meeting could be requested by contributories or creditors representing one tenth in value. Mr Goldman however expressed doubts.

23. Touche Ross & Co (C47) had suggested in para 7 that general and special proxies should be simplified. It was agreed that these should be simplified. The further suggestion relating to the standardisation of the rules relating to proof for interest was not discussed.

24. In para 8 , the Insolvency Practitioners Association (C56) had suggested that all directors resident in the UK should be required to attend the meeting called under s.293. The Chairman pointed out that if no directors turned up the meeting was a farce, and the suggestion was adopted. It was further suggested that it should apply to anybody who had been a director within the 6 months prior to liquidation.

25. Paras 9 to 15 of ILRC 46 dealt with the appointment of a liquidator.

26. In para 9 Kidsons (C16) submitted that the chairman of the meeting should be required to notify the liquidator of his appointment forthwith if he, or his representative, was not present when the resolution was passed. This was accepted.

27. In para 10 both the Finance Houses Association (C41) and the Equipment Leasing Association (C58) had submitted that the person nominated should be at arm's length from the company and its directors. This was accepted.

28 The Association of Certified Accountants (C46) had suggested in para 11 that limits should be placed on persons eligible for appointment, Touche Ross & Co (C47) in para 12 thought liquidators should be licensed, and the Divisional Consumer Protection Officer, South Yorkshire County Council (C49) in para 13 wanted some control over who could act as liquidator. It was agreed that this question should be discussed at a later date. Mr Graham said that a paper on the subject was coming from the Law Society and Bar Council.

29. In para 14 the Insolvency Practitioners Association (C56) were against the auditor of a company or his partners acting as liquidator. The Committee agreed.

30. Touche Ross & Co (C47) had expressed the opinion in para 15 that shareholders should not have power to appoint a liquidator unless the creditors failed to do so. This was accepted.

31. Paras 16 to 23 of ILRC 46 dealt with Committees of Inspection.

32. Mr Knight(C17) had suggested in para 16 that resolutions of the Committee of Inspection should be valid if signed by all members entitled to be present. This was supported by the Association of Certified Accountants (C26)(para 17). It was remarked that physical presence was becoming obsolete and the majority of the Committee agreed with the proposal. Mr Taylor was against it as he thought it was open to abuse.

33. GKN (C29) (para 18) thought the small creditors should be given a statutory right to adequate representation. It was thought that almost certainly this would be accepted.

34. In para 19 the Association of Certified Accountants (C46) recommended a simplified procedure for the appointment of the committee of inspection. It was decided that this referred only to compulsory liquidations.

35. In para 20 the Association had suggested that Rule 163 (restricting a member of the Committee of Inspection from trading with the liquidator) was too rigid. The Chairman thought that Rule 163 was essential and Mr Taylor supported this.

36. The City of London Solicitors' Company (C63) had in para 21 made proposals about the numbers of members on the committee of inspection. There was some discussion about harmonisation with compulosry liquidations; it was pointed out that in a voluntary, the meeting appointed the committee, whereas in a compulsory the meeting recommends but the Court actually appoints. This should be looked at when compulsories were discussed.

37. They had also in para 22 recommended that a member of the committee of inspection representing a company should be able to be represented by any other officer or employee without the need to produce a power of attorney. This was accepted.

38. In para 23 they had recommended that a resolution signed by a majority should be effective. This was not accepted if physical meetings were not to be held.

39. The question of change of name was discussed briefly. It was suggested that it should be a "Liquidation Committee" rather than a "Committee of Inspection" but this would be discussed again later.

40. Paras 24 to 27 dealt with conversion of voluntary winding-ups from creditors' to members' and vice versa.

41. Paras 24 and 25 referred to the proposal of the Association of British Chambers of Commerce (C28 and 44) to convert a creditors' to a members'. This had been discussed at the eighth meeting and a decision reached (para 32 of the minutes).

42. In paras 26 and 27 Nottinghamshire Chamber of Commerce (C18) supported by the Sheffield Chamber of Commerce (C36) and Touche Ross (C47) were in favour of conversion from members' to creditors' if creditors had not been repaid in 12 months, and that creditors should then be enabled to appoint another liquidator. This was accepted.

43. In para 28 GKN (C29) had suggested that the liquidator should issue reports and detailed accounts at intervals of no less than 3 months. This would be costly and could not be accepted.

44. In para 29 Mr Hand (C52) had made proposals about depositing funds in the Companies Liquidation Account and the payment of interest. This was felt to be a major subject for separate discussion.

45. Mr Instone (C10) in para 30 referred to s.206 and s.306 and debenture stock trustees. It was felt that this should be dealt with in the overall discussion on "Arrangements".

46. The Committee were not entirely clear as to what Mr Farrar (C15) had meant in para 5(a) They agreed that they would consider some form of small insolvency where the small company could not get into voluntary.

Farrar has now amplified this.

47. The Association of Certified Accountants (C46) had suggested in para 32 that it might be possible, if adequate controls on the liquidator were introduced, to conduct all liquidations on a voluntary basis. It was remarked that a company could only get into voluntary liquidation if it could afford a liquidator. The proposals will be considered.

48. In para 33 Touche Ross (C47) suggested that s.277 should be extended to voluntary winding up. This section will be considered later as a separate subject.

49. The Insolvency Practitioners Association (C56) suggested in para 34 that the priority afforded to the payment of certain costs and expenses by s.309 should be extended to costs of calling the meeting and ancillary work. The Chairman pointed out that a proper report for the meeting was essential and that a firm of accountants would normally be called in to prepare it. The Committee agreed with the proposal, but that it should be subject to the approval of the committee of inspection.

50. The Committee then dealt with ILRC 43. The Secretary said that the Committee had previously considered ss.278-283, CA 1948 which covered the commencement of voluntary winding up, and that this paper covered the remaining sections which concerned creditors' voluntary winding up. It cited the present law and proposals for change which had been put forward before the present Committee had been set up.

51. Proposals concerning s.288 (duty of liquidator to call creditors' meeting in case of insolvency) were set out in paras 3 to 9. Paras 3 to 5 were accepted. The substance of para 6 had already been discussed to some extent (see para 42 above). It was agreed that at the creditors' meeting, they should decide whether the winding up continued as a "members" or became a "creditors' voluntary". On paras 7 and 8 it was felt that the fine should be increased to £300 (although the whole question of fines and penalties would need to be discussed later) and that para 8(b) could be accepted. Para 9 (Gazetting of meetings) was provisionally agreed, with Mr Taylor dissenting, due to cost.

52. The proposals on s.293 (Meeting of creditors) were set out in paras 12 to 21. On the question of notice (para 14) it was agreed provisionally that at least seven days' notice should be given. On para 15 it was agreed that if the directors failed to turn up, the creditors should be entitled to appoint a chairman. The question of a penalty for all directors was deferred for further consideration.

On para 16, it had been decided already that all directors should be required to attend and the Chairman suggested that the Legal Panel should look at the proposal to see if it was practicable. Paras 17-19 had been considered earlier, the suggestion in 19(b) being accepted. The Committee rejected the proposal in para 20 that loan creditors have no vote at the creditors' meeting. With regard to para 21, it was felt that the statement of affairs in the form presented at the meeting and any report sent to the creditors thereafter should be filed within 14 days with the Registrar of Companies. The Chairman undertook to provide an example of a report to creditors.

53. Para 23 contained a proposal in connection with s.294 (Appointment of liquidator). It was agreed that where no meeting was convened, or no liquidator was appointed, steps should be taken to put the company into compulsory winding up. The implementation of this proposal would require further consideration.

54. The last sentence of para 27 (s.295 - Appointment of Committee of Inspection) referred to the question of no committee of inspection being appointed. If there was no committee the liquidator could go to a general meeting of creditors.

55. There were no proposals on s.296 (Remuneration and cesser of directors' powers).

56. Para 34 dealt with s.297 (Power to fill vacancy). It was felt that a liquidator could only resign if he called a meeting of creditors. If for some other reason a vacancy occurred, a meeting of creditors should be called within seven days either by the committee of inspection or failing that, by the Department of Trade.

57. s.299 (Duty of liquidator to call meetings each year) had already been dealt with (para 22 above).

58. On s.300 (Final meeting and dissolution) (par 42) it was felt that there must be a final meeting.

59. On s.303 (Powers and duties of liquidator in voluntary winding-up) (para 44) it was agreed that some attempt at harmonisation should be made after the Committee had considered the powers and duties of a liquidator in a compulsory winding up.

60. Para 46 referred to s.306 (Arrangement when binding on creditors). The Committee did not accept the proposal and considered that such a resolution should continue to require a majority of three-fourths in number and value of the creditors.

61. S.309 (Costs) (paras 48,49) had been dealt with earlier (see para 49 above).

NEXT MEETING

62. It was agreed that the next meeting would be held on Thursday 17 November. The Chairman invited members meantime to consider whether or not they wished to deal with written evidence submitted by consultees in the same manner as at the present meeting; this would be considered at the next meeting.