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CROSS-BORDER INSOLVENCY

Newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency

Note by the Secretariat

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continues its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the development of a legal instrument relating to cross-border insolvency.¹ This is the fourth session that the Working Group is devoting to the preparation of that instrument, currently entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners, including at the UNCITRAL Congress under the theme "Uniform commercial law in the twenty-first century", held in 1992.² The Commission decided at its twenty-sixth session to pursue those suggestions further.³ Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994) involving practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders.⁴ The Colloquium gave rise to the suggestion that work by the Commission should, at least at the current stage, have the limited but useful goal of facilitating judicial cooperation in insolvency matters, providing court access to foreign insolvency administrators and establishing rules for recognition of foreign insolvency proceedings.

3. Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in this area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22 - 23 March 1995)).⁵ The view of the participating judges and government officials concerned with insolvency was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

4. At its eighteenth session (Vienna, 30 October - 10 November 1995), the Working Group considered possible issues to be covered by the instrument⁶; at its nineteenth and twentieth sessions (New York, 1-12 April 1996, and Vienna, 7-18 October 1996), the Working Group considered draft articles, until then tentatively in the form of draft model legislative provisions⁷. At the twentieth session, the Working Group decided to continue the work under the assumption that the end-product would be in the form of model legislative provisions, which, however, did not exclude the possibility of undertaking work towards model treaty provisions or a convention in the area of cross-border insolvency if the Commission at a later stage so decides.⁸

5. This note sets forth the newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency, reflecting the deliberations that have taken place thus far, including those of the informal, open drafting group established by the Working Group to revise draft provisions during the course of the deliberations. To the extent the article numbers in the present document differ from those in the previous draft (A/CN.9/WG.V/WP.46), the previous article numbers are indicated in square brackets.

Newly revised articles of the draft UNCITRAL Model Legislative Provisions
on Cross-Border Insolvency

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses [, thereby protecting investment and preserving employment].

Prior discussion

A/CN.9/433, paras. 22-28 (Working Group, 20th session)

Notes

Subparagraph (a). The Guide to Enactment will explain that the enacting State might wish to adapt the expression "courts and other competent authorities" in subparagraph (a) to the terminology used in the State.

* * *

Chapter I. GENERAL PROVISIONS

Article 1. Scope of application

This [Law] [Section] applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*; or

(c) a foreign proceeding and a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]* in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested parties in a foreign State have an interest in requesting the opening of or participating in a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*.

Prior discussion

A/CN.9/433, paras. 29-32 (Working Group, 20th session)

A/CN.9/422, paras. 24-33 (Working Group, 19th session)

Notes

The words "[Law][Section]" in the chapeau are used to emphasize that the Model Legislative Provisions may be enacted as a statute or may be incorporated into an existing insolvency law, for example, as an

additional chapter. The point will be explained in the Guide to Enactment, though the somewhat cumbersome expression "[Law][Section]" is not repeated elsewhere in the text.

* * *

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding, including a proceeding opened on an interim basis, pursuant to a law relating to

insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (g) of this article;

[(d) [(c)] "opening of a foreign proceeding" is deemed to have taken place when the order opening the proceeding becomes effective, whether or not [final][subject to appeal];]

(e) [(b)] "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(f) [(d)] "court" in reference to a foreign court means a judicial or other authority competent to carry out functions referred to in this Law;

(g) [(e)] "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Prior discussion

A/CN.9/433, paras. 33-41, 147 (Working Group, 20th session)

A/CN.9/422, paras. 34-65 (Working Group, 19th session)

A/CN.9/419, paras. 95-117 (Working Group, 18th session)

Notes

Subparagraph (d) [(c)]. See A/CN.9/433, para. 39.

* * *

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty

or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Prior discussion

A/CN.9/433, paras. 42-43 (Working Group, 20th session)

A/CN.9/422, paras. 66-67 (Working Group, 19th session)

Notes

It may be noted that, for example, article 13(6), which does away with legalization of documents, or article 21, which allows courts to communicate directly, may be displaced by multilateral or bilateral treaties on legalization of documents or on particular forms of international communication between courts. The Working Group might wish to discuss whether article 3 could be refined in order to clarify the relationship between the Model Provisions and the treaties and to avoid an unnecessarily broad interpretation of the international instruments referred to in the article.

* * *

Article 4. Competent [court][authority]^a

The functions referred to in this Law relating to recognition of foreign proceedings and

cooperation with foreign courts shall be performed by [*specify the court, courts or authority competent to perform those functions in the enacting State*].

Prior discussion

A/CN.9/433, paras. 44-45 (Working Group, 20th session)

A/CN.9/422, paras. 68-69 (Working Group, 19th session)

A/CN.9/419, para. 69 (Working Group, 18th session)

Notes

1. Footnote "a". The option in footnote "a" has been prepared pursuant to the request reflected in document A/CN.9/433, paragraph 184.

2. "[court][authority]". If in the enacting State the functions relating to recognition and cooperation are performed by an authority other than a court, the enacting State would have to replace, where appropriate, the term "court" by the name of the relevant authority. The point will be explained in the Guide to Enactment, though the somewhat cumbersome expression "[court][authority]" is not repeated in the subsequent articles. Currently, the articles referring to a court in the enacting State are: 6, 7, 8, 12, 13, 15, 16, 17, 19, 21, 22.

3. Court functions relating to recognition and cooperation. The Working Group might want to discuss whether, instead of the general formulation "The functions referred to in this Law relating to", there should be specific reference to articles of the Model Provisions. The directly relevant articles would be 13 and 21. However, there might be other functions for which the court referred to in article 4 should be competent (such as permitting realization and distribution of assets (article 16(3)) and some of the functions listed in articles 15 and 17).

* * *

Article 5. Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State

A *[insert the title of the person or body administering a liquidation or reorganization under*

the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.

Prior discussion

A/CN.9/433, paras. 46-49 (Working Group, 20th session)

A/CN.9/422, paras. 70-74 (Working Group, 19th session)

A/CN.9/419, paras. 36-39 (Working Group, 18th session)

* * *

Article 6 [13]. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be [manifestly] contrary to the public policy of this State.

Prior discussion

A/CN.9/433, paras. 156-160 (Working Group, 20th session)

A/CN.9/422, paras. 84-85 (Working Group, 19th session)

A/CN.9/419, para. 40 (Working Group, 18th session)

Notes

Current draft article 6, which in the previous draft appeared in chapter III (Recognition of a foreign proceeding) as article 13 (A/CN.9/WG.V/WP.46), has been moved to chapter I, in line

with the decision of the Working Group that the provision on public policy should apply to the entirety of the Model Provisions (A/CN.9/433, para. 158).

Chapter II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 7 [6]. Access of foreign representatives to courts in this State

A foreign representative is entitled to apply directly to a competent court in this State for the purpose of obtaining any relief available under this Law.

Prior discussion

A/CN.9/433, paras. 50-58 (Working Group, 20th session)

A/CN.9/422, paras. 144-151 (Working Group, 19th session)

A/CN.9/419, paras. 77-79; 172-173 (Working Group, 18th session)

Notes

1. Draft article 6 as considered by the Working Group at its twentieth session (A/CN.9/433, para. 50) has been split (pursuant to the decision of the Working Group, A/CN.9/433, para. 51) into current draft article 7, current draft article 9 and current draft article 20.

2. The Working Group might wish to consider whether article 7 should be tied to article 4; if so, the article might be redrafted along the following lines: "A foreign representative is entitled to apply directly to the court referred to in article 4 to obtain recognition of a foreign proceeding or to any competent court in this State to obtain [other] relief available under this Law."

* * *

Article 8 [8]. Limited jurisdiction

The sole fact that a request pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the request.

Prior discussion

A/CN.9/433, paras. 68-70 (Working Group, 20th session)

A/CN.9/422, paras. 160-166 (Working Group, 19th session)

* * *

Article 9 [9]. Request by a foreign representative for opening of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

A foreign representative is entitled to request the opening of proceedings in this State under *[insert names of laws of the enacting State relating to insolvency]* if the conditions for opening such proceedings under the law of this State are met.

Prior discussion

A/CN.9/433, paras. 71-75 (Working Group, 20th session)

A/CN.9/422, paras. 170-177 (Working Group, 19th session)

Notes

The Working Group might wish to consider whether the foreign representative's right to request the opening of an insolvency proceeding in "this State" should depend on recognition of the foreign proceeding.

* * *

Article 10 [6(c)]. Participation of a foreign representative in a proceeding under [insert names of laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding concerning the debtor in this State under [insert names of laws of the enacting State relating to insolvency].

Prior discussion

A/CN.9/433, para. 58 (Working Group, 20th session)

A/CN.9/422, paras. 114-115, 147, 149 (Working Group, 19th session)

Notes

The expression "participate" in article 10 is intended to include rights such as the right to be heard in an insolvency proceeding and to make proposals therein.

* * *

Article 11 [10]. Access of foreign creditors to a proceeding under [insert names of laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2), foreign creditors have the same rights regarding the opening of, and participation in, a proceeding in this State under [insert names of laws of the enacting State relating to insolvency] as creditors [that are citizens of this State or are resident, domiciled or have a registered office] in this State.

(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under [insert names of laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than general (non-priority or non-preference) claims.^b

Prior discussion

A/CN.9/433, paras. 77-85 (Working Group, 20th session)

A/CN.9/422, paras. 179-187 (Working Group, 19th session)

Notes

Footnote "b". The alternative provision in footnote “b” relating to foreign tax and social security claims has been prepared pursuant to the considerations in the Working Group reflected in A/CN.9/433, paras. 82-83.

* * *

Article 12 [10]. Notification to foreign creditors of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

(1) Whenever a notification of commencement of proceedings under *[insert names of laws of the enacting State relating to insolvency]* is required under the law of this State for creditors in

this State, such notification shall be made to known creditors not resident, domiciled or with a registered office in this State.

(2) Notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) The notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

Prior discussion

A/CN.9/433, paras. 86-98 (Working Group, 20th session)

A/CN.9/422, paras. 188-191 (Working Group, 19th session)

Notes

1. Paragraph (1). Paragraph (1) has been inspired by article 40(1) of the European Union Convention on Insolvency Proceedings. However, it may be considered that, while in the context of the limited membership of that Convention reference to the debtor's habitual residence, domicile and registered office is needed, such reference in the Model Provisions, which are to apply universally, is less necessary. Therefore, the Working Group might wish to consider replacing the words "known creditors not resident, domiciled or with a registered office in this State" by words such as "known creditors without an address in this State". The suggested wording would have the added benefit of being in harmony with the solutions, found in a number of national laws, which require the foreign creditor who has received notice of an insolvency proceeding to name an address or agent in the State of the proceeding for receiving subsequent notices. Furthermore, the change would avoid using the expressions "resident" and "domiciled", which may be regarded as synonymous.

2. Paragraph (3)(b). It is suggested to align the expressions "secured creditors" and "secured claims" in subparagraph (b) with the corresponding expressions in square brackets in article 23.

* * *

Chapter III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 13 [7, 11]. Recognition of a foreign proceeding for the purpose of obtaining relief

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] opening the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of proof referred to in subparagraphs (a) and (b), any other proof acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2 (g) in the foreign State.

(4) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests.

(5) If the decision or certificate referred to in paragraph (2) indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(e), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

[(8) An application for recognition of a foreign proceeding shall be decided upon expeditiously].

Prior discussion

A/CN.9/433, paras. 59-67, 99-104 (Working Group, 20th session)

A/CN.9/422, paras. 76-93, 152-159 (Working Group, 19th session)

A/CN.9/419, paras. 62-69, 178-189 (Working Group, 18th session)

Notes

1. Paragraph (1). It may be considered whether paragraph (1) should refer to the court specified in article 4 (see also A/CN.9/433, para. 57).

2. Paragraph (3). The Working Group may wish to consider reformulating paragraph (3)(a) along the following lines: "(a) as a foreign main proceeding if the debtor has in the foreign State the centre of its main interests" so as to align it with paragraph (3)(b).

3. Paragraph (3)(b). The Working Group might wish to discuss whether an uncertainty may ensue from an understanding that, strictly speaking, the debtor can be considered as having an establishment in the "centre of its main interests". If so, the Working Group might wish to consider replacing the words "the

debtor has an establishment" in paragraph (3)(b) by a formulation such as "the debtor has merelyan establishment" or to reformulate the subparagraph along the following lines "(b) as a foreign non-main proceeding if the debtor does not have in the foreign jurisdiction the centre of its main interests but an establishment within the meaning of article 2(g)".

4. Paragraph (4). It might be considered whether the substance of paragraph (4) should be moved to the end of the definition of "foreign main proceeding" in article 2(b).

5. Paragraph (8). See A/CN.9/433, para. 109.

6. Possible new provision. The Working Group may wish to consider the need to establish in the Model Provisions a duty of the foreign representative to inform the court of the status of his or her appointment (in particular of the termination of the appointment) or of the status of the foreign proceeding (in particular of its termination or its transformation from a liquidation proceeding into a reorganization proceeding). Giving such information to the court may be important in all circumstances (A/CN.9/419, para. 170), but seems particularly important when the foreign proceeding has been opened on an interim basis or the foreign representative has been appointed provisionally (A/CN.9/433, para. 113). One possible approach to providing such a duty might be to introduce a new subparagraph in article 13(2) along the following lines: "(d) an undertaking to inform the court of any change in the status of the foreign

proceeding or of his or her appointment". Another approach, somewhat different in substance from the one just mentioned, might be to include a new paragraph in article 11 along the following lines: "(5 bis) The court [may][shall] require the foreign representative to undertake to inform the court of any change in the status of the foreign proceeding or of his or her appointment".

* * *

Article 14. Grounds for refusing recognition

Recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(e); or

[(b) the debtor is a *[insert the designations of specially regulated financial services institutions]*, if the debtor's insolvency in this State is subject to special regulation in *[insert names of laws of the enacting State relating to insolvency of such institutions]*].

Prior discussion

A/CN.9/433, para. 103 (Working Group, 20th session)

A/CN.9/422, paras. 42-43, 84-85 (Working Group, 19th session)

A/CN.9/419, paras. 34-35, 40 (Working Group, 18th session)

Notes

1. Subparagraph (b). See A/CN.9/433, para. 103; A/CN.9/422, paras. 42-43; and A/CN.9/419, paras. 34-35.
2. Possible new subparagraph (c). For a possible exclusion of consumer insolvencies from the Model Provisions, see A/CN.9/433, paras. 35-37 (see also A/CN.9/422, para. 41, and A/CN.9/419, para. 33). If the exclusion of consumer insolvencies should be addressed in the Model Provisions, the Working Group might wish to discuss whether this should be done by a footnote to the article (e.g., "The enacting State might wish to consider adding the following subparagraph to article 14: (c) the debtor's debts were incurred predominantly for personal, family or household purposes") or by a new subparagraph in the article itself.
3. Possible new subparagraph (d). The Working Group might wish to consider whether, in light of draft article 13(3), article 14 should contain a provision to the effect that recognition may also be refused where the foreign court lacked jurisdiction to open the foreign proceeding.
4. Reference to article 6. In order to avoid an apparent inconsistency between article 6 and the expression "may only be refused where" in the chapeau of article 14, it might be considered including, at the beginning of article 14, words such as "Subject to article 6".

* * *

Article 15 [12(1)]. Relief upon application for recognition of a foreign proceeding

- (1) From the time of filing an application for recognition until the application is decided upon, the court may, under the conditions in article 17, grant any relief permitted under that article.
- (2) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in this State.
- (3) Such relief may not extend beyond the date that the application for recognition is decided upon, unless it is extended under article 17(1)(c).

Prior discussion

A/CN.9/433, paras. 110-114 (Working Group, 20th session)

A/CN.9/422, paras. 116, 119, 122-123 (Working Group, 19th session)

A/CN.9/419, paras. 174-177 (Working Group, 18th session)

Notes

1. The Working Group may wish to replace the word “permitted” in paragraph (1) by “available”, the expression used elsewhere in the text in similar contexts.
2. Paragraph (2). See note 1 to article 18.
3. Paragraph (3). The Working Group may wish to consider whether, in light of its decision taken at its twentieth session to delete the then draft article 12(d)(i) (see A/CN.9/433, paras. 108 and 136), it wishes to delete also current paragraph (3). (See also article 17(1)(c).)

* * *

Article 16 [12(2)(a), (3)]. Relief upon recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,^c

(a) the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities shall be stayed; and

(b) the right to transfer, dispose with or encumber any assets of the debtor shall be suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under *[insert names of laws of the enacting State relating to insolvency]*.^d

(3) No earlier than ___ days after recognition of a foreign main proceeding, the court may permit the foreign representative to administer, realize and distribute assets of the debtor in the foreign proceeding. If a proceeding concerning the debtor under *[insert names of laws of the enacting State relating to insolvency]* has been opened, such permission may only be given after the completion of that proceeding.

Prior discussion of paragraphs (1) and (2)

A/CN.9/433, paras. 115-126 (Working Group, 20th session)

A/CN.9/422, paras. 94-110 (Working Group, 19th session)

A/CN.9/419, paras. 137-143 (Working Group, 18th session)

Prior discussion of paragraph (3)

A/CN.9/433, paras. 138-139 (Working Group, 20th session)

A/CN.9/422, paras. 112 (Working Group, 19th session)

A/CN.9/419, paras. 148-152 (Working Group, 18th session)

Notes

1. Paragraph (3). It may be noted that article 4, as currently drafted, does not expressly cover the court competence for giving a permission envisaged in article 16(3). The Working Group might wish to consider whether the court mentioned in article 16(3) should be the court referred to in article 4 and whether this should be made clear in the text. (See also note 3 to article 4).

2. Paragraph (3) ("administer"). The Working Group may wish to discuss the relationship between the concept of "administer" in article 16(3) and the concept of "manage" in article 17(1)(e). (See A/CN.9/433, paras. 129, 138-139).

3. Footnote "c" to paragraph (1). Since footnote "c", as drafted, is limited to foreign main proceedings, it might be considered that a bare application for recognition might not suffice to produce the "stay" and "suspension" as provided in subparagraphs (a) and (b). Namely, at the time of application it might not yet be certain whether the foreign proceeding is a main proceeding. The application would at least have to allege or present some proof that the foreign proceeding is a main proceeding, or the court seized with the application would otherwise have to have reasonable assurance that the application concerns a main proceeding.

The Working Group might wish to consider whether the current wording of the footnote is satisfactory or whether additional language should be included to make the point clear.

* * *

Article 17 [12(2)(b)]. Relief upon recognition of a foreign main or non-main proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of

the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they were not stayed under article 16(1)(a);

(b) suspending the transfer, disposal or encumbrance of any assets of the debtor, to the extent they were not suspended under article 16(1)(b);

(c) extending relief granted under article 15;

(d) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

(e) entrusting the preservation and management of the assets of the debtor to the foreign representative or another person designated by the court;

(f) granting other relief that may be available under the laws of this State.^e

(2) The court may refuse to grant relief in respect of a foreign non-main proceeding if such relief would interfere with the administration of a foreign main proceeding.

Prior discussion

A/CN.9/433, paras. 127-134 (Working Group, 20th session)

A/CN.9/422, paras. 111-113 (Working Group, 19th session)

A/CN.9/419, paras. 154-166 (Working Group, 18th session)

Notes

1. Paragraph (2). For the discussion of other possible approaches to distinguishing between main and non-main proceedings, see A/CN.9/433, paras. 147-155.

2. "Paulian actions". If the Working Group decides to consider the right of the foreign representative to initiate actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as "Paulian actions"; A/CN.9/433, para. 134), it may wish to do so on the basis of a new draft article along the following lines: "A foreign representative has the right to initiate, under the conditions of the law of this State, an action to reverse or render unenforceable legal acts detrimental to all creditors."

* * *

Article 18 [12(2)(c)]. Notice of recognition and relief granted upon recognition

[The foreign representative shall] [When the court recognizes a foreign main or non-main proceeding pursuant to article 13(3), it shall order the foreign representative to] give notice of the recognition, of the stay and suspension as provided in article 16(1), and of any relief granted under article 17(1), within ___ days to all known creditors that have an address in this State. Such notice shall be given in the form required by the law of this State. [The obligation] [The order] to give notice does not suspend the effectiveness of the recognition or the relief.

Prior discussion

A/CN.9/433, para. 135 (Working Group, 20th session)

A/CN.9/422, para. 122-123 (Working Group, 19th session)

Notes

1. The Working Group may wish to consider incorporating the notice provision in current article 15(2) into article 18. If it is so decided, the consolidated article 18 might be worded along the following lines:

"Notice by foreign representative to creditors in this State

(1) The court shall order the foreign representative to give notice to all known creditors that have an address in this State of

(a) any relief granted under article 15;

(b) the decision to recognize the foreign main or non-main proceeding pursuant to article 13(3) and of the stay and suspension as provided in article 16(1);

(c) any relief granted under article 17(1).

(2) Such notice shall be given within ___ days of the relevant decision in the form required by the law of this State. The order to give notice does not suspend the effectiveness of the recognition or the relief."

2. The Working Group might wish to discuss whether article 18 should expressly leave room for the court to tailor the notice requirement to fit the circumstances of the case (e.g., by expressly allowing the court to prescribe the content of the notice). On the other hand, it might be considered that the point is sufficiently covered by article 19(3).

* * *

Article 19 [12(4), (5), (6)]. Protection of creditors and the debtor

(1) In granting or denying relief under [articles 15, 16 or 17] [this Law], the court must be satisfied that creditors collectively and the debtor are protected against undue prejudice and will be given a fair opportunity to assert their claims and defences.

(2) Upon request of a person or entity affected by relief under articles 15, 16 or 17, the [competent] court may [deny,] modify or terminate such relief.

(3) The court granting relief to the foreign representative may subject such relief to conditions it considers appropriate.

Prior discussion

A/CN.9/433, paras. 140-146 (Working Group, 20th session)

A/CN.9/422, para. 113 (Working Group, 19th session)

Notes

1. Paragraph (2). (See A/CN.9/433, para. 145).

2. Paragraph (2) ("court may deny ... relief"). It might be considered that reference to denial of relief in paragraph (2) is unnecessary and should be deleted. As to "stay" and "suspension" dealt with in article 16 (1), relief may be denied under articles 16(2) and 6. As to court measures under articles 15 and 17, the possibility to deny relief is implied in the discretion to grant it.

* * *

Article 20 [6(c)]. Intervention by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may intervene in actions in which the debtor is a [party][claimant or defendant] under the conditions of the law of this

State.

Prior discussion

A/CN.9/433, paras. 51, 58 (Working Group, 20th session)

A/CN.9/422, paras. 148-149 (Working Group, 19th session)

Notes

It might be considered whether article 20 should be included, as the second paragraph, in article 7.

* * *

Chapter IV. COOPERATION WITH FOREIGN COURTS
AND FOREIGN REPRESENTATIVES

Article 21 [15]. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, courts of this State shall cooperate to the maximum extent possible with foreign courts and foreign representatives. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* shall, within its authority, cooperate to the maximum extent possible with foreign courts and foreign representatives. The *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is permitted, within its authority, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:

(a) appointment of a person to act at the direction of the court;

(b) communication of information by any means deemed appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) approval or implementation by courts of arrangements concerning the coordination of proceedings;

(e) *[the enacting State may wish to list additional forms or examples of cooperation].*

Prior discussion

A/CN.9/433, paras. 164-172 (Working Group, 20th session)

A/CN.9/422, paras 129-143 (Working Group, 19th session)

A/CN.9/419, paras. 75-76, 80-83, 118-133 (Working Group, 18th session)

Notes

1. Paragraph (1). If the Working Group wishes to implement the suggestion reported in paragraph 168 of document A/CN.9/433, it might decide to replace the expression “courts of this State” in paragraph (1) by words such as: “a court involved in supervising proceedings under *[names of applicable laws of the enacting State relating to insolvency]*” or “a court referred to in article 4”.

2. Paragraph (2). The Working Group may wish to consider whether alignment of articles 5 and 21(2) would be useful.

* * *

Chapter V. CONCURRENT PROCEEDINGS

Article 22 [18]. Concurrent proceedings

(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to open a proceeding in this State against the debtor under *[insert names of laws of the enacting State relating to insolvency]* only if the debtor has [an establishment] [or assets] in this State[, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of this State].

(2) Recognition of a foreign insolvency proceeding is, for the purposes of opening proceedings in this State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.

Prior discussion

A/CN.9/433, paras. 173-181 (Working Group, 20th session)

A/CN.9/422, paras. 192-197 (Working Group, 19th session)

Notes

The Working Group may wish to consider whether the title of the article should read: "Jurisdiction to open a concurrent proceeding in this State".

* * *

Article 23 [19]. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in a proceeding opened in this State under [... *insert names of laws of the enacting State relating to insolvency*]with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in this State is proportionately less than the payment the creditor has already received.

Prior discussion

A/CN.9/433, paras. 182-183 (Working Group, 20th session)

A/CN.9/422, paras. 198-199 (Working Group, 19th session)

A/CN.9/419, paras. 89-93 (Working Group, 18th session)

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¹ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17(A/50/17), paras. 382-393.

² Uniform Commercial Law in the Twenty-first Century, Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992 (A/CN.9/SER.D/1, United Nations publication, Sales No. E.94.V.14), 274.

³ Official Records of the General Assembly, Forty-eighth Session, Supplement No.17(A/48/17), paras. 302-306. The background note on which the Commission based its discussion is contained in document A/CN.9/378/Add.4.

⁴ The report on the Colloquium is found in document A/CN.9/398.

⁵ The report on the Judicial Colloquium is found in document A/CN.9/413.

⁶ The report of the session is found in document A/CN.9/419.

⁷ The report of the nineteenth session is found in document A/CN.9/422; the report of the twentieth session is found in document A/CN.9/433.

⁸ A/CN.9/433, paras. 16-20.

^a A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of
[insert the designation of the government-appointed person or body].

^b The enacting State may wish to consider the following alternative wording to replace article 11(2):

(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[insert names of laws of the enacting State relating to insolvency]* and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than general (non-priority or non-preference) claims.

^c The enacting State may wish to consider the following alternative wording to replace the chapeau of article 16(1):

(1) Upon recognition of a foreign main proceeding, or upon application for recognition of a foreign main proceeding taking place in one of the States listed in Annex X,

^d The enacting State may wish to consider the following two alternatives with respect to paragraph (2):

Alternative I (addition to paragraph (2)): If the foreign main proceeding is taking place in one of the States listed in Annex X, the scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding.

Alternative II (replacement of paragraph (2)): (2) The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding.

^e The enacting State may wish to consider the following alternative wording to replace subparagraph (f):

(f) granting other relief that may be available under the laws of this State or the laws of the State where the foreign proceeding is taking place.

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