UNITED NATIONS

GENERAL
ASSEMBLY

Distr.
LIMITED

A/CN.9/WG.V/WP.44
8 March 1996

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Working Group on Insolvency Law
Nineteenth session
New York, 1-12 April 1996

CROSS-BORDER INSOLVENCY

Draft legislative provisions on judicial cooperation and access and recognition in cases of cross-border insolvency

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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]

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 18-22 May 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 insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders.[4]

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at this stage, have the limited but useful goal of facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "judicial cooperation" and "access and recognition"). It was also suggested that an international meeting of judges take place specifically to elicit their views as to work by the Commission in this area. Those suggestions

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[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1995), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 382 to 393.

[2] The proceedings of the Congress are published in document A/CN.9/SER.D/1, United Nations publication Sales No. E.94.V.14.

[3] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (1993), Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 302 to 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 UNCITRAL-INSOL Colloquium on Cross-Border Insolvency presented by the Secretariat to the Commission at its twenty-seventh session is set forth in document A/CN.9/398.

were received favourably by the Commission at its twenty-seventh session.[5]

4. Subsequently, the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency was held (Toronto, 22-23 March 1995). The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and recognition.[6] The consensus view at the Judicial Colloquium 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, and to include in the text to be prepared provisions on access and recognition. In taking note of the views expressed at the Judicial Colloquium, the Commission noted that the Working Group would examine a range of matters raised at the Judicial Colloquium relating to the possible scope, approaches and effects of the legal text to be prepared.

5. The Working Group commenced that examination at its previous session (Vienna, 30 October-10 November 1995)[7], which included consideration of draft provisions on various issues including definitions of certain terms, rules on recognition of foreign proceedings, effects of recognition, modalities of court access for foreign insolvency representatives, and judicial cooperation in the context of concurrent proceedings. The present note is intended to serve as a basis for the resumption of the deliberations conducted at the previous session. The note presents a set of draft model legislative provisions based on the draft provisions considered by the Working Group at the previous session, revised and supplemented to reflect the discussions that took place. Furthermore, this note also sets forth draft provisions on certain points that the Working Group had noted at the last session might be considered for inclusion in the instrument, or that the Secretariat suggests for consideration.

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[5] Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (1994), Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 215 to 222.

[6] The report on the Judicial Colloquium presented by the Secretariat to the Commission at the twenty-eighth session is set forth in document A/CN.9/413.

[7] The report of the Working Group session is set forth in document A/CN.9/419.

Draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency

Notes to title

1. The discussions at the previous session and at the two Colloquia indicated that there was, at least at this stage, an inclination in favour of model statutory provisions for the work being undertaken, in preference to the form of a convention. The Working Group might wish to proceed on that basis, with a working assumption that the provisions would take the form of a model law. Such an approach would not preclude a subsequent decision to convert the text into a draft convention.

2. As to the specific content of the title, the expression "model legislative provisions" is presented in lieu of "model law", in view of the limited scope of the provisions within the broader field of issues covered in national legislation on insolvency and the possibility that the model provisions would be incorporated into existing legislation, rather than being enacted as a free-standing law. The model text contains only directly pertinent procedural provisions since each enacting State would have existing rules of procedure that would continue to be applicable.

* * *

Preamble

WHEREAS the [Government] [Parliament] of the enacting State considers it desirable to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) fair and efficient administration of insolvencies that protects the interests of creditors from the enacting State, as well as the interests of foreign creditors;

(b) maximizing the value of the insolvent debtor's estate in the event of insolvency proceedings;

(c) facilitating the rescue of financially troubled though viable businesses, thereby protecting investment and preserving employment;

(d) encouraging and providing a predictable environment for trade and investment in the enacting State; and

(e) furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency,

Be it therefore enacted as follows.

Notes

1. The purpose of the statement of objectives in the Preamble would be to state at an appropriate place the underlying purpose of the Law and to provide guidance in the interpretation and application of the model provisions. As such, the statement of objectives would not itself be intended to create substantive rights or obligations. As the legislative practice of States regarding inclusion of preambles differs, consideration might be given to recommending to States in which it is not the practice to include preambles that the statement of objectives might be incorporated in the body of the law. Such a recommendation is made in the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services with respect to the preambular portion of the Model Law.

2. References in the Preamble and elsewhere in the text to "the enacting State" would, in enactment of the model provisions, be replaced by the name of the enacting State.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

This [Law] [Section] applies to insolvencies in which:

(a) a foreign proceeding has been commenced and recognition of that proceeding, and [enforcement of an order, or some other form of] assistance or relief, is sought on behalf of that proceeding in the enacting State;

(b) insolvency proceedings are taking place in the enacting State and the court seeks assistance on behalf of those proceedings from a foreign court or competent authority; or

(c) insolvency proceedings with respect to a debtor are taking place concurrently in the enacting State and in one or more other States.

Notes

1. Chapter I is reserved for a number of provisions of a general nature, including scope of application, definitions, relationship of the draft articles, assuming they remain in the form of statute rather than convention, with treaty obligations of the enacting State, identification of the court or administrative authority competent for carrying out functions referred to in the instrument, and authorization for administrators appointed in the enacting State to act abroad. The Working Group may wish to consider whether there are other issues that could appropriately be dealt with in chapter I.

2. Article 1 refers to cases deriving internationality from the fact that the debtor has assets or activities in more than one jurisdiction. It may be noted that cases deriving internationality from the fact that a debtor in the enacting State has foreign creditors are dealt with in the model provisions to the extent that a creditor-access and non-discrimination provision is found in article 17, which establishes the principle of national treatment of creditors, including the right of foreign creditors to avail themselves of insolvency proceedings in the enacting State. However, mention is not made of such a case in the scope of application provision so as to avoid giving the impression that the mere presence of foreign creditors renders the general rules on recognition applicable. The Working Group may wish to consider whether article 1 should nevertheless be adjusted in some way so as to avoid the erroneous implication that the creditor access and non-discrimination provisions of article 17 apply only in the situations referred to in article 1 (a), (b), or (c).

3. Since the model legislative provisions are of a limited scope, and relate to one extent or another to issues and procedures covered in national insolvency legislation, it can be expected that the provisions might be incorporated by enacting States as an additional element within the existing framework of insolvency legislation. Therefore, in a guide to enactment, it may be acknowledged that, depending upon the form of enactment, a specific provision on scope of application might not be included. The dual phrase in square brackets, "[Law][Section]" is used to acknowledge such possible different forms of incorporation of the model provisions into the insolvency laws of enacting States. Elsewhere in this text, however, simply the word "law" is used, though an enacting State may use a different term throughout.

4. The Working Group may wish to consider whether the specific reference to "enforcement of an order, ... " in square brackets could be deleted and considered covered by the broad reference to "assistance" that would be left following the deletion of the bracketed text.

* * *

Article 2. Definitions and rules of interpretation

For the purposes of this Law,

(a) "Administrator" means a person or body appointed by a court [or by statutory authority] in the enacting State who is authorized to reorganize the debtor's assets or affairs, or to liquidate the debtor's assets, in the context or reorganization of liquidation proceedings initiated under the laws of the enacting State, including the implementation of any measures that may be ordered pursuant to this Law;

Notes

1. As is indicated in the title, article 2 might be used not only for defining various terms, but also for setting forth any rules of interpretation that the Working Group might consider appropriate for inclusion.

2. The definition of the term "administrator" is included since the draft articles address situations and functions involving a person or entity appointed by a court of the enacting State to act in a capacity of supervision over the debtor's assets or affairs, for example, in the context of insolvency proceedings initiated in the enacting State, as well as for the purpose of implementing a regime of recognition and cooperation vis-a-vis a foreign proceeding. The latter may occur when the proceeding taking place in the enacting State is not actually an "insolvency" proceeding as such, but rather an "ancillary" proceeding opened for the purpose of providing assistance to a foreign proceeding. However, in a purely ancillary proceeding there would not necessarily be an administrator appointed and relief could be granted directly to the foreign representative. In the context of parallel or secondary proceedings, the national law of the enacting State would provide an applicable designation and definition of the person or body referred to herein as the "administrator". In that light, the Working Group may wish to consider whether the definition of "administrator" is superfluous.

3. Beyond the question of terminologically blending the reference to the "administrator" with the rest of the enacting State's insolvency laws, the draft model provisions do refer to functions of the administrator in the cross-border context, in particular the empowerment of the courts to authorize the administrator to act extraterritorially as the representative of the court or proceeding before a foreign court or proceeding (article 5).

(b) For the purposes of this Law, "debtor" includes [an insolvent] legal [or natural] person who has the status of an insolvent in a foreign proceeding, [but not including debtors whose debts were [apparently] incurred [predominantly] for personal, family or household use rather than for commercial purposes];

Notes

1. The rule of interpretation of the term "debtor" is intended to take as its departure point the definition of "debtor" that is likely to exist already in the enacting State's insolvency law. Placed within square brackets are various elements of the definition that the Working Group may wish to consider, as outlined below.

2. At the previous session, there was some discussion, though inconclusive at that stage, of whether the instrument should apply to insolvencies of natural persons. Germane to that discussion was the question whether coverage of natural persons would involve extension of the provisions to "consumer" insolvencies, or, in other words, insolvencies of "non-traders" (A/CN.9/419, para. 33). The words in square brackets at the conclusion of the definition are suggested as a possible formulation to exclude such cases, were the Working Group to opt for a "consumer" exclusion, while avoiding a blanket exclusion of insolvencies of natural persons. The formulation of the exclusion is based on article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods. Consideration might be given to retaining the exclusion in the form of an option for enacting States. The word "apparently" is included so as to avoid referring to any particular requirement of proof at the outset of a request for

recognition.

(c) "Foreign proceeding" means a collective judicial or administrative proceeding[, whether voluntary or compulsory,] pursuant to an insolvency law[, or to another law relating to insolvency,] in a foreign country in which assets and affairs of the debtor are subject to control or supervision by a court, by an official authority or by a competent person under the supervision of a court or official authority, for the purpose of reorganization or liquidation;

Notes

1. The definition is based on a text discussed at the previous session (A/CN.9/419, paras. 95 - 110). The text has been modified to reflect observations and suggestions made during that discussion. The modifications include clarification that the supervision of the debtor is pursuant to and under the overall management or supervision of a court or competent authority of the State in which the foreign proceedings were opened.

2. The words in square brackets ("[or to another law relating to insolvency]") allude to the fact that liquidations and reorganizations might be conducted under other than, strictly speaking, insolvency laws (e.g., company laws).

(d) "'Foreign representative" means a person or body appointed in a foreign proceeding, who is authorized by statute, court or other competent authority to reorganize the debtor's assets or affairs, or to liquidate the debtor's assets;

Notes

The definition is based on a text discussed at the previous session (A/CN.9/419, paras. 111-117). The text has been modified to reflect observations and suggestions made during that discussion.

(e) "Opening of foreign proceedings" refers to the initiation of the proceedings, whether or not an order or judgment opening the proceedings is final;

Notes

It was observed at the previous session that references in the text to judgments or orders opening an insolvency proceedings may, depending upon the nature of the process from which the proceeding originates, represent varying degrees of finality as regards the actual initiation of insolvency proceedings. In view of one of the main purposes of the draft provisions -- to allow an early opportunity for cooperation and coordination mechanisms to be set in motion between jurisdictions involved in a cross-border insolvency -- a flexible definition along the above lines may be considered. A definition along similar lines is contained in article 2(f) of the EU Convention.

(f) "Reorganization" refers to proceedings in which rights of creditors and the obligations of debtors are adjusted[, including by way of composition];

Notes

The definition has been included in to make it clear that the various reorganization and rehabilitation proceedings covered include those referred to as "composition" (A/CN.9/419, para. 108).

(g) "Rights in rem" refers to rights of disposal over assets to obtain satisfaction from the proceeds or income of the assets or to an exclusive right to have a claim met, including by way of liens, mortgages, or assignments of claims by way of guarantee, [reservation of title arrangements], rights to the beneficial use of assets, [and creditor rights to setoff of mutual claims].

Notes

1. Reference is made in the draft articles to "rights in rem" in the context of exclusion of such rights from certain effects of recognition (article 6(1)(a)(Option II)). In view of the differing contexts and legal systems in which the expression might be applied, it may be helpful to include a definition such as the above. The suggested text attempts to capture the essential elements of the definition found in article 5(2) of the EU Convention, though in a somewhat abbreviated form.

2. Mention was made at the conclusion of the previous session of the question of reservation of title arrangements, which are mentioned here more as a marker for discussion than necessarily suggesting that this would be an appropriate or adequate treatment in the present context. It may be noted that article 7 of the EU Convention provides that the opening of insolvency proceedings against the purchaser does not affect the seller's reservation of title if the asset is situated in a contracting State outside of the State in which the proceedings were opened. That provision also states that a purchaser is not prevented from taking title, and the sale is not rescinded or terminated, by virtue of the opening of insolvency proceedings against the seller if, at the time of the opening of the proceedings, the object of the sale is situated in a contracting State other than the State in which the proceedings against the seller were opened. The Convention also contains a reference to protection of good faith acquisitions. A similar matter is the proposed inclusion of the reference to creditor rights of setoff of mutual claims. It will further be recalled that the suggestion was made at the previous session to consider dealing with the question of seizures that have been obtained in assets (A/CN.9/419, para. 192).

* * *

Article 3. International obligations of the enacting State

To the extent that this Law conflicts with an obligation of the enacting State under or 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; but in all other respects the provisions of this Law apply.

Notes

On the assumption that the instrument being prepared would take the form of model statutory provisions, the purpose of article 3 is to deal with possible conflicts with treaty or other similar obligations of the enacting State on the international plane. A provision along those lines is found in article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration, and in article 3 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.,

* * *

Article 4. Competent [court][authority] for recognition of foreign proceedings

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by . . . [Each State enacting these model provisions specifies the court, courts or authority competent to perform the functions in the enacting State]

Notes

1. As suggested at the previous session (A/CN.9/419, para. 69), a slot has been created for an explicit indication by the enacting State of the court or administrative authority competent to perform the functions set out in the model provisions. The content of this indication will of course differ from State to State, and within individual States more than one court or authority, or branch thereof, may be indicated depending upon a variety of factors, for example, allocation of jurisdiction in the enacting State, the specific type of proceeding, and whether insolvency proceedings with respect to a debtor would be under way in the enacting State. Henceforth in the present text reference will be made however simply to the "court". From the standpoint of a foreign representative, the obvious advantage of including a provision along the lines of article 4 is that it facilitates speedy action to protect debtor assets from dissipation or concealment.

2. To the extent that the draft model provisions contain, as one course in a "menu of options", automatic recognition without a court or administrative decision in the recognizing State, the scope of article 4 is reduced to cases not subject to automatic recognition. (See further discussion in comment 6 under article 6, and in comment 12 under article 7.)

* * *

Article 5. Authorization for administrators to act extraterritorially

An administrator appointed [in insolvency proceedings] in the enacting State is authorized to act [as foreign representative of those proceedings] [to take such steps as are necessary extraterritorially for the purposes of reorganizing the debtor's assets or affairs, or to liquidate the debtor's asset] in accordance with the orders of the court.

Notes

1. Although the model provisions focus on assistance to foreign proceedings, article 5 is aimed in the other direction, i.e., the empowerment of administrators appointed in the enacting State to act abroad, regardless of whether a foreign jurisdiction in which the administrator is acting has adopted the model provisions. Article 5 is intended to address what may be a deficiency in national laws of some countries, namely, the lack of authority for the locally-appointed administrator to act abroad. In addition to such a legislative grant of authority, the appointing court is empowered, pursuant to the proviso at the end of article 5 ("in accordance with the orders of the court"), and pursuant to article 11, to tailor the extraterritorial mandate of the administrator to fit the circumstances of the given case.

2. As to the formulation of article 5, the Working Group is presented with two variants to consider, the first referring simply to the administrator acting in the capacity of a foreign representative, and the second utilizing a more functional wording.

3. It may be noted that the laws of the enacting State would deal with the question of proper venue for insolvency proceedings conducted in that State. Beyond that, there may be room for the model provisions to suggest venue rules for cases "ancillary" to foreign proceedings. Such rules could provide that, for the purposes of staying a pending action pursuant to article 7(1)(a)(i), the proper venue would be the court before which the action is pending or where property in question is situated. Cases filed for other forms of relief ancillary to a foreign proceeding might have their proper venue in the court relevant to the location of the debtor's principal place of business in the recognizing State, or to the location the debtor's principal assets in that State.

* * *

CHAPTER II. RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS

Article 6. Recognition of foreign insolvency proceedings

(1) For the purposes of this Law, a foreign judgment opening insolvency proceedings shall be recognized [from the time that it becomes effective in the State of the opening of proceedings],

VARIANT A

unless it is shown that there was no substantial connection between the foreign jurisdiction and the debtor.

VARIANT B

if the judgment emanates from a competent court or authority. A court or authority shall be deemed competent if that court or authority has jurisdiction based on any of the following criteria:

(a) domicile or habitual residence of the debtor;

(b) seat or place of registered office;

(c) [principal place of business] [centre of debtor's main interests];

(d) location of assets.

VARIANT C

if the foreign proceeding originates from a court or competent authority in a State [appearing on the following list: ...] [certified for purposes of recognition of insolvency by [name of appropriate entity or officer in enacting State].

(2) Notwithstanding paragraph (1), a court [may][shall] refuse to recognize the opening of foreign insolvency proceedings [, to enforce a judgment emanating from such proceedings] [, or to grant other forms of relief under this Law,] where the effects of such recognition, enforcement or relief would be manifestly contrary to public policy.

Notes

1. Chapter II contains the rules of recognition of foreign insolvency proceedings, starting off in article 6 with the conditions for according recognition. The relief available upon recognition, referred to at the previous session as "effects of recognition", is outlined in article 7. In considering the content of article 6, the Working Group may wish to consider whether such a separate provision is necessary, in view of the risk that it might invite litigation and delay, though it would be probably attractive to some States (A/CN.9/418, paras. 22-27). An alternative approach might be to rely on the predominantly procedural rules in article 13, subject to a general exemption phrased in terms of public policy or prejudice to national interests, coupled with a rebuttable presumption that the foreign proceeding was opened on the basis of a substantial connection with the debtor.

2. The provisions on recognition of foreign proceedings, coupled with those on access of foreign representatives to the courts of the enacting State and on judicial cooperation, provide the equivalent of relief available to a foreign representative in some jurisdictions through an "ancillary proceeding". Such proceedings may be sought regardless of whether there is an ongoing insolvency proceeding in the recognizing jurisdiction. The Model International Insolvency Cooperation Act (MIICA) prepared by Committee J (Insolvency) of the International Bar Association (IBA) highlights the features of legislative provisions on "ancillary proceedings". In addition, chapter II sets forth provisions which can be incorporated referring specifically to effects of recognition of a foreign proceeding that is a "main" proceeding (i.e., a proceeding emanating from the State in which the centre of the debtor's main interests are located), as opposed to a foreign proceeding that is merely a "secondary" proceeding (i.e., a proceeding opened in a State in which the debtor has only assets or an establishment).

3. Article 6 presents possible approaches for consideration by the Working Group as to a rule on conditions for recognition of foreign proceedings. More than one of those approaches might be retained in a "menu of options" for enacting States, in view of differing approaches States may favour. (The discussion at the previous session of possible connecting factors related to competence of the foreign court, and other possible factors that might be considered decisive for according recognition, is reported in A/CN.9/419, paras. 22 to 45.)

4. Variants A and B both refer to the competence of the court opening the foreign insolvency proceeding as dispositive in determining whether to accord recognition, though they differ in the manner in which competence would be assessed. Variant A reflects an approach mentioned in the discussion at the previous session, based on a rebuttable presumption of competence on the part of the foreign court. That approach is particularly receptive to recognition of foreign proceedings, leaving the objecting party to show that the foreign court lacks an adequate jurisdictional link to the debtor.

5. By contrast, Variant B imposes on the court confronted with a petition for recognition of a foreign proceeding the task of assessing the competence of the foreign court. Within that Variant, a number of alternative connecting factors are included, designed to broaden the possible bases on which jurisdiction of the foreign court may be found, while still involving the court in an examination

of the competence of the foreign court. It may be recalled that at the previous session there was discussion of the disadvantages of utilizing only one or the other connecting factor as a basis for according recognition, an approach that might undesirably narrow the range of foreign proceedings subject to recognition in the enacting State (A/CN.9/419, paras. 24, 99-105, and 185-189).

6. Variant C represents the approach of automatically according recognition, and perhaps also various forms of assistance, to foreign proceedings emanating from prescribed countries. Such an approach may be based in particular on an assessment by the enacting State of the degree of similarity of legal systems and insolvency laws of States on the list to its own legal regime. The Variant C approach might be combined with another approach as regards States not appearing on the list of prescribed States (see A/CN.9/WG.V/WP.42, para. 28), for example, Variant C for States within a regional grouping to which the enacting State belongs, and Variant A or B with respect to proceedings from other States. Variant C might be used as part of an automatic recognition scheme of the type in the EU Convention, which does not entail necessarily a formal act of recognition. Other elements of such an automatic scheme provided in the present text include articles 7(3) and 18(1)(Variant B)(Option I).

7. General support was expressed at the previous session for inclusion of an exception to the recognition rule based on public policy grounds (A/CN.9/419, para. 40), a proposed formulation of which is set forth in paragraph (2). At the previous session, reference was made also to referring to possible public policy exceptions with respect to various specific effects of recognition. It is suggested in the present draft, in particular by the words in the second set of square brackets "[, or to grant other forms of relief under this Law," that treatment of public policy exceptions should be consolidated. This would avoid the need to have multiple references in article 7 and elsewhere in the text to various public policy exemptions that were raised in different contexts in the discussion at the previous session.

* * *

Article 7. Relief available upon recognition of foreign proceeding

(1) For the purposes of providing assistance to a foreign proceeding, recognition of a foreign proceeding by a competent court

(a) operates as a stay,

(i) against the commencement or continuation in the enacting State of judicial, administrative or private actions against the debtor or its assets, except

OPTION I

collective proceedings for liquidation or reorganization in the enacting State

OPTION II

[, subject to paragraph (2),] proceedings for the enforcement of [secured creditor claims] [rights in rem], [seizures of assets that have already been obtained prior to recognition of the foreign proceeding],

OPTION III

proceedings for the purposes of police or regulatory enforcement,

and

(ii) against the transfer of any interests in assets by the debtor, except transfers [made in the ordinary course of business] [or] [for the purposes of completion of open financial market transactions]

(b) authorizes the foreign representative to obtain a court order compelling testimony or the delivery of information in written or other form by the debtor or others concerning the acts, conduct, assets and liabilities of the debtor;

(c) authorizes [the court to issue an order permitting] the foreign representative to take custody and management of assets of the debtor, [subject to][with the exception of assets encumbered by] rights in rem [and subject to exclusion of [personal][family] property exempt from insolvency administration under the laws of the enacting State;

(d) authorizes the foreign representative to intervene in collective proceedings for liquidation or reorganization in the enacting State;

(e) authorizes the foreign representative to ask the court to grant such other appropriate relief, including continuation of provisional measures granted pursuant to paragraph (2), as may be available to a liquidator under the law of the jurisdiction in which the foreign proceeding was opened, to the extent that such relief is not prohibited by or inconsistent with the laws of [the enacting State] [, including without limitation actions for voidness, voidability or unenforceability of legal acts detrimental to all creditors that may be available under the law of the enacting State [or under the law of the jurisdiction in which the foreign proceeding was opened], [subject in all cases to:

(i) the procedural requirements of the court, and

(ii) the protection of [local] creditors against undue prejudice or inconvenience];

(f) authorizes the courts of the enacting State to cooperate with the foreign court that opened the foreign proceeding, in accordance with article 11.

(2) Where it is appropriate to protect assets or the interests of creditors, provisional measures may be granted on the application of a foreign representative. Unless the court or authority otherwise orders, an order for provisional measures shall continue until the application for recognition of the foreign proceedings has been decided by the court.

(3) The judgment opening foreign proceedings emanating from a State [referred to in article 6(1)(Variant C)] in which is located the centre of the debtor's main interests ["main proceedings"], produces the same effects as under the law of the State of the opening of the proceedings [, except ... ,] and as long as no proceedings referred to in article 18(1)(Variant B)(Option I) are opened in the enacting State.]

Notes

1. At the previous session, the Working Group considered the "effects", referred to herein as "relief", that would be available upon recognition of a foreign proceeding (A/CN.9/419, paras. 46-69, and 134-177). Draft article 7 reflects basically the approach and formulation developed by the Working Group at that stage of its deliberations (A/CN.9/419, para. 134), though modified to reflect comments made on the earlier version.

2. In its consideration of the effects of recognition, the Working Group may wish to focus in particular on the extent to, and the manner in which, the model provisions might distinguish between effects of recognition, on the one hand, of a foreign "main"proceeding, and, on the other hand, of a foreign "secondary" proceeding. It is conceivable that some States would enact provisions generally on cooperation and coordination with foreign courts and proceedings, without enacting general rules of how to classify proceedings taking place in different countries as "main"or "secondary". Other States, however, would attach particular importance to such a distinction and may differentiate between effects of recognition based on such a distinction.

3. Presumably, the "menu of options" being prepared should attempt to cater to the varying tastes that States may have in the above regard. Accordingly, the words at the beginning of paragraph (1) ("For the purposes of providing assistance to a foreign proceeding") indicate that the relief referred to in paragraph (1) encompasses, but would not necessarily be limited to, relief of an "ancillary" type designed to assist a foreign proceeding. For the enacting State that would wish to go further, and to enact rules on additional effects on its territory of the opening of a recognized foreign "main" proceeding, there is room to do so in paragraph (3), which is based on article 17(1) of the EU Convention.

4. The Working Group may wish to consider further the question of whether a stay of collective actions should be automatic upon recognition of a foreign proceeding. At the previous session, the discussion led to an approach which exempted collective proceedings in the enacting State from automatic stay, though a stay of such proceedings could be requested from the court pursuant to paragraph (1)(e). One approach to this question, as suggested by the presentation of the exemption in an "Option I", would be simply to leave the text as is on this question. States that would not select Option I would thereby enact an automatic stay that included collective proceedings. Another

approach might be to stay collective proceedings if the foreign latter proceeding was the "main" proceeding in accordance with paragraph (3) of the present article.

5. Option II has been included in paragraph (1)(a)(i), providing for exclusion from the automatic stay under paragraph (1) of enforcement of claims of secured creditors, since some jurisdictions exempt enforcement of claims of secured creditors from coverage under insolvency proceedings (A/CN.9/419, para. 137). Reference is made in the draft formulation of Option II to rights in rem, raising the question whether the exemption should be phrased in terms broader than "secured claims". An alternative approach may be that secured creditors would be affected by a foreign main proceeding to the extent provided for by the insolvency law of the enacting State.

6. Pursuant to a suggestion made at the previous session, reference has been made in paragraph (1)(a)(ii) to exemption from the stay of transfers made "in the ordinary course of business" (A/CN.9/419, para. 143). The Working Group may wish to consider whether such an exemption might be seen as running counter to the need for legal certainty, while still distinguishing the need to protect good faith acquisitions. The reference to exemption of transfers for the purpose of completing open financial market transactions is another, separate question presented for consideration by the Working Group. Related to these questions may be the view that, at least in some of the contexts covered by the model provisions, the scope of the stay and its operation could be determined by the law of the foreign "main" proceeding.

7. Option III is included in order to facilitate consideration by the Working Group of whether a specific exception from the stay upon recognition should be provided for actions of a police or regulatory nature. The alternative presumably would be to consider such actions as covered by the omnibus public policy provision (article 6(2)).

8. A reference has been added in the chapeau of subparagraph (a) to the possibility that the stay in subparagraph (i) of individual creditor enforcement actions could be waived on public policy grounds. This suggestion encountered differing views and was left by the Working Group for further discussion (A/CN.9/419, paras. 139-143), though the exception does not appear here in view of the omnibus public policy provision (article 6(2)).

9. Express reference has been added to paragraph (1)(b) to the cloaking of the foreign representative with a court order for the purposes of compelling testimony and other forms of information about the debtor (A/CN.9/419, para. 145). A similar reference has been added to paragraph (1)(c), as it would seem imbalanced to require a court order authorizing the foreign representative to gather information, while not requiring an order for the taking of custody of assets. However, the Working Group may wish to consider further whether at least the reference to the gathering of information should be relieved from the requirement of a specific court order.

10. A reference has been added to paragraph (1)(e) to the possibility of obtaining, as part of the additional relief upon recognition, avoidance of preferential transfers. It may be recalled that, at the previous session, hesitation was expressed at delving into the question of avoidance of preferential transfers and the choice of law questions incident thereto. The Working Group may wish to discuss

this matter further at an appropriate time (A/CN.9/419, paras. 59 and 151), in particular since this is an issue on which a choice of law rule might be considered desirable.

11. Consideration may be given by the Working Group to avoiding the repetition in subparagraph. (e) of the reference to the court taking into account its applicable procedural law and the protection of local creditors. It may be viewed that consideration by the court of such factors is provided for generally by the provision on public policy or would be applicable in any case without additional mention in the present provision.

12. Paragraph (3) is included as part of what would be an optional set of provisions, in conjunction with article 18(1)(Variant B)(Option I), for States opting for a regime of automatic recognition of foreign proceedings distinguishing specifically the effects of recognition of proceedings emanating from the jurisdiction in which is located the centre of the debtor's main interests ("main proceedings"). Such an approach may be patterned on articles 3 and 17 of the EU Convention, which allocate jurisdiction among States to open "main" proceedings on the basis of the location of the centre of the debtor's main interests, and base jurisdiction to open "secondary" proceedings on the presence in other States of assets of the debtor. .

* * *

Article 8. Modification and termination of relief

The relief granted pursuant to article 6 (1) shall continue in place until modified or terminated by the competent court, [or until it lapses in accordance with the laws of [the enacting State]].

Notes

At the conclusion of the previous session, the question was raised of a mechanism for modifying or terminating provisional relief (A/CN.9/419, para. 192). Earlier in the deliberations, a provision along the lines of the above article was tabled, with apparent reference to relief granted under article 6(1) ("non-provisional" or "minimum list" relief). The Working Group might wish to consider the suggestion regarding modification and termination of provisional relief further, taking into account, however, that to one extent or another such issues may be dealt with under existing national law and procedure.

* * *

Article 9. Notification of creditors

[In addition to notification requirements under the laws of the enacting States,] the court may order the foreign representative petitioning for recognition of a foreign proceeding and for relief under article 7 to make such notification as it deems appropriate to creditors.

Notes

1. This provision on notification is intended to be a flexible statement of the requirement that creditors receive notification of steps affecting them as a result of recognition, leaving the exact timing, content and addressees of notification to be determined by the local court in accordance with applicable law and procedures, thereby attempting to avoid the superimposition by the model provisions of notification procedures on those that would in any case be ordered by the court or be required by the applicable law. The provision also replaces the reference to notification that had appeared in the earlier draft of article 7, on granting of provisional relief.

2. The notion of the relationship of the present text to existing notification requirements under national law suggests that it may be useful to point out in a guide to enactment that the enacting State should consider amendment of its rules of procedure to the extent necessary to implement the model provisions. The Working Group may wish at some stage in its deliberations to consider what areas such companion changes in procedural law might generally address.

3. A separate matter is whether to include in the model provisions a rule requiring insolvency administrators appointed in insolvency proceedings commenced in the enacting State to notify creditors in other jurisdictions. Such a provision is found in article 17(2).

4. It will be recalled that at the previous session mention was made of the question of possible notification requirement linked to termination of the foreign proceedings (A/CN.9/419, para. 170). The Working Group might wish to consider that matter further.

* * *

Article 10. Discharge of obligations to debtor

(1) Where an obligation has been honoured in the enacting State for the benefit of a debtor who is subject to foreign proceedings recognized in accordance with article 6, when it should have been honoured for the benefit of the foreign representative pursuant to relief provided to the foreign representative upon recognition, the person honouring the obligation shall be deemed to have discharged the obligation if the person was unaware of the foreign proceeding.

(2) Where an obligation referred to in paragraph (1) is honoured before notification in accordance with article 9 is made, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the foreign proceeding; where the obligation is honoured after such notification, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the foreign proceeding.

Notes

Draft article 10 is included pursuant to the suggestion that consideration be given to dealing with the question of discharge of debts owed to the debtor (A/CN.9/419, para. 192). The provision is patterned on the approach in article 24 of the EU Convention. The Working Group may wish to consider whether anything more than what is said above should be included, bearing in mind the limited scope of the instrument being prepared.

* * *

CHAPTER III. JUDICIAL COOPERATION

Article 11. Authorization of judicial cooperation

(1) The courts of the enacting State and administrators appointed in the enacting State shall cooperate to the maximum extent possible with foreign courts or administrative authorities and foreign representatives of foreign proceedings recognized in accordance with article 5, [taking into account in all cases the procedural requirements of the court and the protection of [local] creditors against undue prejudice or inconvenience].

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

(a) appointment of an administrator or representative to act at the direction of the court;

(b) communication[, by any means deemed appropriate by the court,] of information, and coordination of the administration and supervision of the debtor's assets and affairs, including by approval and implementation by the court of arrangements for the coordination of proceedings in the enacting State with foreign proceedings;

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

(3) The courts of the enacting State may request foreign courts or relevant administrative authorities for assistance in any matter relating to insolvency [proceedings] in the enacting State.

Notes

1. Article 11 is intended to be a general enabling provision authorizing the courts or other relevant administrative authorities of the enacting State to extend cooperation to foreign courts in insolvency proceedings. It is intended to address what has been identified as one of the main obstacles to judicial cooperation in cross-border insolvencies, namely, the lack in many jurisdictions of legislative authority for judges to engage in cooperative activity (A/CN.9/398, para. 6; A/CN.9/413,

para. 14; A/CN.9/419, para. 119).

2. At the previous session, discussion of a draft provision on judicial cooperation arose as part of consideration by the Working Group of the phenomenon of a plurality of insolvency proceedings (A/CN.9/419, paras. 75 and 76, and 118-124). In the present draft, the provision appears in a separate chapter, so as to indicate its applicability in a variety of contexts, as was the view at the previous session (A/CN.9/419, paras. 120-121). Those contexts include provision of assistance to a foreign proceeding by way of an "ancillary proceeding", as well as cases of concurrent insolvency proceedings. The latter category includes the case of a foreign "primary" or "main" proceeding, with "secondary" proceedings taking place in the enacting State, and the case of a foreign jurisdiction and the enacting State both conducting proceedings considered by them to be primary.

3. The Working Group may wish to consider whether the reference to conformity with the procedural requirements of the court and protection of creditor needs to be mentioned in paragraph (1), as those elements might be considered either subsumed in the general public policy rule (article 6(2), in the case of protection of local creditors), or applied by the court in any case (regarding procedural requirements). A further question is whether the reference to protection of creditors should refer to protection only of local creditors.

4. Paragraph (2) is included to add an element of descriptiveness to the provision on judicial cooperation (A/CN.9/419, paras. 122-123), thereby providing more definitive guidance to courts as to the forms of cooperation envisaged. The Working Group may wish to consider whether to include additional forms of cooperation to be included in the indicative list (e.g., approval of ad hoc governance protocols), in addition to leaving open the possibility for enacting States to list additional forms of cooperation if that were felt helpful for judges.

* * *

CHAPTER IV. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS

Article 12. Application for recognition of foreign proceeding

A foreign representative may apply for recognition of a foreign proceeding and for provisional and other forms of relief directly in the court referred to in article 4.

Notes

1. Chapter IV deals with certain procedural aspects of obtaining recognition of a foreign proceeding, as well as with the more general proposition of giving access to foreign representatives and foreign creditors to the ordinary insolvency apparatus of the enacting State. The procedural aspects include, in addition to providing for direct access of the foreign representative to the competent court, questions of the requisite proof of the foreign proceeding (article 13) and the possibility of a "limited appearance" by the foreign representative (article 14).

2 . Article 12 reflects the view of the Working Group that the foreign representative should be accorded direct access to the competent court or authority for the purposes of petitioning for recognition. Such an approach, as contrasted with requiring the petition to be routed through diplomatic or consular channels, serves the basic aim of preserving assets against dispersion and concealment where speedy and efficient procedures are essential.

* * *

Article 13. Proof concerning foreign proceeding

(1) A petition for recognition of a foreign insolvency proceeding shall be submitted to the court accompanied by proof of the opening of the proceeding and of the appointment of the foreign representative. Such proof may be in the form of a certified copy of the decision or decisions opening the foreign proceeding and appointing the foreign representative, or, in the absence of such form of proof, in any other manner required by the court. No legalization or other similar formality is required.

(2) A translation of the documents referred to in paragraph (1) into an official language of the enacting State may be required.

[(3) A foreign proceeding shall be presumed to have been properly opened in the foreign jurisdiction, unless it is proved that there was no substantial connection between the debtor and that jurisdiction.]

Notes

1. The above provision reflects the generally held views at the previous session as to the proof that may be required as to the appointment of the foreign representative and the opening of the foreign proceeding (A/CN.9/419, paras. 36-38, 113, and 178-184).

2. In the draft text considered at the previous session (A/CN.9/419, paras. 178 et seq.), it was decided to leave in square brackets for further consideration a reference to a presumption of the proper opening of the foreign proceeding from the standpoint of the competence of the foreign court. That presumption is now set forth as one of the options for enacting States for a competence-based test for recognizability of foreign proceedings (see article 6(1)(Variant A)).

* * *

Article 14. Limited appearance

An appearance before a court in the enacting State by a foreign representative in connection with a petition or request pursuant to the provisions of this Law does not subject the foreign representative to the jurisdiction of the courts of the enacting State for any other purpose, but a court granting relief to the foreign representative may condition any such relief on compliance by the foreign representative with the orders of the court.

Notes

A provision along the above lines was suggested at the previous session for possible inclusion in the text (A/CN.9/419, para. 192). It may be regarded as one of the important foundations of granting access to a foreign representative, who is able to approach the courts for assistance without thereby exposing the representative and the insolvency estate under its control to the full jurisdiction of the court. Such a provision is found in MIICA, Section 5, and in national statutes dealing with cross-border cooperation.

* * *

Article 15. Misdirected applications

If a court to which an application for recognition has been made is not the competent court, [the application shall be transmitted forthwith to the competent court] [the court shall direct the foreign representative to the competent court].

Notes

The Working Group may wish to consider whether a provision along the above lines, based on article 6 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, would be useful.

* * *

Article 16. Commencement of insolvency proceedings by foreign representative

A foreign representative is entitled to initiate an insolvency proceeding in the enacting State [if the conditions for opening such a proceeding under the laws of the enacting State are met].

Notes

1. Article 16 establishes the right of the foreign representative to initiate insolvency proceedings in accordance with the applicable national law of the enacting State. Such a right may be an important adjunct to provisions on ancillary relief, in particular if the actual granting of a petition for ancillary proceedings and relief would rest in the discretion of the court. The route under article 16 may be made available irrespective of whether the foreign representative has sought or been granted recognition and relief under chapter II.

2. The Working Group may wish to consider whether the existence of the foreign proceeding would be sufficient to permit the opening of a domestic proceeding whether or not the conditions for opening a proceeding under the laws of the enacting State were met. (See in this regard the proposed rule in article 18(2) to the effect that recognition of a foreign proceeding constitutes proof that the debtor is insolvent for the purposes of initiating insolvency proceedings in the enacting State.)

* * *

Article 17. Access of foreign creditors to insolvency proceedings in the enacting State

(1) Any creditor, whether or not [habitually] resident, domiciled or with a registered office in the enacting State[, including foreign tax authorities and social security authorities,] has the right to commence and file claims in insolvency proceedings in the enacting State, [to the same extent and in the same manner as other creditors of the same priority,] in accordance with the laws of the enacting State.

(2) As soon as insolvency proceedings are opened in the enacting State, the [court][administrator] shall immediately cause notification of the opening of the proceedings to be made to known creditors not [habitually] resident, domiciled or with a registered office in the enacting State. The notification shall provide [a reasonable minimum time] within which such a creditor can file a claim.

(3) The contents of the notification shall [conform to the requirements for such notifications under the laws of the enacting State [include:

(a) an indication of the time limits and the place for filing of claims, and the sanctions that result from failure to comply with those requirements;

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

(c) any other information required to be included in notifications to creditors pursuant to the laws of the enacting State and the orders of the court.]

Notes

1. The purpose of paragraph (1) of article 17 is to establish the right of foreign creditors both to commence and to participate in insolvency proceedings in the enacting State. The requirements of the national law would have to be fulfilled as regards initiation of proceedings and lodging of claims, as the thrust of the provision is to establish the principle of non-discrimination.

2. It was suggested at the conclusion of the previous session that consideration be given to the recognition of foreign Government claims, including revenue claims (A/CN.9/419, para. 192). Provision is made in the above text for recognition of such claims, with a view to soliciting consideration of the question by the Working Group.

3. Paragraph (2) establishes the obligation of notification to known foreign creditors upon the initiation of insolvency proceedings in the enacting State. Such a provision may be included as an additional way, beyond the basic provisions on access and recognition and judicial cooperation, of dealing with cases of cross-border insolvency, in particular those cases where internationality derives from the presence of creditors of the debtor outside of the debtor's home State. It might help to address what has been reported to be a problem, namely, that creditors often get information about the opening of an insolvency proceeding in another country late or not at all (A/CN.9/WG.V/WP.42, para. 102; A/CN.9/419, para. 84). Examples of such a provision are found in article 40 of the EU Convention, and article 30 of the Istanbul Convention. Other aspects of the creditor information problem in the cross-border context include the language and form of notifications made to foreign creditors, which, if unfamiliar to a foreign creditor, would obscure the significance of the notification.

4. Two possible approaches are suggested in paragraph (3) as to the contents of the notification of foreign creditors, the first involving the extension of domestic type of notification requirements to the foreign notification. The second approach would involve a listing of some specific items to be included in the foreign notification, with a reference to inclusion of other items of information required in notifications in the domestic context. If it is decided to include the second approach, the Working Group may wish to consider whether to add any other items to the list (e.g., language in which claims are to be filed).

* * *

CHAPTER V. CONCURRENT PROCEEDINGS

Article 18. Concurrent proceedings

VARIANT A

(1) Subject to article 5(1)(e), recognition of a foreign insolvency proceeding does not affect the commencement or continuation of insolvency proceedings under the laws of the enacting State.

VARIANT B

(1) Where an insolvency proceeding has been opened in a foreign jurisdiction in which the debtor has its [main centre of interests] [domicile], the courts of the enacting State.

OPTION I

shall have jurisdiction to open insolvency proceedings against the debtor only if the debtor has [an establishment] [or] [assets] in the enacting State[, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of the enacting State.

OPTION II

[may][shall] limit the scope of authority of an administrator appointed pursuant to proceedings initiated in the enacting State to the assets [and establishment] of the debtor in the territory of the enacting State.

(2) [Recognition of a foreign insolvency proceeding] [A certified copy of a judgment opening a foreign insolvency proceeding] is, for the purposes of initiating proceedings in the enacting State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.

(3) The administrator and the foreign representative shall cooperate in accordance with the orders of the court and shall promptly communicate to each other any information which might be relevant to the other proceeding, in particular all measures aimed at terminating a proceeding.

Notes

1. Chapter IV provides the enacting State with a number of provisions designed to deal with the phenomenon of more than one insolvency proceeding taking place with respect to a particular debtor, including the question of what effect recognition would have on the possibility of opening insolvency proceedings also in the recognizing State. As was noted at the previous session, it would not be the premise or the purpose of the model provisions to eliminate or reduce the phenomenon of concurrent or multiple insolvency proceedings. Neither is it intended to suggest that a State would have to establish a hierarchy of proceedings in the context of concurrent proceedings (A/CN.9/419, paras. 70-76). The model provisions might rather provide models for rules of coordination, with respect both to the question of allocation of jurisdiction among States, for those States that would wish to adopt such allocation rules, and with respect to cooperation and coordination between courts and administrators involved in concurrent insolvency proceedings in different jurisdictions.

2. At the previous session, the phenomenon of concurrent proceedings was discussed in particular from the vantage point of judicial cooperation in such cases (A/CN.9/419, paras. 76, and 118-124). Beyond that, it was suggested that some provisions be included concerning the jurisdictional interplay of concurrent proceedings. In the present draft text, the provisions authorizing and describing judicial cooperation, and those dealing with recognition, are presented in separate modules, and are not structurally a part of the provisions on concurrent proceedings, though they would apply in such cases. This may help to make clear that the provisions on judicial cooperation do not depend for their applicability on there being concurrent insolvency proceedings as such. Such a structure may ease the enactment of the provisions on judicial cooperation and on recognition by any State that might not wish to enact the model provisions on concurrent proceedings.

3. The title "concurrent proceedings" is utilized rather than the term "secondary proceedings" so as to provide model rules of coordination in as generally applicable and understandable a way as possible, without linking them for all cases to a determination of which of the concurrent proceedings are "main" proceedings and which are so-called "secondary proceedings", as such a distinction may not be universally made, at least not in the same manner. At the same time, options are included phrased in appropriate terms for jurisdictions that limit their own insolvency jurisdiction in cases of foreign proceedings accorded the status of "main" proceedings if, for example, those foreign proceedings are opened in the jurisdiction where is found the "centre of the main interests" or "domicile" of the debtor (see Variant B in paragraph (1) of the present article).

4. As to the allocation of jurisdiction, it will be recalled that in the previous working paper (A/CN.9/WG.V/WP.42), and in the discussion at the previous session (A/CN.9/419, para. 70), the question was raised what effect recognition of a foreign proceeding might have on the jurisdiction to initiate insolvency proceedings in the recognizing State and how proceedings in the recognizing State might be linked to the foreign proceedings. One method of linking the proceedings under some regimes is to provide that the opening of insolvency proceedings in one State obviates the need in the recognizing State for the court to examine whether the debtor is insolvent for the purposes of opening an insolvency proceeding in the recognizing State (e.g., Istanbul Convention, article 16; EU Convention, article 27). A provision along those lines is found in paragraph (2) of this article.

5. Another manner of linking concurrent proceedings is to provide the foreign representative with the right to commence insolvency proceedings in the recognizing State. That measure is provided in the current draft in article 16.

6. Variant A would give wide latitude to existing rights to initiate collective insolvency proceedings in the recognizing state, despite the recognition of a foreign proceeding. It reflects the assumption of concurrent jurisdiction. Notions closely linked to such an approach, which would also be reflected in statutory language, include the right of the foreign representative to initiate a local procedure. Such an approach would also be in line with leaving up to local law questions such as which of the concurrent proceedings are primary, and which secondary, and whether the local proceedings will have only territorial effect, will only be available if the debtor has an establishment in the recognizing country, and whether the mere presence of assets locally gives rise to insolvency jurisdiction..

7. Variant B is intended to present enacting States with options as regards a closer interrelationship as regards allocation of jurisdiction between concurrent jurisdictions. In that regard, four possible systems were presented to the Working Group at the previous session (A/CN.9/WG.V/WP.42, para. 87, as well as surrounding discussion). An attempt has been made in the present draft to focus on options as regards limitation of jurisdiction by the enacting State in the face of a foreign proceeding considered by it to be a main proceeding, and as to possible triggers for opening secondary proceedings. Those possible triggers include the presence of an establishment or of assets of the debtor in the enacting State (Variant B, Option I). A somewhat milder approach as regards limiting the jurisdiction of the courts of the enacting State is also presented for consideration, leaving up to the court's discretion the possibility of restricting the scope of the administrator's powers in the face of a foreign main proceeding (Variant B, Option II).

8. Beyond the possible links between concurrent proceedings, and jurisdictional restrictions in the enacting State possibly associated with a recognition regime, set forth in the draft article, some States may provide further degrees of linkages and restrictions between concurrent proceedings. Examples include in particular limitations on the rights of creditors in the recognizing State to initiate "secondary" proceedings when a foreign "main" proceeding is taking place, restrictions on access of local creditors to proceeds of secondary proceedings in such contexts, and rules on transfer to the main proceeding of assets remaining after payment of claims in the secondary proceeding. The Working Group may wish to consider whether any options with respect to such further provisions should be included, without surpassing the limited scope and purpose of the instrument being prepared.

9. As noted in comment 4 above, paragraph (2) establishes a link between the foreign proceedings and insolvency proceedings that might be concurrently available in the enacting State by establishing the rule that the opening of the foreign proceedings relieves the local court of having to examine de novo the question of whether the debtor is insolvent. The Working Group may wish to consider whether, at least as an option for enacting States, the scope of the rule in paragraph (2) on presumption of insolvency should be limited to cases in which the foreign proceeding is a "main" proceeding. Such an approach might be coupled with a prohibition against offering of proof to the contrary, subject to public policy.

* * *

Article 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 participate in a dividend for the same claim in an insolvency proceeding opened with regard to the same debtor in the enacting State, so long as the dividend received by the other creditors in the proceeding opened in the enacting State is less than the dividend the creditor has already received.

Notes

1. As noted earlier (A/CN.9/WG.V/WP.42, para. 43; A/CN.9/419, para. 192), the Working Group may wish to include a rule along the above lines to the effect that a creditor that has received part payment in one proceeding may not receive a dividend for the same claim in another proceeding until other creditors of the same class have obtained an equal dividend. Referred to in some countries as the "hotchpot" rule, the principle has been reflected in multilateral instruments as well (e.g., Istanbul Convention, article 5; EU Convention, article 20(2)).

2. The Working Group may wish to consider whether the "cross filing" of claims filed in concurrent proceeding should be mentioned as an alternative means to achieve equalization in the rate of payment of creditors, or whether such cross-filing could be mentioned separately, as a method of coordinating concurrent proceedings.

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