United Nations A/CN.9/699/Add.1

General Assembly

Distr.: General
1 April 2010

Original: Spanish

United Nations Commission on International Trade Law
Forty-third session
New York, 21 June-9 July 2010

UNCITRAL Legislative Guide on Insolvency Law: draft part three on the treatment of enterprise groups in insolvency

Compilation of comments by Governments*

Contents

* It should be noted that these comments have been prepared on the basis of documents A/CN.9/WG.V/WP.90 and addenda. The numbering of the recommendations in A/CN.9/WG.V/WP.90 differs slightly from the numbering of recommendations in the subsequent document A/CN.9/WG.V/WP.92 as follows: recommendations 226 to 239 in the earlier document are numbered 225 to 238 in the revised version.

V.10-52413 (E)

II. Comments received from Governments

A. Bolivia (Plurinational State of)

…

Analysis

1. [Comments with respect to document] A/CN.9/WG.V/WP.90/Add.1: international treatment of enterprise groups in insolvency

1. Article 25 of the UNCITRAL Model Law on Cross-Border Insolvency, which provides for cooperation and direct communication between a court of this State and foreign courts or foreign representatives, specifically lays down that, in matters referred to, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].

2. Article 25 also stipulates that the court shall be entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

3. The purpose of this article is to avoid the utilization of time-consuming procedures traditionally in use, such as letters rogatory, by enabling courts, with the appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign courts or foreign representatives. This ability is critical when courts consider that they should act with urgency.

4. In order to emphasize the flexible and potentially urgent character of cooperation, the enacting State may find it useful to include in the enactment of the Model Law an express provision that authorizes courts, when they engage in cross-border communications under article 25, to forgo the use of formalities that are inconsistent with the policy behind the provision (for example, communication via higher courts, letters rogatory or diplomatic or consular channels).

5. With regard to recommendation 245 in the Legislative Guide on Insolvency Law (conditions applicable to cross-border communication involving courts), the repetitive wording of paragraph (d) should be rectified.

6. For a better understanding of recommendation 246, the words "between the courts" should be added after the word "communication".

7. With respect to recommendation 247 (coordination of hearings), the reference to "joint" hearings could lead to confusion for a country's domestic law.

8. It is important to retain the text "to the extent permitted or in the manner required by applicable law" in draft recommendation 253 (authority to enter into cross-border insolvency agreements) and to retain the text "involving two or more members of an enterprise group" in draft recommendation 254 (approval or implementation of cross-border insolvency agreements).

2. [Comments with respect to document] A/CN.9/WG.V/WP.90: enterprise groups in insolvency in the domestic context

9. Regarding recommendation 221 (exclusions from substantive consolidation), given that draft recommendation 220 is a permissive provision, it will be necessary to make reference to recommendation 220, i.e., the insolvency law should permit the court to exclude assets and claims from an order for substantive consolidation and specify standards applicable to those exclusions.

10. Clarification of draft recommendation 225 is necessary because there might be confusion between the issue of priority of a claim and its value as opposed to the amount recovered on the claim; the value of a claim would not be affected by substantive consolidation, whereas the actual recovery might be.

…

4. Position of the Ministry of Justice of the Plurinational State of Bolivia

11. The Office of the Deputy Minister of Justice and Fundamental Rights a.i. of the Ministry of Justice subsequently stated, on 13 January 2010, that it did not have any comments concerning the UNCITRAL Model Law on Cross-Border Insolvency but requested that the results of the thirty-eighth session of UNCITRAL Working Group V (Insolvency Law) be sent to the different working groups in order that those views might be incorporated subsequently in the preparation of the legislation.

B. Colombia

1. Comments by the Companies Supervisory Authority of Colombia

…

Working paper A/CN.9/WG.V/WP.90, on enterprise groups in insolvency: domestic issues

12. In the commentary, paragraph 88 on post-application finance contains the same text as appears in paragraph 96 on the need for post-commencement finance; one or the other should therefore be deleted.

13. Recommendation 220: According to the recommendation, it is the court having competence to conduct the insolvency proceedings which takes the decision on substantive consolidation. Paragraphs (a) and (b) of the recommendation specify the limited circumstances in which an order for substantive consolidation may be issued (under the Colombian system, the possibility of implementing orders in this way is not provided for). Paragraph (b) refers to circumstances where it is established that the enterprise group members are engaged in a fraudulent scheme or an activity with no legitimate business purpose. In some jurisdictions, including that of Colombia, insolvency judges do not have competence to determine whether activities are fraudulent or to rule on the legitimacy or otherwise of a debtor's business; it would therefore be very difficult for such a provision to be applied by judges hearing insolvency matters since the determination of fraud, for example, falls within the competence of criminal court judges.

14. As regards the other issues, we consider that their contents can be approved.

Working paper A/CN.9/WG.V/WP.90/Add.1, on enterprise groups in insolvency (international issues), was revised at the thirty-seventh session of Working Group V, held in Vienna from 9 to 13 November 2009, the revision being contained in report A/CN.9/686, on which we comment as follows:

15. With respect to the general purpose clause for the recommendations applicable to enterprise groups in insolvency, we consider that the proposed text prepared by the Secretariat, as set out in paragraph 15 of document A/CN.9/686, should be included in the revised version of part three of the Legislative Guide.

With reference to section B (Promoting cross-border cooperation and coordination of enterprise group insolvencies):

16. We agree with the Working Group's view that a new recommendation should be included, along the lines prepared by the Secretariat, to provide for direct access of foreign representatives to the courts and recognition of foreign insolvency proceedings, which we consider to be useful both for systems that have incorporated the Model Law on Cross-Border Insolvency and for those that have not.

17. With regard to participation by parties in communications, we agree that "parties in interest" and not "affected parties" should be entitled to participate (paragraph 24); this amendment has to be made to paragraphs (c) and (f) of recommendation 245.

Recommendations 240 to 247 on cooperation with the courts

18. Recommendation 240: The wording of the recommendation would need to be amended in the Spanish version. At the beginning of the recommendation, the text refers to the court hearing a case of insolvency of an enterprise group member but then mentions "those" proceedings, having referred earlier to a single case. Also, the proceedings to be coordinated are not only those commenced with respect to the same enterprise group member but with respect to that member and to other members of the enterprise group, which could precisely affect the insolvency of the "group" and not just that of one member of the group. The suggestion would be to replace the final phrase "*contra la misma empresa del grupo*" with "*contra empresas del mismo grupo*".

19. Recommendation 242: We agree that paragraphs (b) to (d) are examples of means of communication and should therefore be included in the description in paragraph (a).

20. Recommendation 245: While is appears appropriate to provide notice to affected parties concerning communications between insolvency courts or between such courts and insolvency representatives, is does not seem either useful or practical to entitle those affected parties to participate in communications. Such an excessive guarantee could give rise to an unmanageable issue in proceedings in which a large number of persons normally have interests. As with insolvency representatives, it could be decided that this possibility should be granted to, for example, the creditor committee, which in theory represents the creditors' interests. It also appears reasonable that the court itself should have the option of deciding whether or not the participation of the insolvency representative or of any of the

affected parties in the communication is appropriate, especially when that is to form part of the record as a transcript of the communication, which will in fact be available to all the parties.

21. With regard to the insolvency representative, paragraph 38 of the document refers to cooperation between insolvency representatives. In this connection it should be mentioned that, under some systems, such as that of Colombia, in recovery and specifically reorganization proceedings the insolvency representative usually performs its functions alongside a debtor in possession, since the insolvency does not have as a consequence the dispossession of the debtor. Therefore, only in liquidation proceedings does the insolvency representative assume responsibility for day-to-day administration of the insolvency estate of the debtor, and in reorganization proceedings the debtor will in some instances be required to undertake coordination with other insolvency representatives or with other courts.

Recommendations 248 to 250 on the insolvency representative

22. Recommendation 250: Cooperation between insolvency representatives is possible only if the court authorizes the activities described in paragraphs (a) to (e). The text should be revised if, rather than being regarded as vested in the insolvency representative, such prerogatives are described as measures that could be authorized by the court and not as the exercise of powers conferred on the insolvency representative, who in practice acts under the direct supervision of the court which appointed the insolvency representative.

Recommendations 251 and 252

23. We agree to the amendment of the proposed text concerning the purpose of legislative provisions, given that the decision to appoint a single insolvency representative in multiple proceedings should rest with the court or courts hearing the case if they consider that such a decision is conducive to the effectiveness of the proceedings and if the decision does not give rise to conflicts of interest.

24. Recommendation 252: The evaluation of conflicts of interest that may arise should be made by the court prior to adopting a decision on the appointment of a single insolvency representative. The court's focus should be on resolving the insolvency and avoiding the creation of conflicts in that process.

25. As regards the other issues dealt with in document A/CN.9/WG.V/WP.90/Add.1, we are in agreement with their contents.

26. Future work: We consider it necessary to have more detailed information in order to support one or more of the topics proposed at the last meeting of Working Group V (Insolvency Law). However, we view with interest the possibility of working on the issue of the liability of directors and officers of enterprises in insolvency.

…

2. Comments by the Directorate of International Legal Affairs

…

27. The purpose of model legislation formulated by UNCITRAL is to establish guidelines and references for States wishing to regulate international trade law issues. Such documents do not constitute treaties; they do not therefore give rise to any form of obligation for States and it is States that freely decide whether or not to adopt model legislation and incorporate it in their domestic law.

28. It should, however, be pointed out that, with a view to meeting its aim of achieving homogeneous trade law at the international level and ensuring that States regulate such issues in a similar fashion, model legislation has to be incorporated in domestic law with the smallest number of modifications.

29. A major achievement in Colombian trade law has been the inclusion of the norms of the UNCITRAL Model Law on Cross-Border Insolvency of 1997 in title III of Law No. 116, of 2006, establishing enterprise insolvency law in the Republic of Colombia and laying down other provisions.

30. As pointed out by Working Group V in connection with the issue of enterprise group insolvency, it is appropriate that insolvency law, especially rules on cross-border insolvency, should provide for the existence of enterprise groups.

31. Colombian trade law does not currently contain any provisions applicable to the insolvency of such groups. While provision is made for cross-border insolvency, that is centred on insolvency proceedings against the same debtor and not against different enterprises within one and the same group.

32. A study of existing related legislation should accordingly be undertaken to determine the appropriate means of facilitating the treatment of enterprise group insolvency cases, taking into account the already existing advantage of the incorporation in domestic legislation, under Law No. 116 of 2006, of the principles of cross-border cooperation, which also apply to enterprise groups.

...

C. Spain

33. Before going into detail, we should commend UNCITRAL, and the members of its Secretariat in particular, for the work accomplished, which constitutes a suitable formula for supplementing the text of the Guide, a major instrument for the unification and enhancement of insolvency law in all States.

1. General comment

34. In the Spanish version, the expressions should be "*miembro del grupo de empresas*" or "*miembro de un grupo de empresas*" ("enterprise group member"), as appropriate in each case, and not "*empresa del grupo*" or "*empresa de un grupo*". This phrasing has to be applied to the entire document.

35. Where the document refers to "*procedimientos de insolvencia contra*" ("insolvency proceedings against"), the text should read "*procedimientos de insolvencia relativos a*" ("insolvency proceedings concerning"). It should be noted that the rejection of the expression "insolvency proceedings against", as indicated in the present comment, is also applicable to the English and French versions: insolvency proceedings, when commenced, affect one or more debtors; they are not instituted against such debtor or debtors. The fact that the aforementioned expression appears (twice) in the Guide should not allow its indiscriminate use.[1]

2. Comments on document A/CN.9/WG.V/WP.90

36. Glossary: The definition of "enterprise group" (paragraph (a)) in the Spanish version reads as follows: "*el que está formado por dos o más empresas que están vinculadas entre sí por alguna forma de control o una participación importante en su capital*". The following replacement wording is proposed: "*dos o más empresas que están vinculadas entre sí por alguna forma de control o una participación importante*". Such rephrasing is an attempt to avoid any idea of "formation" within the group so that the definition includes what could be described as actual groups that constitute a group situation even though they are not "formed" as such. Also, the deletion of the reference to "*capital*" is intended to show that that such enterprises may be entities that differ from joint stock companies (*sociedades de capital*).

37. Paragraphs 9 to 18 (Nature of enterprise groups): Mention should perhaps be made of the modifiability of enterprise groups in order to make this aspect more apparent (in some instances, enterprise groups have begun on a small scale and then diversified and expanded, and, in other instances, such groups have been the outcome of corporate break-ups, for example the takeover of one group by another, the divestment of part of the group, etc.). The aim is to prevent this part of the document from giving an overly static impression of enterprise groups, which in fact constitute, as the document affirms, an area of vigorous economic activity (a reference to paragraphs 20 and 21 at some point or points in paragraphs 9 to 18 might suffice).

38. Paragraph 118, second sentence: This reads: "*una empresa conexa perteneciente al grupo*" ("a related group member"). It should read: "*un miembro del grupo*" ("a group member").[2]

39. Paragraph 119, *in fine*: This reads: "*las empresas conexas de un grupo*" ("related group members"). It should read: "*los miembros pertenecientes a un grupo*" ("group members").

40. Paragraph 124, third sentence: This reads: "*la sociedad matriz*". ("the parent company"). It should read: "*la entidad matriz*" ("the parent entity").

---

[1] With regard to the document to which the present comments refer (A/CN.9/WG.V/WP.90), the same correction should be made in the following instances: para. 80, *in fine*; para. 57, second sentence; para. 130, *in fine*; and para. 143, second sentence.

[2] It is pointed out that the equivalent phrase in the English version ("related group member") could be corrected (omission of redundant word).

41. Paragraph 132, first sentence: This reads: "*de cada empresa*" ("single enterprise"). It should read: "*de cada entidad*" ("single entity").[3]

42. Paragraph 132, second sentence: This reads: "*de cada empresa del grupo*". It should read: "*de cada entidad*". The idea could perhaps be extended to the English and French versions, with the replacement of the words "enterprise" and "*entreprise*" with "entity" and "*entité*" respectively.

43. Recommendation 237, paragraph (c) (in accordance with paragraph 122 of document A/CN.9/686): The text will need to be revised, in order to align it with the suggestions put forward, once the final form is adopted.

[3] A further instance appears in paragraph 181, second sentence.