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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 226-239 in the earlier document are numbered 225-238 in the revised version.

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II. Comments received from Governments

A. Egypt

[1. International]

Recommendations 240 to 247

1. [We agree with the p]urpose of legislative provisions … .

Recommendation 240

2. We consider the words "for that purpose by the court" to be superfluous, since insolvency proceedings are known to the parties and to those concerned, i.e., the insolvent party or parties, the insolvency representative, the individual creditors, and, of course, the court. We believe that appointment by the court of a special person would create a new entity that is unfamiliar in insolvency proceedings. The function and authority of such an entity is not defined in an inclusive and exclusive manner and this can lead to some unwarranted complication and lengthening of the proceedings. We, therefore, believe that those words should be deleted and that cooperation should be carried out directly through the courts or through the insolvency representatives and the courts.

Recommendation 241

3. The words "and subject to the supervision of the court" in the third line are vague. It is not clear whether or not they mean "and subject to the agreement of the court". We believe that it would be better to change them to "and subject to the agreement of the court", so that it cannot be understood that the insolvency representative may cooperate with foreign courts in a proceeding without express approval by the court that appointed him.

Recommendation 242

4. We disagree to item (f) for the reasons mentioned under recommendation 240 on the same subject.

5. We agree to (e) in its entirety as it stands, because preserving as far as possible the assets of the enterprise group subject to insolvency proceedings and maximizing the utilization of such assets is the most important purpose of insolvency proceedings. It is of definite benefit to the insolvent as well as stakeholders. We, therefore, believe that extending coordination between the different courts to management of the assets of the enterprise group undergoing insolvency proceedings would contribute to the objective of protecting the assets of the insolvent and maximizing their value in an effective and practical manner.

Recommendation 243

6. We [a]gree.

Recommendation 244

7. The same remark as on recommendation 241.

Recommendation 245

8. [Paragraph (a):] We agree to the word "by" because it implies the prior development of a procedural regulatory framework in a manner known by and clear to all, not changing with the change of judges from case to case nor affected by variation of the insolvent persons or the economic entities to which they belong or the persons and nationalities of insolvency representatives. Thus the time, "place and manner" of communication become like general rules declared and known to all before they are engaged in. This achieves stability and confidence as well as transparency to all concerned parties;

9. [Paragraph (b):] We disagree with the words "or their representatives" because they are superfluous, since the general rule in all cases in courts, including insolvency cases, is that knowledge by an agent implies knowledge by the principal until the opposite is proved;

10. [Paragraph (c)]: We disagree with the words "or their representatives" for the above-mentioned reason;

11. [Paragraph (d)]: The words "That transcript may be treated as an official transcript of the communication, filed as part of the record of the proceedings" is not understandable to us, in the light of the preceding sentence that the communication may be recorded and a written transcript prepared. In other words, if the communication is recorded and a written transcript prepared, then such a transcript must be treated as an official transcript done by a person so authorized and dealing with an ongoing insolvency proceedings. It thus becomes like any paper or evidence submitted in the proceedings. To say that it "may" be treated as an official transcript and filed as part of the record of the proceedings means, conversely, that it may also not be so treated. Thus the question arises: how then should it be treated? How can it be insured that the substance of such a communication — which can have important effects for the parties concerned — has become existent and recorded — as has actually been done — and available in a paper or in evidence in the proceedings?

12. We therefore suggest that the wording should be "If the communication was not recorded and a written transcript prepared as directed by the courts, such a transcript shall be officially prepared and kept as part of the record of the proceedings … ."

Recommendation 246

13. We agree to the word "any" communication made, because it is more comprehensive and general and covers all cases. It is also better than the word "a" communication, which suggests that what will be made according to the recommendations is one anticipated communication, while it is conceivable and possible that tens or even hundreds of communications will be made.

14. Generally, we do not consider that there is any practical need for the recommendation as a whole. Since this communication will be done by the person entitled to do it and in accordance with the terms and conditions defined by the Guide and applied in each State adoption, the general rules of evidence in each State are adequate to judge the level of such a communication as evidence from which any position, confirmation or waiver by any concerned party can be deduced in an

express or implied manner. Thus, from a practical point of view, this recommendation is not needed, since the rules of evidence in each State enumerate such matters in detail.

Recommendation 247

15. We disagree with the words "Notwithstanding the conduct of a joint or coordinated hearing …", as they are absolutely redundant. The reason is that any court will have full knowledge that it must pronounce its decision on the matters before it. It retains this duty until it disposes of it by making its decision on the matters before it. Otherwise it would be denying justice. This principle is among the basics of judicial work in any judicial system in the modern world. A mere reference to this in the recommendations would imply that there are courts that, because joint hearings are conducted, abdicate to a court of another jurisdiction their responsibility for making their decision. This would be contrary to the general order in any State and inconceivable. We believe that these words should be entirely deleted.

Recommendations 248 to 250

Recommendation 248

16. We agree to this recommendation, with a reservation as to the words "and subject to the supervision of the court", as already explained under recommendation 241.

Recommendation 249

17. We agree to this recommendation, with the above-mentioned reservation.

18. We suggest that recommendation 249 should be merged with recommendation 248, so that the latter would contain the words "Such cooperation shall permit the insolvency representative to directly communicate with foreign insolvency representatives …", with the above-mentioned reservation on that being subject to the supervision of the court.

Recommendation 250

19. We suggest the addition of the words "and assets" to item (d), so that it reads: "Coordination with respect to administration and supervision of the affairs and assets of the group members … ."

Recommendation 251

20. We prefer the words "where the court determines it to be in the best interests of the relevant insolvency proceedings", because they give the court the discretion to use or not use this power. They also confirm that this competence is based on the desire of the court to conduct the relevant insolvency proceedings in the best possible manner that it considers appropriate in each case. Furthermore, the words "in appropriate cases" are vague and too broad, with nothing to confirm that the basic purpose of this measure is to serve the insolvency proceedings themselves in the best possible manner.

21. We disagree with the word “insolvency” law that appears at the end of the recommendation, since it involves unnecessary restriction and specification. An insolvency representative is always subject to the supervision of the court that appointed him, according to the insolvency law of the State concerned as well as other laws, the most important of which are procedural laws that are the general basis for organizing the relationship of the court to the parties of any proceedings, including insolvency proceedings, particularly in the absence of a specific provision.

22. In general, we feel that recommendation 251 embodies a risk, since if the court, for any reason, reverses its decision to appoint the insolvency representative to administer the insolvency in more than one State, or if it deposes him after some time, which frequently happens in practice, that would have the worst impact on the insolvency proceedings and the assets of the enterprise group simultaneously in several States and would create some vacuum and chaos that would adversely affect the rights of the parties concerned. That would not be the case if the administration of insolvency proceedings was assigned to several insolvency representatives who cooperate with each other in all possible ways.

Recommendation 252

23. This recommendation carries the risk that we feel, as described above. It adds a further dimension to the risk of appointing a single insolvency representative. This confirms our view that the whole idea of a single insolvency representative should be deleted. This is because it is also possible, where a conflict of interest arises, that the measure taken would be to depose the insolvency representative, which would create a situation of chaos and vacuum as described above.

Recommendation 253

24. We disagree with the words “involving two or more members of an enterprise group in different States”, because as long as the recommendation permits “other parties in interest”, including, of course, bidders in auctions to sell the assets of the enterprise group in the different States or those submitting offers to operate some or all of such assets for a return, as well as other parties, to enter into cross-border insolvency agreements, it would be meaningless to require that the agreement should involve two or more members of an enterprise group, as it is conceivable that a cross-border agreement between two or more real estate investment firms to coordinate among themselves so as to enter auctions in which the real estate assets of the enterprise group are sold in various States and not engage in competition harmful to them can be entered into without the participation of the enterprise group. Thus the text as it stands deprives the above-mentioned parties from the right to enter into such agreements in a legal manner recognized under insolvency law.

Recommendation 254

25. We disagree with the word “or” that appears in the first line of the recommendation. This is because the recommendation requires that the law should permit the courts to approve or implement a cross-border insolvency agreement. This implies alternatives, i.e., that the court may approve without implementing or may implement without having approved, which is neither clear nor understandable. If the court had agreed to the agreement, this would imply that it approves it. Since

court approvals are not a theoretical matter but actually decisions, it is inconceivable that the court would not implement such an agreement after having approved it. On the other hand, it is inconceivable that the court would implement an agreement that it had not agreed to when it was submitted to it in a specific proceeding. We, therefore, suggest that the word "or" be replaced by the word "and".

[2. Domestic]

Recommendation 211

26. [We propose to modify the chapeau of recommendation 211 as follows:] "The insolvency law should specify that the court may permit an enterprise group member subject to insolvency proceedings to:".

Recommendation 212

27. [We propose to modify the beginning of the chapeau of recommendation 212 as follows:] "The insolvency law should specify that the court may permit post-commencement finance to be [provided] …".

28. [With respect to recommendation 212, we have the following questions:] Who guarantees that this result will be achieved under changing market conditions? What if this offsetting is not achieved and the finance becomes a new burden on the enterprises, competing with the rights of creditors?

Recommendation 214

29. [We propose to r]eplace "may" by "should".

Recommendation 220

30. [We propose to modify the beginning of the chapeau of recommendation 220 as follows:] Replace "[in the following limited circumstances]" by "in certain cases, including:".

Recommendation 223

31. [We propose to modify recommendation 223 as follows:] Add "or the group member subject to insolvency proceedings himself".

Recommendation 224

32. [With respect to paragraph (c), we express our preference for the word] "single".

Recommendation 225

33. [We express our preference for the word] "improve".

Recommendation 226

34. [With respect to paragraph (b), we propose to] replace "It is determined" by "The court determines" … .

Recommendation 230

35. [We propose to insert the following addition at the end of recommendation 230] "… already taken pursuant to the order and fully implemented."