United Nations A/CN.9/708

General Assembly

Distr.: General
4 May 2010

Original: English

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

UNCITRAL Legislative Guide on Insolvency Law
Part three: Treatment of enterprise groups in insolvency

Note by the Secretariat: Revisions to A/CN.9/WG.V/WP.92 and Add.1*

1. This note sets forth amendments and additions to the draft of part three of the Legislative Guide on Insolvency Law (as contained in documents A/CN.9/WG.V/WP.92 and Add.1), based upon the deliberations and decisions of Working Group V at its thirty-eighth session from 19-23 April 2010 (see document A/CN.9/691 for the report of that meeting).

2. For reasons of economy, this note sets forth only the revised text of those recommendations or parts of recommendations and paragraphs of the commentary that were amended or added at that session of Working Group V. Recommendations or parts of recommendations and paragraphs of the commentary that are not included in this document remain as set forth in A/CN.9/WG.V/WP.92 and Add.1. Paragraph and sentence numbers refer to the text as set forth in A/CN.9/WG.V/WP.92 and Add.1.

* The submission of this document was delayed due to the need to finalize consultations.

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Introduction and purpose clause (see A/CN.9/691, para. 15)

1. At its thirty-eighth session, Working Group V agreed to the addition of text to clarify what was intended by the words "a better, more effective result" for the enterprise group. The intent of this purpose clause is that the insolvency law should not only address the insolvency of individual members of the enterprise group, but that, as appropriate, it should also consider the group context in which these individual insolvency proceedings occur and the manner in which the individual member operates within that group. Accordingly, the insolvency law should facilitate the financial difficulty of those members being addressed in a manner that not only considers the individual debtors, but takes the group context into consideration in order to achieve a better, more effective insolvency solution for the group as a whole.

2. The Commission may wish to consider how this explanation might be added to the purpose clause, such as by way of a footnote or by replacing the phrase "a better, more effective result" with the words along the lines of "a better, more effective insolvency solution".

I. General features of enterprise groups

Commentary, paragraph 1 (see A/CN.9/691, para. 17)

3. Fifth sentence: Replace the words "legal persona" with "legal personality".

Commentary, paragraph 9 (see A/CN.9/691, para. 18)

4. New fourth sentence: "In some cases, the parent may be an unincorporated entity, such as a foundation or other form of non-profit organization."

5. Footnote 9: "A holding or parent company or entity directly or indirectly controls enough voting stock in another firm to determine financial operational policies. The term may signify a company or entity that does not produce goods or services itself, but whose purpose is to own shares of other companies (or own other companies outright)."

II. Addressing the insolvency of enterprise groups: domestic issues

B. Application and commencement

1. Joint application

Recommendation 200 (b) (see A/CN.9/691, para. 24)

"200. (b) A creditor, provided that:

(i) It is a creditor of each group member to be included in the application; and

(ii) Each of those group members satisfies the commencement standard of recommendation 16."

2. Procedural coordination

Commentary, paragraph 22 (see A/CN.9/691, para. 26)

6. First sentence: Replace the words "others with legally recognized interests" with the words "other parties in interest".

Commentary, paragraph 26 (see A/CN.9/691, para. 31)

> "26. Part two chapter III discusses the participation of creditors in insolvency proceedings and in particular, the formation of creditor committees (see paras. 99-114). The considerations discussed would also apply in the context of insolvency proceedings concerning enterprise group members. With respect to such proceedings, the interests of creditors of the different group members have the potential to diverge and it is unlikely that those interests could be represented in a single creditor committee. It may also be the case, however, that where procedural coordination involving many group members is ordered, establishing a separate committee for the creditors of each member might prove to be extremely costly and inefficient for administration of the proceedings. For that reason, the courts in some States have the discretion not to establish, in appropriate circumstances, a separate creditor committee for each group member subject to insolvency proceedings. Those circumstances may include where the interests of creditors of the different group members are not diverse and can be accommodated and appropriately protected in a single committee or where the creditors are common to the group members concerned. The desirability of forming a single committee may also depend upon the extent to which creditors can participate in the insolvency proceedings under the applicable insolvency law (see part two, chap. III, paras. 75-83) and whether that participation can be facilitated by a creditor committee (see part two, chap. III, paras. 99-112). Where it is not appropriate to establish a single committee, it will be desirable to facilitate coordination between the various committees in the different proceedings."

Commentary, paragraph 37 (see A/CN.9/691, para. 26)

7. Replace the word "reversal" with the word "termination" throughout the paragraph.

Recommendation 203, footnote 26 (see A/CN.9/691, para. 29)

8. Second sentence: "Accordingly, an order for procedural coordination may require action by one or more than one court."

Recommendation 204 (see A/CN.9/691, para. 30)

> "204. Procedural coordination may involve, for example, appointment of a single or the same insolvency representative; establishment of a single creditor committee, as appropriate; cooperation between courts, including coordination of hearings; cooperation between insolvency representatives, including information sharing and coordination of negotiations; joint provision of notice; coordination between creditor committees; coordination of procedures for submission and verification of claims; and coordination of avoidance

proceedings. The scope and extent of the procedural coordination should be specified by the court."

C. Treatment of assets on commencement of insolvency proceedings

(b) Post commencement finance

Commentary, paragraph 56 (see A/CN.9/691, para. 37)

9. Replace the words "related parties" with the words "related persons". When part three of the Guide is integrated with the existing parts of the Guide, it should be made clear that the reference in paragraph 56 to "para. (jj) of the glossary" is to the glossary currently appearing before part one of the Guide.

Recommendation 212 (b) (see A/CN.9/691, para. 40)

"212. (b) Determines that any harm to creditors of that group member will be offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance."

D. Remedies

3. Substantive consolidation

Commentary, paragraphs 106-107 (see A/CN.9/691, para. 46)

10. Throughout those paragraphs, the references to "consolidation" are to be replaced with "substantive consolidation".

Recommendation 221 (see A/CN.9/691, para. 49)

"221. Where the insolvency law provides for substantive consolidation in accordance with recommendation 220, the insolvency law should:

"(a) Permit the court to exclude specified assets and claims from an order for substantive consolidation; and

"(b) Specify the circumstances in which those exclusions might be appropriate."

Commentary, paragraph 136: Exclusions from an order for substantive consolidation (see A/CN.9/691, para. 49)

11. Third sentence: "Those circumstances might include where the ownership of certain specific assets could readily be identified or part of the business activities of the consolidated group members could be separated because it was not involved in the fraudulent scheme, where including certain assets in an order for substantive consolidation might exacerbate the consequences of a fraudulent scheme, or where the assets were burdensome, such as assets carrying an environmental liability or assets that would be difficult or costly to administer (see part two, chapter II, para. 88)."

Recommendation 224 (c) (see A/CN.9/691, para. 51)

"224. (c) Claims against group members included in the order are treated as if they were claims against the single insolvency estate."

Recommendation 228 (see A/CN.9/691, para. 53)

"228. (1) The insolvency law should specify the date from which the suspect period with respect to avoidance of transactions of the type referred to in recommendation 87 should be calculated when substantive consolidation is ordered with respect to two or more enterprise group members.

"(2) The specified date from which the suspect period is calculated retroactively in accordance with recommendation 89 may be:

"(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member; or

"(b) A common date for all enterprise group members included in the substantive consolidation, being either (i) the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members; or (ii) the date on which all applications for commencement were made or all proceedings commenced."

Recommendation 231 (see A/CN.9/691, para. 55)

"231. The insolvency law should establish requirements for giving notice with respect to applications and orders for substantive consolidation and modification of substantive consolidation, including the scope and extent of the order; the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice."

E. Participants

Recommendation 236 (see A/CN.9/691, paras. 59-60)

"236. The insolvency law should specify that the cooperation to the maximum extent possible between insolvency representatives be implemented by any appropriate means, including:

"(c) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors; and

"(d) Coordination with respect to the proposal and negotiation of reorganization plans."

F. Reorganization of enterprise groups members

Recommendation 238 (see A/CN.9/691, para. 62)

> "238. The insolvency law should specify that an enterprise group member that is not subject to insolvency proceedings may voluntarily participate in a reorganization plan proposed for one or more enterprise group members subject to insolvency proceedings."

III. International issues

B. Promoting cross-border cooperation in enterprise group insolvencies

2. Access to courts and recognition of foreign insolvency proceedings

Purpose clause (see A/CN.9/691, para. 67)

> "The purpose of provisions on access and recognition of foreign insolvency proceedings with respect to enterprise group members is to ensure that access and recognition are available under applicable law."

Recommendation 239 (b) (see A/CN.9/691, para. 68)

> "239. (b) Recognition of the foreign proceedings, if necessary under applicable law."

C. Forms of cooperation involving courts

3. Appointment of a court representative

Commentary, paragraphs 14-34 (see A/CN.9/691, para. 69)

12. Additional footnotes referring to specific paragraphs of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation should to be added throughout those paragraphs, as appropriate.

Commentary, paragraph 37 (see A/CN.9/691, para. 71)

13. Fourth sentence: "The appointing court may consider the qualifications required to perform the functions to be undertaken, as well as issues of conflict of interest and will typically outline the terms under which the appointee is authorized to act and the extent of its powers."

Purpose clause (see A/CN.9/691, para. 73)

> "(a) To authorize and facilitate cooperation between the courts seized of insolvency proceedings relating to different members of an enterprise group in different States;

"(b) To authorize and facilitate cooperation between the courts and the insolvency representatives appointed to administer those different proceedings; and"

Recommendations 240-245 (see A/CN.9/691, paras. 74-80)

"240. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the insolvency representative or other person appointed to act at the direction of the court, to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that the same enterprise group."

"241. The insolvency law should specify that cooperation to the maximum extent possible between the court and foreign courts or foreign representatives be implemented by any appropriate means, including for example:

"(a) Communication of information by any means considered appropriate by the court, including provision to the foreign court or the foreign representative of copies of documents issued by the court or that have been or are to be filed with the court concerning the enterprise group members subject to insolvency proceedings or participation in communications with the foreign court or foreign representative;"

"242. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives concerning those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group."

"243. The insolvency law should specify that communication between the court and foreign courts or foreign representatives should be subject to the following conditions:"

"244. The insolvency law should specify that communication between the court and foreign courts or foreign representatives shall not imply:

"(c) A waiver by any of the parties of any of their substantive or procedural rights and claims; or"

"245. The insolvency law may permit the court to conduct a hearing in coordination with a foreign court. Where hearings are coordinated, they should be subject to certain conditions to safeguard the substantive and procedural rights of parties and the jurisdiction of each court. Those conditions might address the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to a foreign court; and limitation of the jurisdiction of each court to the parties appearing before it. Notwithstanding the coordination of hearings, each court should maintain its independence in reaching its own decision on the matters before it."

D. Forms of cooperation involving insolvency representatives

1. Cooperation involving insolvency representatives

Purpose clause (see A/CN.9/691, para. 82)

"The purpose of legislative provisions on cooperation between insolvency representatives and between insolvency representatives and foreign courts in the context of multinational enterprise groups is:

"(a) To authorize and facilitate cooperation between insolvency representatives appointed to administer insolvency proceedings relating to different members of an enterprise group in different States; and"

Recommendations 246-247 (see A/CN.9/691, para. 83)

"246. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group."

"247. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign representatives appointed to administer insolvency proceedings commenced in other States with respect to members of the same enterprise group in order to facilitate coordination of those proceedings."

Recommendation 248 (see A/CN.9/691, para. 92)

"248. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with, or to request information or assistance directly from, foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group."

Recommendations 249-250 (see A/CN.9/691, paras. 83-84)

"249. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign representatives appointed to administer insolvency proceedings commenced in other States with respect to members of the same enterprise group concerning those proceedings."

"250. The insolvency law should specify that cooperation to the maximum extent possible between insolvency representatives be implemented by any appropriate means, including:

"(d) Coordination with respect to administration and supervision of the affairs of the enterprise group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors; and"

2. Appointment of a single or the same insolvency representative

Commentary, paragraph 46 (see A/CN.9/691, para. 85)

14. First sentence: Add a reference at the end of that sentence to part two, chapter III, paragraphs 36-47 dealing with appointment of the insolvency representative, including qualifications, as well as a reference to paragraph (v) of the glossary.

Recommendation 251 (see A/CN.9/691, para. 87)

"251. The insolvency law should permit the court, in appropriate cases, to coordinate with foreign courts with respect to the appointment of a single or the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States. To the extent required by applicable law, the insolvency representative would be subject to the supervision of each of the appointing courts."