United Nations A/CN.9/SR.889

General Assembly

Distr.: General
28 July 2009

Original: English

United Nations Commission on International Trade Law
Forty-second session

Summary record of the 889th meeting*
Held at the Vienna International Centre, Vienna, on Wednesday, 1 July 2009, at 9.30 a.m.

Chairperson: Mr. Soogeun Oh.....(Republic of Korea)

Contents

* No summary record was prepared for the 888th meeting.

V.09-85164 (E)

The meeting was called to order at 9.35 a.m.

Finalization and adoption of UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings
(A/CN.9/WG.V/WP.86 and Add.1-3;
A/CN.9/666 and 671)

1. **The Chairperson** drew attention to the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings contained in document A/CN.9/WG.V/WP.86, the compilation of comments by Governments contained in the three addenda thereto and the reports of Working Group V (Insolvency Law) on its thirty-fifth and thirty-sixth sessions contained in documents A/CN.9/666 and A/CN.9/671 respectively.

2. **Ms. Clift** (Secretariat) said that the Commission had agreed at its thirty-ninth session in 2006 that initial work to compile practical experience in negotiating and using cross-border insolvency agreements would be undertaken informally through consultations with judges, insolvency practitioners and other experts, and that a preliminary progress report would be submitted to the Commission at its fortieth session in 2007. Following further work and consultations in 2007 and 2008, Working Group V had considered a first draft of the Notes at its thirty-fifth session in November 2008 and decided to circulate them to Governments for comment. The comments had been taken into account in an amended version considered by the Working Group at its thirty-sixth session in May 2009. It had recommended, inter alia, amending the word "Notes" in the title to read "Practice Guide".

3. Since that session cross-border agreements had been adopted in two major cross-border insolvency cases, concerning Bernard Madoff and the Lehman Brothers. Both should, in the Secretariat's view, be included in the draft Notes. The Lehman Brothers agreement involved an enterprise group and the insolvency proceedings concerned members of the group in a number of States. Incorporation of a reference to the cases in the draft Notes would require only minor amendments and the addition of summaries to the annex. There had not been time to prepare and translate an appropriate text, but if the Commission authorized the Secretariat to proceed, it would edit and finalize the draft Notes in the light of the Commission's discussion.

4. The Commission might also wish to discuss a resolution on the draft Notes which had been drafted by the Secretariat.

5. **The Chairperson** invited general comments on the draft UNCITRAL Notes.

6. **Mr. Cooper** (International Association of Restructuring, Insolvency and Bankruptcy Professionals – INSOL International) said that the draft Notes were being adopted at an opportune moment in the light of the global financial crisis. As more cross-border agreements could be expected in the coming months, he encouraged the Secretariat to look into the possibility of maintaining a database of relevant cases. The updating process should not, however, delay publication.

7. The draft UNCITRAL Notes had been widely welcomed at a Judicial Colloquium held two weeks previously in Vancouver and attended by some 80 judges from over 40 countries. The propriety of communication between judges had always been a matter of concern and the draft Notes sent out an appropriate signal in that regard. In the absence of any internationally accepted best practice, judges had previously relied on recommendations by professional bodies. The draft Notes confirmed that communication between judges was both appropriate and in the best interests of the economies involved.

8. **Mr. Redmond** (United States of America) said that the Working Group and the Secretariat had produced an excellent text providing valuable background information. In view of the ongoing financial crisis, it was also a timely and beneficial instrument. He supported the proposal to change the title to "Practice Guide".

Introduction, part I (Background) and part II (UNCITRAL Model Law on Cross-Border Insolvency: possible forms of cooperation under article 27)
(A/CN.9/WG.V/WP.86)

9. **The Chairperson** invited the Secretariat to introduce parts I and II of the draft Notes.

10. **Ms. Clift** (Secretariat) said that part I provided background information. Section I.A noted the inadequacy of both domestic and international legislative frameworks as a basis for coordination and

cooperation in cross-border insolvency and section I.B reviewed various international initiatives in that regard.

11. Part II focused on the UNCITRAL Model Law on Cross-Border Insolvency, particularly the provisions concerning cooperation under article 27. Although the Model Law authorized cross-border cooperation and communication between judges and insolvency representatives, it did not specify how such cooperation and communication might be achieved in practice. Part II sought to provide more detail regarding the types of cooperation outlined in article 27, focusing on possibilities other than cross-border agreements, which were addressed in part III.

12. **Mr. Clark** (United States of America) said that, as an insolvency judge, he had frequently discussed the difficulty of implementing articles 25 to 27 of the Model Law with colleagues from around the world. The "Practice Guide" offered a comprehensive review as to how such communications could be accomplished in a manner compatible with the many different kinds of insolvency laws in force. Its clarity and detail were unsurpassed and it would prove extremely helpful for both judges and the administrators working with them.

13. **Mr. Marca Paco** (Plurinational State of Bolivia), referring to the definition of the term "court" in paragraphs 8 and 13 (f) of the glossary (section B of the introduction to the document), and in subsection III.B.3 entitled "Courts", said that his Government wished to know whether the authorities in all countries involved in a cross-border insolvency case had to be judicial bodies or whether they could also be administrative bodies if the jurisdictional and administrative structure of the country concerned so required. In particular, he asked whether the phrase "other authority competent to control or supervise insolvency proceedings" in paragraph 13 (f) of the glossary was applicable to an administrative body or whether the "other authority" must have judicial status in all cases.

14. **Ms. Clift** (Secretariat) said that the definition of the term "court" had been used since the adoption of the Model Law on Cross-Border Insolvency and it also appeared in the Legislative Guide. She confirmed that it was intended to include judicial and other types of authorities that supervised insolvency proceedings. For instance, the administrative body that supervised insolvency proceedings in Colombia would certainly be covered by the definition.

15. **Mr. Marca Paco** (Plurinational State of Bolivia) explained that a national supervisory body had formerly exercised jurisdiction in his country over the reorganization of companies that were at risk of insolvency. It had also dealt with cross-border issues, notably in a case in which it had ordered the reorganization of a bank to prevent insolvency. As a result of institutional restructuring, however, the new entity that performed the same function operated under the auspices of the Ministry of Economy and Finance and was thus part of the Executive. He wished to know whether that circumstance might impede his country's ability to conclude cross-border agreements in the future.

16. **Ms. Clift** (Secretariat) said that the definition of the term "court" was intended to cover any body that supervised insolvency issues, whether or not it had judicial status. Cross-border judicial cooperation was only one form of cross-border cooperation in insolvency proceedings. In many jurisdictions, courts did not play a significant role in such cooperation, which was conducted through insolvency representatives.

17. **Mr. Redmond** (United States of America) said that great care had been taken to ensure that the terminology used in the draft Notes was consistent with that used in the Model Law on Cross-Border Insolvency and the Legislative Guide. The definitions in the Model Law and the Legislative Guide covered all kinds of judicial and administrative proceedings.

18. **Mr. Marca Paco** (Plurinational State of Bolivia) said that the assertion in the second sentence of paragraph 8 of the introduction to the draft Notes that an authority which did not have adjudicative functions (*cometido judicialmente resolutorio*) with respect to insolvency proceedings would not be regarded as within the meaning of the term "court" appeared to exclude the type of administrative body to which he had referred. He therefore proposed adding the words "or decision-making administrative functions" after the words "adjudicative functions".

19. **Ms. Fall** (Senegal) said that the first sentence referred to a judicial or other authority competent to control or supervise insolvency proceedings. The second sentence referred to an authority that belonged to a different category. She therefore proposed replacing "An authority" at the beginning of the second sentence with "Any other authority".

20. **Ms. Sanderson** (United Kingdom) expressed support for that proposal. She further proposed amending the definition of a court under "Terms and explanations" in section B.2 to read: "'Court': a judicial or other non-judicial authority, as defined by local law, competent to control or supervise insolvency proceedings".

21. **Mr. Marca Paco** (Plurinational State of Bolivia) said that his problem was with the words "*judicialmente resolutorio*" (adjudicative) in the second sentence of paragraph 8. A non-judicial body could not be described has having such functions.

22. **Mr. Clark** (United States of America) said that it might be helpful to include a definition of the kinds of administrative bodies that were involved in insolvency proceedings in countries such as the Plurinational State of Bolivia.

23. **Mr. Sorieul** (Secretary of the Commission) said that, unlike the French and English texts which referred only to adjudicative functions, the Spanish text referred to judicial decision-making functions. The Spanish text could therefore be amended to align it with the other versions.

24. **Ms. Otunga** (Kenya) expressed support for the Secretary's comment and pointed out that the definition in paragraph 8 had been taken from the UNCITRAL Legislative Guide on Insolvency Law.

25. **Mr. Marca Paco** (Plurinational State of Bolivia) proposed either deleting the phrase "does not have adjudicative functions with respect to these proceedings" or deleting the whole of the second sentence of paragraph 8.

26. **Ms. Sanderson** (United Kingdom) expressed support for the proposal to delete the second sentence.

27. **The Chairperson** said that, if he heard no objection, he would take it that the Commission agreed to delete the whole sentence.

28. *It was so decided.*

29. **The Chairperson** said he took it that the Commission wished to adopt the introduction, part I and part II of the draft Notes.

30. *It was so decided*.

Part III (Cross-border agreements)
(A/CN.9/WG.V/WP.86)

Section A: Preliminary issues

31. **The Chairperson** invited the Secretariat to introduce section III.A.

32. **Ms. Clift** (Secretariat) said that part III described existing practice with respect to the use of cross-border agreements without suggesting that the practices described should be applicable in all jurisdictions. It did not suggest either that a cross-border agreement could be used to circumvent national law or to change the obligations of the parties under such law.

33. Section III.A identified some of the key issues that arose under cross-border agreements. While the use of such agreements had previously been confined to a relatively small number of countries, they were likely to spread concurrently with the increase in insolvency cases involving a multiplicity of jurisdictions. As each agreement was drafted for a specific case, the decision as to whether one was needed was a matter of judgement. An agreement might be necessary, for instance, in a case where different jurisdictions had ordered different kinds of relief with respect to their own proceedings or where different types of insolvency procedures were taking place in the States concerned, such as reorganization involving the replacement of management by insolvency representatives in one forum and the debtor in possession in the other forum.

34. There was no fixed timing for the negotiation of an agreement, which might take place before the proceedings, at the beginning of the case or during the proceedings as issues arose. Agreements were usually concluded between the insolvency representatives and sometimes also included the debtor or creditors. In some cases the courts were involved in the background to the negotiation of an agreement, but they did not formally appear as parties. The capacity to enter into an agreement depended on the applicable domestic law. In some States the insolvency representative's authority to do so was explicitly or implicitly recognized under insolvency law. In other States the consent of creditors or authorization by a court might be required.

35. There was no standard format for a cross-border agreement. In practice agreements had been reached in both oral and written form. In some jurisdictions

written agreements were required for validity and were deemed preferable in order to create a record of what had been agreed. Standard provisions might be used at the beginning of each agreement, but the substance then tended to vary widely. Examples of common provisions included methods of communication between courts and issues such as amendment and termination of the agreement.

36. The legal effect of a cross-border agreement depended in some cases on court approval. The agreement would then constitute a court order and be enforceable as such. Alternatively, it might be regarded as a simple contract between the parties. Safeguard provisions were usually included to clarify that the agreement did not constitute a derogation from applicable law, court authority or public policy.

37. As insolvency proceedings were ongoing, a cross-border agreement needed to be flexible and to allow for amendment and even termination. Alternatively, the parties could first enter into a preliminary agreement and foresee the drafting of a second agreement or even more agreements at a later stage.

38. **Mr. Redmond** (United States of America) said that one of the difficulties in cross-border cases was that the proceedings could be duplicated in different jurisdictions, greatly diminishing the ultimate payment to creditors and companies' ability to reorganize. Insolvency representatives were trying to establish uniform procedures to avoid duplication and to ensure uniform treatment of creditors. The provisions in part III.A offered excellent guidance to practitioners and insolvency representatives seeking uniformity and also provided a tool that would assist the judiciary in determining whether the primary issues had been addressed in an agreement.

39. **Mr. Cooper** (INSOL International), endorsing the previous remarks, said that law reform was usually perceived as the solution when times got rough, but there was often an even greater need to develop institutional capacity to deal with problems. The best practice issues addressed in part III.A would prove extremely useful and the guidance offered would increase the cost-effectiveness of insolvency proceedings with consequent benefits for creditors, employees and other stakeholders.

The meeting was suspended at 10.50 a.m. and resumed at 11.20 a.m.

40. **Mr. Bellenger** (France) said that the use of the term "international agreements" (*accords internationaux*) in some passages of part III.A was unduly general and not very enlightening. He suggested using terms such as "international insolvency agreements" or "insolvency administration contracts" more systematically.

41. **Mr. Clark** (United States of America) said that the draft Notes referred to "cross-border agreements" and used terminology that was as generic as possible in order to anticipate the many different ways in which such agreements might be reached and to allow a measure of flexibility. In some jurisdictions an agreement might be drafted initially by insolvency practitioners and presented to the court for adoption or approval. In other jurisdictions the agreement might take the form of a memorandum of understanding between the administrators of insolvency proceedings, as was the case in Germany. In the recent case of the Lehman Brothers bankruptcy, it had been necessary to draft an agreement that would be acceptable in the many different jurisdictions involved, some applying civil law and some common law, and some with judiciaries that played a more active role than others in the process. By using a generic term, it had been possible to draft an agreement to which the right party in each jurisdiction could accede to the extent that local law permitted.

42. **Ms. Muindi** (Kenya) associated herself with the clarification made by the representative of the United States of America. She drew the attention of the representative of France to paragraph 9 of the introduction to the draft Notes, which further clarified the term "cross-border agreement".

43. **Mr. Bellenger** (France) said that the English term "cross-border agreement" was more specific than its French equivalent "*accord international*", which was extremely generic. He thought that the term "insolvency administration contract" or "cross-border insolvency agreement" should have been used throughout the draft Notes.

44. **The Chairperson** suggested that a more suitable French translation of the English term "cross-border agreement" should be sought.

45. **Ms. Fall** (Senegal) pointed out that the title of the draft Notes referred to "cross-border insolvency proceedings" (*procédures d'insolvabilité internationale*). It was therefore clear that all references to "cross-border agreements" (*accords internationaux*) concerned insolvency.

46. **Mr. Cooper** (INSOL International) said that the terms in question were rarely included in the final court documents on which agreement was reached. Such documents usually listed under a general title the cases and parties involved and then described the specificities of the case. The risk of there being an international agreement that could be deemed to have wider import was negligible.

47. **Mr. Komarov** (Russian Federation) emphasized that the focus should be on "insolvency" rather than on "cross-border". He therefore suggested that all references to "cross-border agreements" should be amended to read "cross-border insolvency agreements".

48. **Mr. Redmond** (United States of America), **Mr. Bellenger** (France) and **Mr. Schoefisch** (Germany) supported the proposal by the representative of the Russian Federation.

49. **Ms. Sanderson** (United Kingdom), supported by **Mr. Gandhi** (India), said that paragraph 13 (i) in the "Glossary" section clearly defined the term "cross-border agreement". It should, in her view, be sufficient to meet the concerns raised by several delegations.

50. **Mr. Sato** (Japan) said that the context in which the term "cross-border agreement" was used in the document was very clear.

51. **Ms. Muindi** (Kenya) asked whether the term "cross-border agreement" had already been defined in the Model Law on Cross-Border Insolvency or the Legislative Guide. If not, she was in favour of amending it in accordance with the proposal made by the representative of the Russian Federation.

52. **Ms. Clift** (Secretariat) said that the term had not been used in the Model Law on Cross-Border Insolvency or the Legislative Guide.

53. **The Chairperson**, proposing a compromise that would not sacrifice clarity to brevity, asked whether it was acceptable to use the term "cross-border insolvency agreement" in all titles and subtitles and "the agreement" in running text. The term would be clearly defined on its first appearance with the comment "hereinafter referred to as 'the agreement'".

54. *It was so decided*.

55. **Mr. Bellenger** (France), referring to paragraph 17 concerning the capacity to enter into a cross-border agreement, queried the statement that civil law courts lacked the judicial discretion available to common law courts. In some circumstances the contrary was the case and judges exercised considerably greater discretionary authority in civil law courts. He therefore proposed that the second sentence of the paragraph should be deleted.

56. **Mr. Schoefisch** (Germany) said that if the phrase "An agreement requiring approval by a court" at the beginning of the first sentence referred to a national law requirement in a civil law jurisdiction, the judge in question would have no problem because the statutory basis for a decision already existed. If it meant that the parties agreed that approval by a court was required, a problem might arise in certain civil law jurisdictions which did not require court approval. He therefore proposed amending the sentence to read: "If parties agree that court approval is necessary, they might face problems in certain civil law jurisdictions, as in these jurisdictions court approval is not regulated by law; in these cases, however, it is highly unlikely that parties will agree on those terms, as they know that they will face problems."

57. **Mr. Clark** (United States of America) expressed support for the proposal by the representative of Germany. However, he felt that it was unnecessary to refer to civil law jurisdictions and proposed the following alternative wording: "The parties to an agreement may desire to have court approval, but there may be difficulties in some jurisdictions in obtaining such approval." The draft Notes should perhaps also reflect the fact that insolvency practitioners were drafting ever more sophisticated agreements with the expectation that they might not require court approval.

58. **Mr. Bellenger** (France) said that there was no need to contrast the civil law and common law traditions in a way that suggested the inferiority of the former. The reason for the conclusion of a large number of cross-border insolvency protocols between common law countries was probably the fact that they had a common language.

59. **Mr. Cooper** (INSOL International) said that he agreed with the suggestion to remove references to civil law jurisdictions. A French court had recently found itself able to acknowledge and agree with practitioners entering into an agreement, although it could not find any basis for the court itself to seal the agreement. The court's action in that instance reflected a pragmatic acceptance that what was happening was in the best interests of the case, but it stopped short of formal "approval". The text to be adopted by the Commission should reflect such an approach.

60. **Mr. Schoefisch** (Germany) said that the rewording suggested by the representative of the United States took care of his delegation's concerns.

61. **The Chairperson** said that the Secretariat would revise the first sentence of paragraph 17 along the lines suggested by the representative of the United States.

62. **Mr. Schoefisch** (Germany) noted that the second sentence of paragraph 18 suggested that some judges might rule improperly because they were afraid of being held personally liable, which was certainly not the case. He therefore proposed replacing the words "in some civil law jurisdictions, judges perhaps might be held personally liable" with the following: "in civil law jurisdictions, judges generally act on the basis of written law. Acting outside the law may result in being personally liable, as is the case in other jurisdictions."

63. **Mr. Bellenger** (France) said that the simplest solution to the problems in paragraphs 17 and 18 would be to eliminate any mention of civil law jurisdictions and to refer instead to "some jurisdictions".

64. **The Chairperson** said he took it that the Commission wished to adopt section III.A (Preliminary issues) as revised to reflect delegations' comments and suggestions.

65. *It was so decided*.

Section B: Comparison of cross-border insolvency agreements

66. **Ms. Clift** (Secretariat), introducing section B, said that the purpose of the section was to promote a greater understanding of the specific content of cross-border agreements and to show what could be and had been done in using such agreements in practice. The goal was not to devise a standard "one size fits all" agreement, but rather to describe the content and structure of a number of agreements used in recent cross-border cases, showing the different approaches taken to the same topics. As far as possible, an attempt had been made to identify the reasons for including different provisions in particular agreements. Section B covered a range of topics, including recitals, terminology, powers and responsibilities of courts, administration of the proceedings, allocation of responsibilities between the parties to the agreement, communication, amendment, revision and termination of the agreement.

67. Some issues, such as terminology and rules of interpretation, might be less controversial, and agreement might be easier to reach on them. Indeed a degree of standardization already appeared to be evolving with respect to those issues. Other items, such as provisions on courts, administration of the proceedings and allocation of responsibilities between the parties to the agreement might prove to be more difficult to address, as they touched upon weightier issues that might involve the applicable law in the different insolvency proceedings.

68. For example, a provision on the courts might allocate responsibility for specific issues, such as the sale of certain assets, to one court. Alternatively, it might set out the factors to be considered in determining which court should have responsibility for which functions; for instance, each court might be assigned responsibility for approval of transactions involving assets located within its jurisdiction. Some of the provisions affecting the courts might require court approval in order to be effective, although the same result might be achieved by agreement between the parties that did not involve the question of court approval.

69. Part B also contained a number of "sample clauses," which were not intended to be model clauses, nor was it suggested that they would form part of a "model protocol". They were included for illustrative purposes only.

70. The annex to the draft Notes contained a short summary of the cross-border agreements referred to in the body of the text. The purpose of the summaries was to present a basic idea of the case underlying the cross-border agreement and to provide references to agreements that were publicly available.

71. **Mr. Clark** (United States of America) noted that the value of compiling specific examples of cross-border insolvency agreements could not be overestimated. Countries facing cross-border insolvency cases for the first time often looked about for tools they could use, and the compilation in section B would be an invaluable resource. The fact that it bore the imprimatur of UNCITRAL would enhance its authority in the eyes of users. The Secretariat deserved high commendation for the work it had done.

72. **The Chairperson** said that two very important cross-border insolvency cases had occurred recently – the Madoff and Lehman cases – and the Commission should authorize the Secretariat to update section B by adding information on those cases.

73. **Mr. Redmond** (United States of America) said that the Lehman case was probably one of the most extensive cross-border bankruptcy proceedings in history, while the Madoff case was perhaps the biggest financial fraud ever perpetrated, involving $50 billion and affecting investors in many countries around the world. The two cases provided instructive insights into how the underlying issues could be dealt with and it would be useful to include them in the draft Notes. Otherwise a substantial amount of history and experience would be lost.

74. **The Chairperson** said that, if he heard no objection, he would take it that the Commission wished to authorize the Secretariat to include information on the two recent insolvency cases and that it wished to adopt section III.B (Comparison of cross-border insolvency agreements) of the draft notes as so amended.

75. *It was so decided*.

76. **The Chairperson** said that the Working Group had proposed replacing the word “Notes” in the title with “Practice Guide”. As the title was, in his view, too long, he suggested shortening it to “Practice Guide on Cross-Border Insolvency Cooperation” and providing a full explanation of the title in the body of the text.

77. **Mr. Schoefisch** (Germany) and **Ms. Sanderson** (United Kingdom) supported the Chairperson’s suggestion.

78. **Mr. Redmond** (United States of America), supported by **Ms. Fall** (Senegal), said that it would be useful to retain a reference to UNCITRAL in the revised title in order to make clear the origin of the product, given the credibility that UNCITRAL enjoyed in the legal community.

79. **The Chairperson** said he took it that the Commission wished to adopt the amended title “UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation”.

80. *It was so decided*.

The meeting rose at 12.30 p.m.